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Amicus Curiae Brief

On the non-conformity of transitory Article 24 of the Legislative Act No. 01 of 2017 with regard to command responsibility under the Rome Statute of the International Criminal Court

Before the Constitutional Court of Colombia,

to be considered during its review of transitory Article 24 of Legislative Act No. 01 of April 4th, 2017 "by which a title of transitory articles is created in the Constitution to end the armed conflict and build a stable and lasting peace as well as further provisions are added".

Berlin, May 2017

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I. INTRODUCTION

The Berlin-based European Center for Constitutional and Human Rights (ECCHR) respectfully submits this *amicus curiae* brief before the Constitutional Court of Colombia to be considered during its review of Legislative Act No. 01 of April 4th 2017, which creates a number of transitory provisions to the Colombian Constitution to ensure the implementation of the peace agreement between the government and the Revolutionary Armed Forces of Colombia – People's Army (Spanish abbreviation: FARC-EP).[1] The *amicus curiae* brief specifically addresses transitory Article 24, which sets out the legal standards applicable under the planned Special Jurisdiction for Peace to establish the criminal responsibility of high-ranking state officials for crimes committed by their subordinates. ECCHR puts forward that these standards are not in conformity with those recognized under Article 28 of the Rome Statute of the International Criminal Court (ICC), and should therefore be adjusted.

1. About ECCHR

ECCHR is an independent non-profit human rights organization registered in the municipality of Berlin-Charlottenburg, Germany since 2007. By engaging in strategic litigation, ECCHR uses international legal means to protect groups and individuals against systematic human rights violations, and hold state and non-state actors accountable for these egregious acts.

ECCHR qualifies as expert organization for this *amicus curiae* brief because of its current and previous work on Colombia and international crimes as well as ECCHR`s staff experience on international criminal law and specifically on command responsibility. Before the founding of ECCHR, its Secretary General Wolfgang Kaleck was already actively involved in the fight against impunity for crimes against humanity committed during the dictatorship in Argentina, by holding Argentinean military officials accountable for these atrocities. He has also worked together with the New York Center for Constitutional Rights (CCR) to pursue criminal proceedings against high-level United States (US) officials, in relation to crimes committed in the context of the "war on terror". These and other projects further developed under ECCHR's International Crimes & Accountability Program, in which legal action is taken in order to ensure that those most responsible for war crimes and crimes against humanity, including torture, extrajudicial killings and sexualized violence, will be held accountable. It particularly seeks to put an end to the impunity often enjoyed by high-ranking individuals who may be physically removed from the actual crime scene, but should nevertheless be held criminally responsible for the acts of their subordinates. In this regard, ECCHR has presented several communications to the Office of the Prosecutor (OTP) of the ICC in relation to sexualized violence and violence against trade unionists as crimes against humanity allegedly committed in Colombia.

In addition to its work in relation to Colombia, ECCHR also presented arguments to the OTP in order to hold British state officials responsible for war crimes allegedly committed by British soldiers against Iraqi detainees. Most recently, a criminal complaint was submitted to the German Federal Prosecutor against six high-level officials of the Syrian Military Intelligence Service for alleged war crimes and crimes against humanity committed in the context of the ongoing conflict in Syria.

Besides the abovementioned projects, ECCHR also holds the required academic expertise in relation to the topic of command responsibility. Most notably, among its legal advisors and co-authors of this

[1] Congreso de la República de Colombia, Acto Legislativo No. 01 de 2017 "por medio del cual se crea un título de disposiciones transitorias de la Constitución para la terminación del conflicto armado y la construcción de una paz estable y duradera y se dictan otras disposiciones", 4 April 2017.

amicus curiae brief is Professor Dr. Chantal Meloni, who is associate professor of international criminal law at the University of Milan, and has published extensively on the topic of command responsibility and other related matters of international criminal law.

ECCHR has extensive practical and academic experience on questions surrounding command responsibility as a mode of liability and, as such, holds the expertise to present arguments on the definition of command responsibility under review by this Court, in particular regarding said definition's conformity with the international legal standards recognized under international treaties, especially the Rome Statute, and in international jurisprudence.

2. Purpose of this *Amicus Curiae* Brief

On 13 March 2017, the Colombian Congress approved Legislative Act No. 01 of 2017, which allows for the insertion of a number of articles in the Constitution. Transitory Article 24 sets out the legal standards applicable in proceedings under the planned Special Jurisdiction for Peace when determining the criminal responsibility of members of the public forces ("*Fuerza Pública*")[2] for crimes committed by their subordinates. ECCHR does not deem this definition to be fully in line with the legal elements of command responsibility recognized under Article 28 of the Rome Statute[3], as it easily allows for an interpretation under which high-ranking commanders could avoid accountability for international crimes committed under their watch. On the one hand, such an outcome would interfere with the rights of the victims of the armed conflict to truth, justice, reparation and non-repetition. On the other hand, it may lead the OTP of the ICC to declare that the Colombian state is "unwilling" to investigate and prosecute these crimes, in accordance with its complementarity principle, as will be explained in more detail below. The purpose of this *amicus curiae* brief is therefore to analyze Article 28 of the Rome Statute as well as the most relevant international criminal law jurisprudence to demonstrate that the definition of command responsibility under Legislative Act No. 01 of 2017 does not fully meet these international standards and should therefore be adjusted to be in conformity with the Rome Statute. ECCHR respectfully requests this Court to take its opinions and arguments into consideration when reviewing Legislative Act No. 01 of 2017, specifically transitory Article 24.

II. THE LEGAL DEFINITION OF COMMAND RESPONSIBILITY UNDER THE PEACE AGREEMENTS AND TRANSITORY ARTICLE 24 OF LEGISLATIVE ACT NO. 01 OF 2017

1. The 2015 Victims' Agreement

After a first text with respect to victims' rights was agreed upon in September 2015, a second, more detailed agreement between the Colombian government and the FARC-EP, named the *Acuerdo sobre las Víctimas del conflicto* ("Victims' Agreement"), was reached on 15 December 2015.[4] This was the first agreement that included a provision on the legal standards applicable under the planned Special

[2] Under Article 216 of the Colombian Constitution of 1991, the term "la Fuerza Pública" encompasses both the military forces and the national police.

[3] Colombia ratified the Rome Statute on 5 August 2002 and is a party since 1 November 2002.

[4] Oficina del Alto Comisionado para la Paz, *Acuerdo sobre las víctimas del conflicto: "Sistema Integral de Verdad, Justicia, Reparación y No Repetición"*, incluyendo la Jurisdicción Especial para la Paz; y Compromiso sobre Derechos Humanos, 15 December 2015.

