



## MEANS TO AN UNCERTAIN END: THE POLITICS OF INTERNATIONAL LAW IN THE FARC-COLOMBIA CONFLICT

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**Photo: Christian Escobar Mora/EPA (*The Guardian*)**

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Fourteen months since the signing of the historic Colombian peace agreement, aspects of the conflict remain shrouded in a blind overture to bilateral diplomacy. Despite measures to ease the violence between *Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo* (Revolutionary Armed Forces of Colombia – People’s Army, FARC-EP) and the Colombian government, much of the conflict’s evolution and key players continue to be overlooked.

Media reports and political pundits hail President Juan Manuel Santos, aided by U.S. support, as the hero of the decades-old conflict, but this reductionist analysis fails to give sufficient weight to international law and its role in facilitating the conflict’s détente. In fact, International Humanitarian Law (IHL) was in many ways the key instrument in advancing Santos’ political mission, while the framework



provided by IHL also sheds light on the manipulations of the Colombian and U.S. governments. This context is crucial so that the militaristic alliance of the United States and former Colombian governments is not accepted as a legitimate contributor to peace; and secondarily, so that FARC fighters are not written off as nothing more than senseless killers. In this way, a deeper analysis of international law and its politicization better respects the struggle of the Colombian nation and reveals misguided historical intervention, exposing a common thread: at different moments and under different administrations, the political manipulation of international law was crucial in both prolonging the conflict and agreeing to its suspension.

### **History of the conflict and U.S. involvement**

The FARC-Colombia conflict has inflicted unmatched damage on the Colombian people – it is second only to the Syrian Civil War in number of internally displaced persons and, at its membership peak in 2009, the FARC-EP (FARC, for simplicity) numbered 20,000 fighters with an [annual turnover](#) of \$600 million USD, third in line behind Hamas and ISIL. The violence began more than 60 years ago during the infamous period called “*la violencia*” (“violence”). At this time, triggered by the assassination of liberal leader Jorge Eliecer Gaitan, the game became simply killing, especially as far as the quest for land was concerned; peasants were forced out of their villages and had to regroup as guerrilla factions to protect themselves from Colombian renegades and right-wing vigilantes. Despite sporadic attempts to achieve political representation at higher government levels, over time, Marxist voices were silenced as the violence and alliances further evolved, leading to the FARC’s solidification as a militant group.

While this class-divided cycle of discontent brewed for decades, the escalation of the conflict and the FARC’s transition into an organized entity were only fully realized after 1960, when the United States became increasingly interested in retaining Colombia as an anti-communist regional stronghold. Colombia was seen as a strategic geopolitical ally, and the [groundwork for intervention](#) was laid under U.S. Presidents Dwight D. Eisenhower and John F. Kennedy. Following a U.S. mission to Colombia, a plan was devised “to pressure toward reforms known to be needed [and] execute paramilitary, sabotage and/or terrorist activities against known communist proponents.” The resultant [Plan Lazo](#), initiated by U.S. officials and adopted by the Colombian authorities in January 1962, kicked off decades of militant activities against FARC groups, who retaliated in turn. Beginning in the 1970’s, paramilitary groups known as “death squads,” funded by Colombian social, political, and religious elites, in partnership with the Colombian Armed Forces, [killed thousands](#) of *Partido Union Patriótica* (Patriotic Union Party, a non-violent socialist party) and communist individuals, sabotaging any hope of reconciliation between the government and its socialist constituents.

Since that epoch, the FARC has been heavily implicated in the area’s coca drug trade to finance its activities via peasant farmers with little choice for profitable crops, leading the United States to justify its intervention as part of the failed “war on drugs” under U.S. President Richard Nixon. After decades of



violence from all sides (a trend catalyzed by elite money and social dominance), the FARC would also turn to kidnapping for ransom, holding hostages, and killing policemen and political opponents. The matter was further complicated by the paramilitary death squads, funded by the U.S. and Colombian governments, leading the FARC to increase its military breadth and further implicate the rural and indigenous populations where coca was grown. Consequently, the majority of internally displaced persons are [indigenous and poor farmers](#), many of whom have also been killed, caught in the crossfire between the U.S.-funded *Fuerza Pública* (the Colombian army plus the National Police), allied paramilitaries, and the FARC.