Jurisdiction for Peace to determine the responsibility of high-ranking state officials for crimes committed by their subordinates. They were described in the following manner:

> *The responsibility of members of the "Fuerza Pública" for acts committed by their subordinates must be based on the effective control over the respective conduct, on the knowledge based on the information at their disposal before, during and after the commission of the respective conduct, as well as on the means at their disposal to prevent and, if already occurred, promote the relevant investigations.*[5]

After the signing of the Victims' Agreement, strong concerns were expressed that the legal definition of command responsibility could be easily interpreted in a manner that would shield high-level commanders from prosecution, thereby failing to meet the international standards recognized under Article 28 of the Rome Statute.[6] In particular, the text was criticized for creating ambiguity surrounding the effective control requirement – which under the Victims' Agreement refers to control over the illegal conduct rather than over the subordinates, as is done under the Rome Statute – and, secondly, the *mens rea* requirement – which under the Victims' Agreement does not appear to include constructive knowledge (i.e. that the superior "should have known" about the crimes) which is an explicit alternative to actual knowledge under the Rome Statute.[7]

2. Final Peace Agreement

After the Colombian peace accord of September 2016 – which contained the provisions on command responsibility agreed upon in the Victims' Agreement – was rejected in the October plebiscite, the parties reached a new agreement on 12 November 2016. This agreement provided a range of modifications, including on the topic of command responsibility, where the following passage was added:

> *Effective control over the respective conduct is to be understood as the actual possibility that the superior had to exercise an appropriate control over his or her subordinates, in relation to the commission of the criminal conduct, as established under Article 28 of the Rome Statute.*[8]

This new language, however, was deleted from the final version of the agreement signed on 24 November 2016. In relation to the responsibility of members of the FARC-EP, the added paragraph remained, but the reference to Article 28 of the Rome Statute was replaced with the term "international law" ("*derecho internacional*").[9]

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[5] *Ibid.*, para. 44 (own translation). Spanish original: "La responsabilidad de los miembros de la fuerza pública por los actos de sus subordinados deberá fundarse en el control efectivo de la respectiva conducta, en el conocimiento basado en la información a su disposición antes, durante y después de la realización de la respectiva conducta, así como en los medios a su alcance para prevenir, y de haber ocurrido, promover las investigaciones procedentes." The same definition was agreed on regarding members of the FARC-EP (*ibid.*, para. 59).

[6] Human Rights Watch, *Human Rights Watch Analysis of Colombia –FARC Agreement*, 21 December 2015, available at: https://www.hrw.org/news/2015/12/21/human-rights-watch-analysis-colombia-farc-agreement.

[7] *Ibid*.

[8] Oficina del Alto Comisionado para la Paz, *Acuerdo Final Para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera*, 12 November 2016, para. 44 (own translation). Spanish original: "Se entiende por control efectivo de la respectiva conducta, la posibilidad real que el superior tenía de haber ejercido un control apropiado sobre sus subalternos, en relación con la ejecución de la conducta delictiva, tal y como indica el artículo 28 del Estatuto de Roma."

[9] Oficina del Alto Comisionado para la Paz, *Acuerdo Final Para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera*, 24 November 2016, paras. 44 and 59.

3. Transitory Article 24 of Legislative Act No. 01 of 2017

The latest legal definition of command responsibility was provided by transitory Article 24 of Legislative Act No. 01 of 2017. The definition, which was approved by Congress on 13 March 2017 and signed into law on 4 April 2017, erased earlier adjustments to the text under the Victims' Agreement and the Final Peace Agreement, and also added a significant part relevant to the interpretation of the effective control requirement:

> *In determining command responsibility, the Special Jurisdiction for Peace will apply, in relation to members of "La Fuerza Pública", the Colombian Criminal Code, International Humanitarian Law as lex specialis and the operational rules of the "Fuerza Pública" in relation to International Humanitarian Law, as long as these are not contrary to the [domestic] legal framework.*
>
> *The determination of command responsibility cannot be exclusively based on rank, hierarchy or scope of jurisdiction. The responsibility of members of the "Fuerza Pública" for acts committed by their subordinates must be based on the effective control over the respective conduct, the knowledge based on the information at their disposal before, during and after the commission of the respective conduct, as well as the means at their disposal to prevent the commission or continued commission of the punishable conduct, in so far as permitted by factual circumstances, and if already occurred, further the relevant investigations.*
>
> *It will be understood that effective command and control of the military or police superior over the acts of his subordinates exists, when the following concurring conditions are demonstrated:*
>
> > *a. That the criminal act or acts were committed within the area of responsibility assigned to the unit under his or her command in accordance with the corresponding jurisdiction, and are related to activities under his or her responsibility;*
> >
> > *b. That the superior had the legal and material capacity to issue, modify and enforce orders;*
> >
> > *c. That the superior had the effective capacity to develop and execute operations within the area where the criminal acts where committed, according to the corresponding level of command;*
> >
> > *d. That the superior had the material and direct ability to take adequate measures to prevent or suppress the criminal act or acts of his or her subordinates, provided that he or she had the actual or updatable knowledge of their commission.*[10]

[10] Own translation. Spanish original: "Artículo transitorio 24. Responsabilidad del mando.
Para la determinación de la responsabilidad del mando, la Jurisdicción Especial para la Paz aplicará, en el caso de los miembros de la Fuerza Pública, el Código Penal colombiano, el Derecho Internacional Humanitario como ley especial, y las reglas operacionales de la Fuerza Pública en relación con el DIH siempre que ellas no sean contrarias a la normatividad legal.
La determinación de la responsabilidad del mando no podrá fundarse exclusivamente en el rango, la jerarquía o el ámbito de jurisdicción. La responsabilidad de los miembros de la Fuerza Pública por los actos de sus subordinados deberá fundarse en el control efectivo de la respectiva conducta, en el conocimiento basado en la información a su disposición antes, durante, o después de la realización de la respectiva conducta, así como en los medios a su alcance para prevenir que se cometa o se siga cometiendo la conducta punible, siempre y cuando las condiciones fácticas lo permitan, y de haber ocurrido, promover las investigaciones procedentes.
Se entenderá que existe mando y control efectivo del superior militar o policial sobre los actos de sus subordinados, cuando se demuestren las siguientes condiciones concurrentes:
a) Que la conducta o las conductas punibles hayan sido cometidas dentro del área de responsabilidad asignada a la unidad bajo su mando según el nivel correspondiente y que tengan relación con actividades bajo su responsabilidad;
b) Que el superior tenga la capacidad legal y material de emitir órdenes, de modificarlas o de hacerlas cumplir;

This latest definition was equally met with strong criticism regarding the effective control and knowledge requirements, including in relation to the newly added criteria to demonstrate effective control.[11] This *amicus curiae* brief will put forward in more detail how the definition under transitory Article 24 fails to meet the legal standards under Article 28 of the Rome Statute, on the one hand, by imposing strict concurring requirements to demonstrate effective control, most of which under ICC jurisprudence only serve as indicative elements, and on the other hand, by failing to include constructive knowledge as fulfilling the *mens rea* requirement, as is done under the Rome Statute. Before going into these arguments, the following section will first outline the legal elements of command responsibility as these evolved historically under international criminal law and were eventually adopted under Article 28 of the Rome Statute.