With the government's failure to stall the increasing devastation in the country, the United States has steadily upped its involvement in the region since the 1960's, allying itself with decades of right-wing and center-right Colombian presidents. The most striking example of this intrusion is the United States' 1999 systematized "Plan Colombia," which to date has dedicated more than \$10 billion USD to countering the production of narcotics and defeating the FARC militarily. Despite constant U.S. aid, Plan Colombia is increasingly recognized as a [failure](#) or even a farce: it failed to curb violence and the narcotics trade as per its mandate, but it succeeded in strengthening the Colombian army and the United States' grasp on its southern stronghold.

It was former Venezuelan President Hugo Chavez who eventually introduced a new line of thought regarding the resolution of the FARC-Colombia conflict – one which would prove instrumental: recognize the FARC as a belligerent force in a legitimate armed conflict, thereby triggering the application of IHL and obligating both parties to follow the law or risk international condemnation. Interestingly, due in part to the fact that Chavez was an open sympathizer of the FARC's political plight, and in part because the FARC shared his opinion regarding IHL, his 2008 suggestion was initially met with [skepticism](#) or even outrage. The FARC, then and now, are recognized as a terrorist organization by the United States, Colombia, Chile, Canada, New Zealand, and the European Union.

Amid some debate, many international institutions began accepting the FARC as a belligerent actor subject to IHL, giving them a stronger foundation from which to dialogue and affording the FARC the stronger political stance it had sought for the better part of a century. At the same time, the Colombian government was finally forced to comply or at least be aware that its militaristic actions carry consequences. In 2010, President Santos recognized that (a) military defeat was impossible despite Plan Colombia and U.S. wishes, and (b) political dialogue from a sound legal foundation was the only way to achieve peace. Since 2012, peace talks have been held in Havana, Cuba and in November 2016, the peace agreement was approved, leading thousands of FARC members to lay down their weapons and allowing for greater political involvement by the former fighters. A month later, Santos was awarded a Nobel Peace Prize, despite some restlessness as to the integrity of his achievements.

## **FARC-Colombia violence: A missed opportunity for IHL?**

The application of IHL had been a possibility for some time, even if it was never fully recognized until Santos' presidency. International Humanitarian Law is a branch of law outlined by the International Community of the Red Cross (ICRC) in the Geneva Conventions, internationally ratified since the 19<sup>th</sup> century. IHL's original purpose was to protect human life during armed conflict – not an insurgency, uprising, or terrorist situation. Despite IHL's potential, it has gone largely unaddressed in media reports on Colombia; even so, as early as 2001, Human Rights Watch (HRW) [called for IHL](#) to be put in place and the norms of the foundational Geneva Conventions to “be embraced fully and without conditions.” Astutely, HRW also recognized the political nature and ambiguities of IHL, saying “the [distance between words and deeds is vast](#). All parties actively manipulate the concept of international humanitarian law for perceived political and tactical gain.” This has been true throughout the history of the conflict, both on the part of the FARC and of the Colombian government. Few would deny that the FARC had consistently violated the would-be laws of war and humanitarian law, had they been applied. The Colombian government, likewise, has engaged in questionable tactics of warfare and impunity. But without IHL, these breaches have primarily gone unaddressed – especially for the latter party.

Under IHL, various *means* (weapons) of warfare are outright banned. The FARC is known to have planted anti-personnel mines and gas-cylinder handmade explosives, which, since 1990, have “killed or wounded more than 11,000 Colombians,” nearly half of them civilians. At the time, these mines were a cheap and desperate measure to preserve FARC numbers during a period of [increased governmental and paramilitary crackdown](#) by elite military forces. According to IHL norms, anti-personnel mines are illegal due to their nature of indiscriminate murder, duration of harm (even after the conflict is over), and long-lasting impact on the land in which they are buried.<sup>1</sup> They are also implicated in general principles of the Geneva Convention protocols regarding indiscriminate harm and [unnecessary suffering](#). Mines and makeshift bombs have caused thousands of cases of such injury, and unlike other means of warfare, their death toll is never justifiable as a “military necessity.”

Besides illegal means of warfare, the FARC also engaged in illegal *methods* that unequivocally affected non-combatant civilians, causing greater harm than even the mines – the group has employed child soldiers, held hostages for ransom, and murdered civilians. As outlined explicitly in the 1949 Geneva Convention and emphasized in other protocols, [civilians and non-combatants](#) make up the primary population that is to be protected under the terms of the IHL. This norm in theory protects child soldiers under the age of 17, but the FARC is estimated to have employed nearly [one in five](#) at the age of 15 – up to 1000 total – including many whom were forcibly taken from their families, violating another IHL

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<sup>1</sup> Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction





regulation regarding hostage-taking.<sup>2</sup> The FARC's signature method of warfare is kidnapping or hostage-taking, including of children and politicians. This is, importantly, distinct from "prisoners" who are taken, in theory, for military necessity, and therefore allowed by IHL.

The FARC has undeniably wreaked havoc and misery on the Colombian people for the past 60 years – this is visible with or without the lens of IHL. But the same could be said about its adversaries, although transgressions by the government and its death squads have often gone unnoticed or unaddressed. In fact, since the 1960's, the close relationship between the Colombian *Fuerza Pública* and paramilitaries, all aided by massive U.S. aid, has led to over [11,000 "targeted murders"](#) compared to the FARC's 3900, and over 100 reports of [impunity](#), which were mostly ignored in the legal system. Amnesty International (AI), Human Rights Watch, as well as Latin American regional and supranational bodies, have called out the government for human rights abuses such as targeted murder, but even if brought to court, the cases and defendants are more often than not let off with minimal charges. The majority of such violations, had they been subject to *in bello* (IHL) laws prior to the 2000's, would have been prohibited by various statutes, including the most basic fundamental guarantee of protecting "all persons who do not take a direct part or who have ceased to take part in hostilities violence" against "violence to the life, health and physical or mental well-being... in particular murder as well as cruel treatment." Most dramatically, according to a report sponsored by Colombian non-profit *Centro de Memoria Histórica*, the *Fuerza Pública* also engaged in [371 cases of terror](#), the very same label thrown at the FARC in an attempt to dismiss its legitimacy as a belligerent. But the government's atrocities were often overlooked in the debate over whether the appropriate international law could even be applied. Any legal matters were also perhaps deliberately swept aside by right-wing governments like those of Álvaro Uribe and Andrés Pastrana Arango, who in some cases were themselves implicated in [paramilitary land grabs](#), and who also sought U.S. approval and a military win over actual steps toward reconciliation.

### Debating the law

Despite the violence and human rights violations that raged for decades with little to no legal justiciability, politicians and pundits were (and remain) generally hesitant to accept the idea of classifying the FARC as a legitimate belligerent and acknowledging the conflict as an IHL-subjectable armed conflict. When Chavez first proposed the idea and it gained traction with leftists like Rafael Correa, then-Colombian President Uribe rejected it, calling it an ["outrage against democracy"](#) and arguing that belligerent status would afford the fighters a legitimacy that they did not deserve when they were little more than a guerrilla group, or most likely a terrorist group. In the United States, too,

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<sup>2</sup> "Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977." *Ihl-Databases.icrc.org*, International Committee of the Red Cross, [ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=F9CBD575D47CA6C8C12563CD0051E783](http://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=F9CBD575D47CA6C8C12563CD0051E783).

the idea was soundly rejected... perhaps in part because Chavez had publicly criticized and called then-U.S. President George W. Bush a donkey.