III. THE LEGAL ELEMENTS OF COMMAND RESPONSIBILITY UNDER THE ROME STATUTE

1. The definition of command responsibility as evolved under international criminal law

The birth of the doctrine of command responsibility can be traced very anciently: that commanders have to be responsible for the conduct of their troops is a concept which is embedded in every military code and is as old as the concept of war itself. However, this did not necessarily mean that a criminal responsibility was imputed on the commanders for the crimes committed by their subordinates. Command responsibility, as intended today, is indeed a very special criminal law tool because the superior is made responsible for the crimes of his or her subordinates that he or she failed to prevent or punish, as he or she had personally committed them. In this sense the doctrine of command responsibility, while having its roots in military laws, further evolved in international humanitarian law and finally established itself before the international criminal courts and tribunals of the past. It can be thus considered as an original creation of international criminal law.[12]

Prior to its explicit codification in the 1977 Additional Protocol I of the 1949 Geneva Conventions, the doctrine of command responsibility had already been applied[13], or had been of influence[14] in several

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c) Que el superior tenga la capacidad efectiva de desarrollar y ejecutar operaciones dentro del área donde se cometieron los hechos punibles, conforme al nivel de mando correspondiente; y
d) Que el superior tenga la capacidad material y directa de tomar las medidas adecuadas para evitar o reprimir la conducta o las conductas punibles de sus subordinados, siempre y cuando haya de su parte conocimiento actual o actualizable de su comisión."

[11] Human Rights Watch, *Letter on "Command Responsibility" in the Implementing Legislation of the Peace Agreement*, 25 January 2017, available at: https://www.hrw.org/news/2017/01/25/letter-command-responsibility-implementing-legislation-peace-agreement. See also R. Uprimny and D. Güiza, *Reflexiones sobre la reforma constitucional que crea la Jurisdicción Especial para la Paz y regula el tratamiento especial a la Fuerza Pública*, Centro de Estudios de Derecho, Justicia y Sociedad (Dejusticia), 13 February 2017.

[12] See C. Meloni, The Evolution of Command Responsibility in International Criminal Law, in M. Bergsmo et al. (eds.), *Historical Origins of International Criminal Law: Vol. III*, TOAEP, 2015, pp. 683-714.

[13] *See* the Yamashita Trial of 1945, where a US military commission convicted Japanese General Tomoyuki Yamashita for grave atrocities committed by Japanese soldiers under his command, for failing to control their operations, which permitted the occurrence of these crimes. *United States v. Tomoyuki Yamashita*, US Military Commission, Manila 8 October – 7 December 1945, in *Law Reports of Trials of War Criminals*. Selected and prepared by the United Nations War Crimes Commission ("Trials of War Criminals"), Vol. IV, 1948, pp. 1-96; and the High Command Trial and the Hostage Trial, two of the twelve major trials held by US military tribunals in Nuremberg between 1947 and 1949. In the High Command Trial, Field Marshal von Leeb and thirteen other high-level German officials were convicted for atrocities committed under Nazi Germany, due to their failure to

convictions of high-level individuals for crimes committed by their subordinates, mainly in cases dealing with the responsibility of German and Japanese state officials for atrocities committed during the Second World War.[15] In 1977, Additional Protocol I to the 1949 Geneva Conventions became the first international instrument to explicitly recognize the doctrine of command responsibility as a distinct mode of liability for military commanders. As provided under Article 86 (2):

> *The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.*[16]

Article 87, explicitly referring to the duty of "military commanders", specifies that these "feasible measures" refer to "such steps as are necessary to prevent such violations (…), and, where appropriate, to initiate disciplinary or penal action against violators thereof".[17]

Building upon the text under Additional Protocol I, the Statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) contained a specific provision on command responsibility, which included the following legal elements:

> *The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.*[18]

By using the general expression 'superior responsibility', this definition allowed the doctrine of command responsibility to also extend to non-military superiors.[19]

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exercise control properly over their subordinates. *United States v. Wilhelm von Leeb et al*., 4 February 1948 – 28 October 1948, in *Trials of War Criminals*, Vol. XI, pp. 512 et seqq.

[14] See the 1946 Nuremberg Judgment of the International Military Tribunal, where high-level state officials were not convicted under purely omissive forms of responsibility, but which nevertheless holds relevance for extending criminal responsibility to civilian superiors. *United States v. Göring et al.*, Judgment of 30 September – 1 October 1946 in *American Journal of International Law* (1947), pp. 172 et seqq.; and the International Military Tribunal for the Far East (Tokyo Tribunal), which tried twenty-eight Japanese defendants for atrocities committed by their subordinates and for the first time recognized responsibility for omission, which also extended to civilian leaders. See B.V.A. Röling, C.F. Ruter (eds.), *The Tokyo Judgment: the International Military Tribunal for the Far East (IMTFE)*, 29 April 1946 – 12 November 1948 (Amsterdam, University Press, 1977).

[15] See C. Meloni, *Command Responsibility in International Criminal Law* (The Hague, TMC Asser Press, 2010) ("Meloni"), pp. 33-76. Here, it should be noted that superior responsibility also played a role in the trials against U.S. soldiers for crimes committed during the Vietnam War. *Ibid*., p. 64.

[16] 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 16 ILM 1391 (1977), Article 86 (2).

[17] *Ibid*., Article 87 (3).

[18] 1993 Statute of the International Criminal Tribunal for the Former Yugoslavia, 32 ILM 1159, Article 7 (3); 1994 Statute of the International Criminal Tribunal for Rwanda, 33 ILM 1598, Article 6 (3).