In such an emotionally charged context, international law becomes all the more relevant; if the FARC is nothing more than a guerilla faction, the group can be dismissed as outside the law and Colombian legitimacy is bolstered. But if the FARC constitutes a legitimate belligerent, the situation becomes an armed conflict and IHL responsibilities can be enforced, including against Colombia itself.

It is no secret that the law is highly interpretable regarding who is a legitimate “belligerent” in an armed conflict versus an “insurgent” or “guerrilla,” as Uribe would claim, and therefore outside the law. The ICRC requires that only two conditions be met for an armed conflict to exist, both of which are subjective: “the armed groups involved must show a minimum degree of organization and the armed confrontations must reach a minimum level of intensity.”<sup>3</sup> Once these conditions are determined to have been met by an evaluation across several indicators, the actors are recognized as belligerents, although technically no legal characterization is needed to do so. This is where politics are allowed greater weight in characterizations across administrations.

Complicating the definitional issue of an armed conflict is the ambiguous definition of terrorism, primarily because having [“undertaken terrorist acts”](#) would nullify any potential IHL responsibilities for the two parties. In IHL and according to the UN and various NGOs, there is consensus as to the required *political nature* of any suspected terrorist group, but the group’s intention to “provoke a state of terror” remains unmeasurable. Such doubt does not stop Colombian or U.S. officials from declaring the FARC a terrorist group, but there is no single definition that could either prove or disprove this claim. With the Santos Administration, though, the terrorism angle was largely dismissed, simultaneously creating a favorable political opportunity and brushing off claims as to the Colombian state’s own historical terrorist activities.

Setting aside terrorism as a measurable offense, then, one classification remains to properly locate the Colombian conflict in the realm of IHL: the FARC as an “organized resistance movement” against a state actor. To be provided IHL protection in armed conflict, such a movement must meet the following conditions:

- “a) that of being commanded by a person responsible for his subordinates;
- b) that of having a fixed distinctive sign recognizable at a distance;
- c) that of carrying arms openly;

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<sup>3</sup> Lawand, Kathleen. “Internal Conflicts or Other Situations of Violence – What Is the Difference for Victims?” *ICRC.org*, International Committee of the Red Cross, 10 Dec. 2012, [www.icrc.org/eng/resources/documents/interview/2012/12-10-niac-non-international-armed-conflict.htm](http://www.icrc.org/eng/resources/documents/interview/2012/12-10-niac-non-international-armed-conflict.htm).

d) that of conducting their operations in accordance with the laws and customs of war.”<sup>4</sup>

Regarding conditions a, b, and c, the FARC’s adherence is quite clear: they have their own flag with a distinct coat of arms, the colors of which also appear on each fighter’s armband, the group has also never been covert about carrying arms openly, and their leader Timoleón Jiménez is well-known by his *nom de guerre* “Timochenko.” Condition d is the weak point of this stipulation in that both the Colombian government and the FARC have violated the laws of war, as shown in the previous section, but nevertheless, the Santos administration harnessed pure politics to move the debate forward.

Even before the peace process started in earnest, the lead negotiator, Camilo Gomez, [declared](#) that he saw “no contradiction between the U.S. position on labeling the FARC as a terrorist group and his government’s policy of holding peace talks with the guerrillas.” In this statement, it is clear that the government was prepared to take any stance, even a relatively weak one, in order to advance the peace process. In other words, interacting with “guerillas,” no matter their legal status in conflict, was the way forward, and no law can adequately contradict this. Former peace commissioner Daniel Garcia Pena highlighted the government’s political intentions, saying, “Colombian law recognizes the FARC ... as [political actors](#), which permits the government to negotiate with these insurgencies.” With this mindset, the Santos administration was able to lessen the importance of the FARC’s technical legal status and instead capitalize on the FARC’s *political* existence and, most importantly, its political potential.