[19] The United Nations Committee of Experts investigating international crimes committed in the territory of the former Yugoslavia found that the "doctrine of command responsibility is directed primarily at military commanders", but nevertheless noted that "in certain circumstances" political leaders and public officials had also been held liable under this doctrine. See *Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992)*, 27 May 1994, UN Doc. S/1994/674, para. 57. In the end, as demonstrated by the jurisprudence of the *ad hoc* Tribunals, the provision of command responsibility was also considered to be applicable to civilian superiors. See, for example, *Prosecutor v. Zlatko Aleksovski*, Trial Judgement ("*Aleksovski* Trial Judgement"), Case No. IT-95-14/1-T, T. Ch., 25 June 1999, para. 103; upheld by

2. The definition of command responsibility under Article 28 of the Rome Statute, and the ICC's interpretation of the effective control and knowledge requirements

The subsequent jurisprudence of the *ad hoc* Tribunals played a significant role in the drafting and formulation of the provisions adopted in the Rome Statute. Finally, a very detailed definition of command responsibility, which for the first time explicitly applies also to civilian superiors, was adopted in Article 28 which reads:

> *In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:*
>
> *(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:*
>
> > *(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and*
> > *(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.*
>
> *(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:*
>
> > *(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;*
> > *(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and*
> > *(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.*[20]

While this definition is built upon the interpretation of the doctrine developed following the Additional Protocol I to the 1949 Geneva Conventions and the Statutes of the *ad hoc* Tribunals, it provides for a much more thorough description of the legal elements of command responsibility; most notably under lit. (b), Article 28 of the Rome Statute includes an express provision applicable to the responsibility of non-military superiors which presents slightly different features.

The following two subsections will discuss how the two crucial aspects of the doctrine of command responsibility, namely the effective control and the *mens rea* requirements, have been interpreted by the ICC. As already anticipated, such elements appear to be particularly problematic as formulated under the Colombian transitory Article 24 here analyzed.

i. The effective control requirement

From the abovementioned definition under Article 28 of the Rome Statute, it can be established that in order to conclude that a high-ranking superior can be held criminally responsible, the following *objective* elements need to be demonstrated:

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the Appeals Chamber Judgement, Case No. IT-95-14/1-A, 24 March 2000, para. 76; and *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Trial Judgement, Case No. ICTR-95-1, T. Ch. II., 21 May 1999, para. 216.

[20] 1998 Rome Statute of the International Criminal Court, 37 ILM 1002 (1998), Article 28.

1. The commission of a crime under the jurisdiction of the Court;
2. A military or civilian hierarchical relationship between the superior and the person(s) committing the criminal conduct;
3. The effective command and control, or the effective authority and control by the superior over the person(s) committing the criminal conduct;
4. In case of a non-military superior, the criminal conduct concerned activities within the effective responsibility and control of the superior;
5. The superior's failure to adopt reasonable and necessary measures to prevent, repress or submit the crimes to competent authorities;
6. A causal nexus between the superior's failure to exercise control properly and the commission of the criminal conduct.

Different than under transitory Article 24, which requires that the effective control requirement be established "over the respective *conduct*", Article 28 of the Rome Statute explicitly refers to "*forces* under his or her effective command and control". Thus it shall be noted that the Rome Statute requires control over the subordinates committing the crimes rather than over the actual criminal conduct itself. The first, and so far only, interpretation of Article 28 of the Rome Statute by the ICC Trial Chamber is contained in the Judgment against Bemba Gombo (*Bemba*) issued in March 2016. Here, the Trial Chamber also refers to "effective control over the relevant forces".[21] Such understanding of effective control is also supported by the jurisprudence of the *ad hoc* Tribunals.[22]

It should be noted that with respect to the responsibility of *non*-military superiors, Article 28 of the Rome Statute additionally requires that the specific activities realizing the criminal conduct were "within the effective responsibility and control of the superior".[23] When the determination of effective control concerns military commanders, however, who have a more strongly identifiable legal duty to act in accordance with their military obligations[24], this is certainly not a requirement. What suffices is the commander's effective control over his or her subordinates.

The Trial Chamber in *Bemba* further clarified that the 'effective control' test requires the accused to "have the material power to prevent or repress the commission of crimes or to submit the matter to a competent authority."[25] It also confirms the Pre-Trial Chamber's conclusions as well as *ad hoc* Tribunals' jurisprudence[26] that effective control is either a manifestation of a *de jure* or *de facto*

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[21] *Situation in the Central African Republic. In the Case of The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment pursuant to Article 74 of the Statute ("*Bemba* Judgment"), Case No. ICC-01/05-01/08, T. Ch. III, 21 March 2016, para. 184.

[22] See, for example, *Prosecutor v. Dario Kordić & Mario Čerkez*, Trial Judgement, Case No. IT-95-14/2-T, T. Ch., 26 February 2001, paras. 414-416; *Prosecutor v. Tihomir Blaškić*, Trial Judgement ("*Blaškić* Trial Judgement"), Case No. IT-95-14-T, T. Ch., 3 March 2000, paras. 300 and 335; *Prosecutor v. Momčilo Perišić*, Trial Judgement, Case No. IT-04-81-T, T. Ch. I., 6 September 2011, para. 1673; *Prosecutor v. Rasim Delić,* Trial Judgement, Case No. IT-04-83-T, T. Ch. I., 15 September 2008, para. 58; *Prosecutor v. Sefer Halilović*, Appeals Chamber Judgement ("*Halilović* Appeals Chamber Judgement"), Case No. IT-01-48-A, A. Ch., 16 October 2007, para. 59; and *Prosecutor v. François Karera,* Trial Judgement, Case No. ICTR-01-74-, T. Ch. I, 7 December 2007, para. 564, all referring to control over "the actual perpetrators", "subordinates" or "persons committing the underlying violations" rather than the criminal conduct.

[23] Rome Statute, Article 28 (b) (ii).

[24] See Meloni, *supra*, p. 162.

[25] *Bemba* Judgment, *supra*, para. 170.

[26] See, for example, *Prosecutor v. Naser Orić,* Appeals Chamber Judgement ("*Orić* Appeals Chamber Judgement"), Case No. IT-03-68-A, A. Ch., 3 July 2008, para. 20; also *Prosecutor v. Naser Orić,* Trial Judgement, Case No. IT-03-68-T, T. Ch. II, 30 June 2006, para. 311; *Prosecutor v. Šainović et al.,* Trial Judgement, Case No. IT-05-87-T, T. Ch., 26 February 2009, para. 118; *Prosecutor against Brima et al.,* Trial Judgement ("*Brima et al.* Trial Judgement"), Case No. SCSL-04-16-T, T. Ch. II, 20 June 2007, para. 786; *Prosecutor v. Sefer Halilović*, Trial Judgement ("*Halilović* Trial Judgement"), Case No. IT-01-48-T, T. Ch. I Section A, 16 November 2005, paras. 62 to 63; *Prosecutor v. Pavle Strugar*, Trial Judgement ("*Strugar* Trial

hierarchical relationship,[27] and explains that "[w]hether or not there are intermediary subordinates between the commander and the forces which committed the crimes is immaterial; the question is simply whether or not the commander had effective control over the relevant forces".[28] The Trial Chamber also concluded that Article 28 of the Rome Statute does not require a commander to "have sole or exclusive authority and control over the forces who committed the crimes", which means that "multiple superiors can be held concurrently responsible for their subordinates' actions".[29]

When explaining the assessment of effective control, the Trial Chamber in *Bemba* again followed the *ad hoc* Tribunals' jurisprudence, by stressing that

> *[The] question of whether a commander had effective control over particular forces is case specific. There are a number of factors that* ***may indicate*** *the existence of 'effective control' which requires the material ability to prevent or repress the commission of crimes or to submit the matter to the competent authorities; these have been properly considered as 'more a matter of evidence than of substantive law'. These factors* ***may include****: (i) the official position of the commander within the military structure and the actual tasks that he carried out; (ii) his power to issue orders, including his capacity to order forces or units under his command, whether under his immediate command or at lower levels, to engage in hostilities; (iii) his capacity to ensure compliance with orders including consideration of whether the orders were actually followed; (iv) his capacity to re-subordinate units or make changes to command structure; (v) his power to promote, replace, remove, or discipline any member of the forces, and to initiate investigations; (vi) his authority to send forces to locations where hostilities take place and withdraw them at any given moment; (vii) his independent access to, and control over, the means to wage war, such as communication equipment and weapons; (viii) his control over finances; (ix) the capacity to represent the forces in negotiations or interact with external bodies or individuals on behalf of the group; and (x) whether he represents the ideology of the movement to which the subordinates adhere and has a certain level of profile, manifested through public appearances and statements.*[30] (Emphasis added)

What can be clearly inferred from this is that while the material power to prevent or repress the commission of crimes or to submit the matter to a competent authority is an absolute requirement to demonstrate the existence of effective control, the other factors mentioned are merely indicative. This means that these factors may or may not be demonstrated in each case, largely depending on the nature and context of the conflict as well as the parties involved. To require that some of these indicators be

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Judgement"), Case No. IT-01-42-, T. Ch. II, 31 January 2005, paras. 363 to 366; *Prosecutor v. Mladen Naletilić and Vinko Martinović*, Trial Judgement, Case No. IT-98-34-T, T. Ch., 31 March 2003, para. 69; *Prosecutor v. Milorad Krnojelac,* Trial Judgement, Case No. IT-97-25-T, T. Ch. II, 15 March 2002, para. 93; *Blaškić* Trial Judgement, *supra*, paras. 296 and 303; and *Aleksovski* Trial Judgement, *supra*, para. 106.

[27] *Bemba* Judgment, *supra*, para. 184.

[28] *Bemba* Judgment, *supra*, para. 184.

[29] *Bemba* Judgment, *supra*, para. 185.

[30] *Bemba* Judgment, *supra*, para. 188, referring to: *Prosecutor v. Tihomir Blaškić*, Appeals Chamber Judgement ("*Blaškić* Appeals Chamber Judgement"), Case No. IT-95-14-A, A. Ch., 29 July 2004, para. 69; *Prosecutor v. Dragomir Milošević,* Appeals Chamber Judgement, Case No. IT-98-29/1-A, A. Ch., 12 November 2009, para. 280; *Halilović* Appeals Chamber Judgement, *supra*, para. 207; *Prosecutor v. Pavle Strugar,* Appeals Chamber Judgement, Case No. IT-01-42-A, A. Ch., 17 July 2008, paras.254 and 256; *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Appeals Chamber Judgement, Case No. IT-01-47-A, A. Ch., 22 April 2008, para. 199; *Orić* Appeals Chamber Judgement, *supra*, para. 159; *Halilović* Trial Judgement, *supra*, para. 58; *Prosecutor v. Dario Kordić & Mario Čerkez*, Trial Judgement, Case No. IT-95-14/2-T, T. Ch., 26 February 2001, paras. 418 and 421; *Strugar* Trial Judgement, *supra*, paras. 392 to 397, 406, 408, 411, and 413; *Prosecutor v. Tharcisse Muvunyi,* Trial Judgement and Sentence, Case No. ICTR-2000-55A-T, T. Ch. II, 12 September 2006, para. 497; *Prosecutor v. Zejnil Delalić et al.*, Trial Judgement ("*Čelebići* Trial Judgement"), Case No. IT-96-21-T, T. Ch., 16 November 1998, para. 767; and *Brima et al.* Trial Judgement, *supra*, para. 788.

proven as concurrent conditions, as does transitory Article 24, goes far beyond the standards established in international law.

ii. The mens rea requirement

Returning to Article 28 of the Rome Statute, the *subjective* elements of command responsibility can be described in the following manner:

I. The military or civilian superior knew that the crimes were being or about to be committed; or

II. In the case of military commanders: The military commander, owing to the circumstances at the time, should have known that the crimes were being or about to be committed;

III. In the case of civilian superiors: The civilian superior consciously disregarded information which clearly indicated that the crimes were being or about to be committed.

What clearly emerges from these elements is that in addition to a situation where a military commander has actual knowledge ("knew") of the criminal conduct, he or she also fulfills the *mens rea* requirement if it is merely demonstrated that he or she "should have known" that crimes were being or about to be committed.