### The IHL road to peace

Soon after Santos’ inauguration in 2010, despite continued skepticism by some political elites, the Colombian government, perhaps reluctantly, accepted IHL as normative. Both the state and the FARC would use the new IHL framework to their advantage, as well as fall into its traps. But crucially, the new shared legal footing allowed for open dialogue – a state of being that would have been unthinkable even five years before. As stated in a report by AI, despite setbacks, human rights abuse “[cases attributable to the FARC fell](#) as the peace process advanced.” The government, too, took steps to remedy its irresponsibility: in September 2011, an intelligence chief of the Uribe administration was [sentenced](#) to 25 years prison due to his involvement with paramilitary death squads. While this cannot undo decades of impunity, it signified an auspicious start to the 2012 peace talks and Santos’ peace process.

In April 2012, the FARC [released](#) its last 10 military hostages, as well as remaining political hostages, and [pledged](#) to stop killing and kidnapping civilians, including child soldiers – moves that brought the conflict back within IHL norms. A major advancement was the group’s March 2015 announcement that they would [de-mine their territory](#) in collaboration with a British NGO, *Halo*, and the Colombian Army. The

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<sup>4</sup> “Customary IHL: Practice Relating to Rule 4: Definition of Armed Forces.” *ICRC.org*, International Committee of the Red Cross, [ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule4](http://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule4).



agreement came after President Santos temporarily halted the bombing of FARC targets, which he did in response to the FARC's announcement that they would no longer recruit children under 17 years old.<sup>5</sup>

The dialogue was working. Over the past two years, thousands of FARC fighters have abandoned their arms and are reforming as a legitimate political party moving into the next elections, renamed *Fuerza Alternativa Revolucionaria del Común*, or "Common Alternative Revolutionary Force." Likewise, the Colombian government continues to prosecute paramilitary actors and the obligations of the peace agreement are slowly being fulfilled. That said, many analysts accuse the Santos administration of dragging its feet or otherwise not fulfilling its end of the bargain by allowing paramilitaries to continue unrestrained; a recent [report](#) by Telesur calculates that in fact only 18% of the terms have been satisfied.

IHL does not disengage here. Given such continuing violence and failure to recuperate *desaparecidos*, the ICRC and others call for sustained vigilance and reparations. In a happy overlap, the moral obligation from the ICRC is echoed not only by Latino media and international observers, but also by international law's mandates. The establishment of IHL, then, is not conducive just for reducing and prosecuting the violence by the two actors, but also for righting the wrongs that for so long had gone unaddressed due to legal uncertainties and lack of conversation. Together, IHL and open dialogue provide a way forward – albeit imperfect – that had not been available for more than 60 years.

## Conclusion

Even with IHL in place, much remains to be done for the sustainability of the peace agreement and for upholding the laws of armed conflict. Legal obligations are ongoing, not to mention the dramatic societal overhaul that will need to take place over the next decades to restore families and neighborhoods and bring former fighters into the political sphere.

In looking at the history and applicability of IHL in the FARC-Colombia conflict, what emerges is not so much the binding norms of international law or the success of diplomacy, but the importance of politics, and particularly the political maneuvering by the Santos administration in establishing a secure foundation from which the peace agreement could be deliberated. What becomes clear is that only when the two groups were placed on equal footing, politically and legally, were they able to engage in dialogue and move toward peace. Going forward, it remains to be seen how words and politics will have a similar impact on the obligations set out under the peace agreement, as well as in other conflicts. For now, though, it is clear that, while not infallible, Santos was the first to acknowledge the FARC as legitimate constituents with legitimate concerns, lifting them up with international law and proving himself to be a formidable politician.

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<sup>5</sup> That said, it should be acknowledged that isolated cases of hostage-taking continued to occur and subsequently be resolved.





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