This requirement is different, at least in wording, from the "had reason to know" standard under the Statutes of the *ad hoc* Tribunals, whose jurisprudence has been relatively inconsistent on what this standard actually entails.[31] In relation to *actual* knowledge, the Trial Chamber in *Bemba* established that such knowledge cannot be presumed but should be established by direct or circumstantial evidence. In its analysis of whether Mr. Bemba fulfilled the required *mens rea*, it found the evidence to be sufficient to demonstrate that Mr. Bemba had this *actual* knowledge. The Trial Chamber did therefore not discuss the "should have known" standard in more detail. The Pre-Trial Chamber in its Confirmation of Charges Decision, however, did analyze what was to be understood by "should have known", clarifying it to be "a form of negligence".[32] Referring to the ICTY Trial Chamber decision in *Blaŝkić*, the Pre-Trial Chamber in *Bemba* explained that this requirement merely entails that the superior has "been negligent in failing to acquire knowledge of his subordinates' illegal conduct".[33] This means that:

> *[If] a commander has exercised due diligence in the fulfillment of his duties yet lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties.*[34]

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[31] In the *Čelebići* Trial Judgement, the Chamber found this standard to entail that . See *Čelebići* Trial Judgement, *supra*, para. 393. The *Blaŝkić* Trial Chamber on the other hand, concluded that the "had reason to know" standard actually meant that a lack of knowledge cannot be held as a defense if this "absence of knowledge is the result of negligence in the discharge of his duties". See *Blaškić* Trial Judgement, *supra*, para. 332. This, however, was later reversed by the Appeals Chamber. See *Blaškić* Appeals Chamber Judgement, *supra*, para. 406. The ICTR adopted the standard in a similar manner in the *Bagilishema* Appeals Chamber Judgement. See *Prosecutor v. Ignace Bagilishema*, Appeals Chamber Judgement, Case No. ICTR-95-1A, A. Ch., 3 July 2002, paras. 29-30.

[32] *Situation in the Central African Republic. In the Case of the Prosecutor v. Jean-Pierre Bemba Gombo,* Decision pursuant to Article 61 (7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo ("Case of *Bemba,* decision on the confirmation of charges"), Case No. ICC-01/05-01/08, P. T. Ch. II, 15 June 2009, para. 429.

[33] Case of *Bemba*, decision on the confirmation of charges, *supra*, para. 432.

[34] *Ibid*., referring to *Blaškić* Trial Judgement, *supra*, para. 332.

As concluded by the Pre-Trial Chamber, the "should have known" standard thus "requires more of an active duty on the part of the superior to take the necessary measures to secure knowledge of the conduct of his troops and to inquire, regardless of the availability of information at the time on the commission of the crime."[35]

In contrast, transitory Article 24 fails to include the "should have known" standard as provided under the Rome Statute, as it only refers to "the knowledge based on the information at their disposal before, during and after the commission of the respective conduct" as well as to "actual or updatable knowledge".

IV. TRANSITORY ARTICLE 24 OF LEGISLATIVE ACT NO. 01 OF 2017 IS NOT IN CONFORMITY WITH ARTICLE 28 OF THE ROME STATUTE

From the analysis of the objective and subjective elements of Article 28 of the Rome Statute as well as their interpretation in the *Bemba* case, it can be concluded that the definition under transitory Article 24 of Legislative Act No. 01 of 2017 does not meet the international legal standards as recognized under the Rome Statute.

1. The effective control requirement

In the first place, with respect to the requirement that a superior has effective control, transitory Article 24 refers to effective control over the "respective conduct" or the "acts of his or her subordinates"[36]. This imposes a stricter criterion for establishing the responsibility of military commanders than is required under Article 28 of the Rome Statute. As already mentioned above, jurisprudence from the ICC and the *ad hoc* Tribunals consistently refers to effective control over "the actual perpetrators", "subordinates" or "persons committing the underlying violations" rather than over the criminal conduct as such.

To require effective control over the subordinate's *conduct* would in fact change the concept of command responsibility into a form of direct responsibility, such as co-authorship and other forms of individual criminal liability listed in Article 25 (3) (a) of the Rome Statute.

Secondly, the definition under transitory Article 24 adds a number of factors that need to be all concurringly established in order to prove that a superior had effective control; however, most of these factors only serve as alternative, indicative elements under the ICC jurisprudence and the jurisprudence of *ad hoc* Tribunals in order to consider the effective control element fulfilled.

While, as mentioned above, international criminal law jurisprudence indeed requires the superior to have the material ability to prevent or repress the commission of the crimes or to submit the matter to a competent authority, all other factors that need to be demonstrated under transitory Article 24 are merely referred to as factors that *may indicate* the existence of effective control. Therefore, these factors shall not be individually listed as cumulative requirements to fulfill the standard of proof for the commander, as this would be an excessive burden of proof for the prosecuting authorities, contrary to the international criminal law requirements. Indeed, it would be extremely difficult to demonstrate – in addition to a superior possessing the material ability to prevent or repress the criminal acts of his or

[35] Case of *Bemba*, decision on the confirmation of charges, *supra*, para. 433.
[36] Spanish original text: "La responsabilidad de los miembros de la Fuerza Pública por los actos de sus subordinados deberá fundarse en el control efectivo de la respectiva conducta".

her subordinates or to submit the matter to a competent authority –, that, as foreseen in transitory Article 24: "(a) the criminal act or acts were committed within the area of responsibility assigned to the unit under his or her command in accordance with the corresponding jurisdiction, and are related to activities under his or her responsibility; (b) the superior had the legal and material capacity to issue, modify and enforce orders; [and] (c) the superior had the effective capacity to develop and execute operations within the area where the criminal acts were committed, according to the corresponding level of command."

Taking the *Bemba* case as a relevant term of comparison, it can be noted that – as affirmed by the Prosecutor of the ICC in her op-ed of 21 January 2017, published in *Semana*[37] – Mr. Bemba (a national of the Democratic Republic of the Congo) was convicted for crimes committed by his subordinated even if these crimes were "outside" of his area of responsibility on the basis of his exercise of effective control on his troops and the knowledge of the commission of the crimes which were actually taking place in the Central African Republic. In fact, the Trial Chamber found that Mr. Bemba was in regular contact with commanders in the field, received detailed information through operational and intelligence reports, represented the forces of the *Mouvement de Liberatión du Congo* in the Central African Republic in external matters and maintain his power and authority to remove his troops from that country.[38]

The ICC Trial Chamber also specifically distinguished between the concept of 'unity of command' and 'effective control', explaining in relation to unity of command: "[f]or the proper functioning of an army, there can be only one individual in command of any particular unit at one time".[39] The material power to prevent, repress or submit the criminal conduct to competent authorities, however, "need not be an exclusive power and multiple superiors can be held concurrently responsible for their subordinates' actions".[40] Therefore, the fact that Mr. Bemba's troops communicated and cooperated with authorities from the Central African Republic throughout the operation did not mean that Mr. Bemba had no effective authority and control over these troops, in spite of them operating on foreign territory.[41]

The Bemba conviction is an historic judgment since it is the first conviction by the ICC based on command responsibility. However, had the definition of command responsibility under transitory Article 24 been applied to it, instead of the standards as set out by Article 28 of the Rome Statute, the accused would have never been convicted. More in detail, the accused would not have been found to have exercised effective control, under the reasoning that the crimes were not committed "within the area of responsibility assigned to the unit under his command", as required under the list of concurring conditions required by transitory Article 24.

Moreover, it should be pointed out that the holding of formal (or *de jure*) command is not a determinative factor to demonstrate the existence of effective control under Article 28 of the Rome Statute. As also mentioned in the previous section, effective control may be established within either a *de jure* or *de facto* hierarchical relationship.[42] On the contrary, the second concurring factor that must be proven under the transitory Article 24 requires that the superior have *both* legal and material ability to issue, modify and enforce orders. In practice, this would mean that under the Colombian law a

[37] Fatou Bensouda, "El acuerdo de paz de Colombia demanda respeto, pero también responsabilidad", in *Semana*, 21 January 2017, available at: http://www.semana.com/nacion/articulo/deseo-corte-penal-internacional-justicia-transicional-en-colombia/512820.
[38] *Bemba* Judgment, *supra*, para. 704.
[39] *Bemba* Judgment, *supra*, para. 698, citing *Prosecutor v. Vujadin Popović et al.*, Trial Judgement, Case No. IT-05-88-T, T. Ch. II, 10 June 2010, para. 2025.
[40] *Bemba* Judgment, *supra*, para. 698.
[41] *Bemba* Judgment, *supra*, para. 699.
[42] *Bemba* Judgment, *supra*, para. 184.

superior without formal authority to issue orders, yet with the material capacity to do so, would not be found to have effective control for lacking the legal capacity, and as such avoid criminal responsibility. This requirement thus directly contradicts the provisions of the Rome Statute and ICC jurisprudence.

2. The *mens rea* requirement

The definition provided under the Colombian law does not only fail to meet the standards under the Rome Statute in relation to its objective elements, but also appears to impose a narrower *mens rea* requirement. Transitory Article 24 in fact fails to include the "should have known" standard as provided under the Rome Statute, as it only refers to "the knowledge based on the information at their disposal before, during and after the commission of the respective conduct" as well as to "actual or updatable knowledge".

As already explained above, in addition to actual knowledge (the commander "knew"), Article 28 of the Rome Statute with regard to military commanders also provides for the following *mens rea* standard, namely that, owing to the circumstances at the time, the commander "should have known" that his or her subordinates had committed or were about to commit the crimes. This refers to a situation where a military superior has merely "been negligent in failing to acquire knowledge of his subordinates' illegal conduct".[43] On the contrary, the formulation under transitory Article 24 appears to exclude the possibility that a military commander be responsible because he "should have known" about the commission of the crimes, and thus does not require "an active duty on the part of the superior to take the necessary measures to secure knowledge of the conduct of his troops and to inquire, regardless of the availability of information at the time on the commission of the crime".[44] In particular, the term "updatable" creates ambiguity as to whether a military commander whose lack of knowledge about the crimes is a result of negligence in the discharge of his or her duties would still be found to fulfill the *mens rea* requirement under transitory Article 24.

It is true that with respect to non-military superiors, as is the case for effective control, the Rome Statute adopts narrower criteria, by requiring that the superior "consciously disregarded information which clearly indicated that the crimes were being committed or about to be committed".[45] As explained by the ICC Pre-Trial Chamber, this is the result of "a more stringent approach towards commanders and military-like commanders compared to other superiors that fall within the parameters of Article 28 (b) of the Statute. This is justified by the nature and type of responsibility assigned to this category of superiors".[46] Hence, as also explained above, this is not the standard to be applied for members of the military, whose responsibility is covered by transitory Article 24.

3. Conclusions

It can thus be concluded that the objective elements of transitory Article 24 are not in accordance and do not fulfill the standards set under Article 28 of the Rome Statute, in particular the requirement of control over the *conduct* as well as the listing of factors that need to be proven concurringly in order to demonstrate effective control.

The formulation of its subjective elements may or may not be in line with the Rome Statute, depending on how they are interpreted. Especially worrying is the fact that it leaves out the internationally recognized alternative of a "should have known" standard. This creates ambiguity as to

[43] Case of *Bemba*, decision on the confirmation of charges, *supra*, para. 432.
[44] Case of *Bemba*, decision on the confirmation of charges, *supra*, para. 433.
[45] Rome Statute, Article 18 (2) (i).
[46] Case of *Bemba*, decision on the confirmation of charges, *supra*, para. 433.

how to apply such standards, which may result in an interpretation that allows high-level military commanders who would be held criminally responsible under the standards of the Rome Statute, to escape accountability under the Special Jurisdiction for Peace.

V. WHY IS IT IMPORTANT FOR TRANSITORY ARTICLE 24 TO BE IN CONFORMITY WITH ARTICLE 28 OF THE ROME STATUTE?

After having established that the definition of command responsibility under transitory Article 24 does not meet the international law standards as recognized under Article 28 of the Rome Statute, the following section will discuss the importance of amending the provision in order to be in compliance with the internationally recognized standards.

States that are Parties to the Rome Statute have an implicit obligation to enforce international criminal law principles in their domestic legislation. It is thus commendable that Colombia is amending its legal system in order to accommodate such provisions, thus including the doctrine of command responsibility. However, it is of the utmost importance that the domestic implementation be in line with the international requirements, in order to avoid gaps of impunity in particular with regard to those at the highest echelons of the military and political chain of command that deserve to be held responsible for the commission of grave crimes as the ones perpetrated in Colombia.

Indeed, Colombia ratified the Rome Statute on 5 August 2002. The ICC may therefore exercise jurisdiction over genocide and crimes against humanity committed on Colombian territory, or by Colombian nationals, after the entry into force of the Rome Statute on 1 November 2002. With respect to war crimes, the Court may exercise its jurisdiction over crimes committed since 1 November 2009.[47] The ICC acts as a court of last resort. This means that a primary duty is placed on domestic authorities to ensure the effective prosecution of "the most serious crimes of concern to the international community as a whole" committed on its territory, through the "exercise [of] its criminal jurisdiction over those responsible".[48] While this is first and foremost the responsibility and right of the Colombian State, the ICC can intervene if Colombia is either unwilling or unable to investigate and prosecute such crimes domestically, in accordance with the complementarity principle (see Article 17 of the Rome Statute).

In this complementarity assessment, the ICC does not only consider whether investigations and prosecutions are occurring but also whether these are carried out "genuinely", in particular when determining "unwillingness".[49] Here, unjustified delays in proceedings, a lack of independence and impartiality or the fact that proceedings are conducted in a manner that would shield the person concerned from criminal responsibility, may be determinative to confirm such "unwillingness". Among other indicators, the ICC considers the question whether domestic investigations and prosecutions also target the responsibility of high-level individuals as a relevant factor to take into account when making this determination.[50] The OTP has also explained that evidence of shielding "may exist in documentary form, including legislation, orders, amnesty decrees, instructions and

[47] When Colombia deposited its instrument of accession to the Rome Statute on 5 August 2002, it also deposited a declaration pursuant to Article 124 which excluded war crimes from the jurisdiction of the ICC for a seven-year period. Therefore, the ICC has jurisdiction over war crimes committed in the territory of Colombia or by Colombian nationals since 1 November 2009.
[48] Preamble to the Rome Statute.
[49] Rome Statute, Article 17 (1) (a).
[50] Office of the Prosecutor of the International Criminal Court, *Informal Expert Paper: The Principle of Complementarity in Practice*, 2003, p. 30.

correspondence".[51] Legislation that is drafted in such a manner that would allow high-ranking individuals to easily avoid being held criminally responsible for crimes committed by their subordinates, could thus be considered as a form of shielding the accused and, as such, result in a declaration that a state is "unwilling" to investigate and prosecute genuinely.

The situation in Colombia has been under preliminary examination by the ICC since June 2004. The OTP has already established that there is a reasonable basis that war crimes and crimes against humanity that may fall under ICC jurisdiction have been committed on Colombian territory by both state and non-state actors.[52] These include the so-called '*falsos positivos*' cases which involve members of the Colombian military allegedly killing thousands of civilians who were subsequently reported as guerilla fighters killed in combat.[53] The focus of the OTP preliminary examination activities lies on the complementarity aspect discussed above, where it examines "whether proceedings have been prioritized against those who appear to bear the greatest responsibility for the most serious crimes within the jurisdiction of the Court and whether such proceedings are genuine".[54] Here, it will pay particular attention to proceedings carried out under the Special Jurisdiction for Peace, including the legal standards applicable to establish the criminal responsibility of high-ranking commanders. As stated by the OTP:

> *The OTP would also have to consider whether* ***any substantive lacunae in the laws*** *applied by the competent SJP (Special Jurisdiction for Peace) authorities,* ***including in relation to command responsibility****, could hinder their ability to genuinely proceed in relation to the potential cases which are likely to arise from an investigation into the situation.*[55] (Emphasis added)

This particular focus on command responsibility was again confirmed this year by the Prosecutor herself, Fatou Bensouda.[56] It can thus be said that the proceedings under the Special Jurisdiction for Peace that concern crimes for which high-level commanders may also be held criminally responsible will be of particular interest to the ICC in the context of the complementarity requirement under the Rome Statute. In this context, the ICC will not merely evaluate whether direct perpetrators are held accountable, but also, and especially, whether high-ranking superiors who may bear the greatest responsibility are brought to justice. The OTP has equally declared to pay special attention to the abovementioned '*falsos positivos'* cases.[57] Therefore, a provision that from the outset creates ambiguity, and in some aspects even directly contravenes the international standards recognized under the Rome Statute, very likely would be considered by the OTP as a strong indicator that Colombia is unwilling to investigate and prosecute genuinely.

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[51] *Ibid.*, p. 29.

[52] OTP, *Situation in Colombia – Interim Report*, 14 November 2012 ("OTP, *Colombia Interim Report*"), paras. 5-10, available at: https://www.icc-cpi.int/Pages/item.aspx?name=Situation-in-Colombia-Interim-Report. See also Office of the Prosecutor of the International Criminal Court Report, *Report on Preliminary Examination Activities (2016)*, 14 November 2016 ("OTP, *Report on Preliminary Examination Activities 2016*"), paras. 237-238, available at: https://www.icc-cpi.int/Pages/item.aspx?name=161114-otp-rep-PE.

[53] OTP, *Colombia Interim Report*, *supra*, para. 8.

[54] OTP, *Colombia Interim Report*, *supra*, para. 11.

[55] OTP, *Report on Preliminary Examination Activities 2016*, *supra*, para. 257.

[56] Bensouda, "El acuerdo de paz de Colombia demanda respeto, pero también responsabilidad", in *Semana*, 21 January 2017, *supra*.

[57] OTP, *Colombia Interim Report*, *supra*, para. 22. See also OTP, *Report on Preliminary Examination Activities 2016*, *supra*, paras. 241-244.

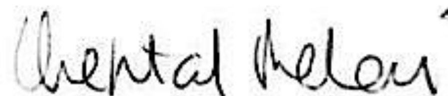
VI. CONCLUSION

The conclusion of the final peace agreement between the Colombian Government and the FARC-EP marked a crucial step in establishing lasting peace in Colombia after more than fifty years of armed conflict, and should therefore be welcomed positively. It is of utmost importance, however, that in dealing with the crimes committed during the conflict, the Special Jurisdiction for Peace will not only establish the criminal responsibility of direct perpetrators, but will also ensure that those who failed to prevent, suppress or submit the crimes to competent authorities in spite of the fact that they knew or should have known that these crimes were being or about to be committed, will also be brought to justice.

This *amicus curiae* brief puts forward that the current Legislative Act No. 01, approved by Congress in March this year, creates an opening for high-ranking commanders to avoid such accountability, by defining the legal standards of command responsibility under transitory Article 24 in a manner that does not meet the international standards as recognized under Article 28 of the Rome Statute. As submitted in the previous sections, the definition of command responsibility under transitory Article 24 directly contravenes the provisions of the Rome Statute in relation to the effective control requirement, in particular the requirement of control over the *conduct* as well as the listing of factors that need to be proven concurringly in order to demonstrate effective control. The formulation of its subjective elements provides ambiguous language regarding the *mens rea* requirement, leaving out the internationally recognized alternative of a “should have known” standard.

As concluded in Section IV, the very first case before the ICC in which the accused was found responsible under the doctrine of command responsibility (the *Bemba* case), would most likely not have led to a conviction of the accused if the Colombian law would have been applied instead of the Rome Statute. It is important to emphasize that the Rome Statute of the ICC is in line with previous international treaties, such as Articles 86 and 87 of the 1977 Additional Protocol I, with regard to the effective control as well as the *mens rea* requirements.

Ensuring that the doctrine of command responsibility under transitory Article 24 meets the requirements of the Rome Statute is not only crucial with a view to the rights of the victims to the conflict, but may also play a determinative role in the OTP’s assessment as to whether Colombia is “unwilling” to investigate and prosecute domestically in the context of the ICC’s complementarity principle. An appropriate definition in compliance with international standards will equally serve as a deterrent factor for possible future crimes committed by troops under superior command. The text under transitory Article 24 should therefore be adjusted so that it is in conformity with Article 28 of the Rome Statute.



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