

The Colombian Peace Talks

Practical Lessons for Negotiators Worldwide



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Introduction

P **peace negotiations** are often held back by a combination of flaws in design and an inability of the parties to overcome substantive disagreements. However, studying previous negotiations can help mitigate both types of challenges, leading to more dynamic and sustainable settlements.

To that end, this publication describes a selection of the most important strategic choices and lessons learnt from the Colombian peace negotiations with the *Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo* (FARC-EP) held in Havana, Cuba, from September 2012 until August 2016. It encompasses an overview of the Colombian armed conflict, a summary of the structure and design of the talks, and a succinct analysis of what was agreed upon under each item of the negotiation, including several of the main sticking points and how these were overcome.

The contents of this publication are based primarily on presentations and interviews given by members of the IFIT Brain Trust for the Colombian Transition during the 2017 course on “Peace-making in Colombia: Strategic Choices, Lessons Learned and Challenges Ahead.” Comprised of fifteen multidisciplinary Colombians who served as expert advisers in Havana, the Brain Trust helps avoid the dispersion of institutional memory and knowledge that typically occurs when a negotiation ends and a peacebuilding phase begins

The Armed Conflict and the Run-up to the Negotiations

For over 50 years, Colombians endured an internal armed conflict, which was characterised by intense violence and involved a vast and intertwined array of actors, including numerous guerrilla and paramilitary groups, and the Colombian military. The conflict began in the 1960s, as several guerrilla groups emerged from peasant and communist revolts. The paramilitary groups, which were formed from private armed groups hired to protect the land of large landowners, entered into the conflict in the 1980s. The production and trafficking of illicit drugs added to the complexity of the conflict and accelerated the expansion of all armed groups.

According to the government's official registry, there were 8.6 million direct or indirect victims of the conflict. This figure includes approximately 47,000 people forcibly disappeared, 267,000 killed, more than 7 million internally displaced, and over 32,000 kidnapped by organised armed groups of a wide variety.

Amidst the decades of violence, there have been negotiations at regular intervals. In the 1980s, the Colombian government negotiated peace agreements with the *Movimiento 19 de Abril* (M-19), the *Ejército Popular de Liberación* (EPL) and the *Movimiento Armado Quintín Lame* (MAQL). Members of these groups were demobilised, given amnesty and reintegrated into the Colombian political system and civil society. In 1991, a new Colombian Constitution was adopted through a constitutive assembly process in which these demobilised groups participated.

As the constitutive assembly met to rewrite the Constitution, another set of peace negotiations got underway. This one was sparked by a significant attack by the Colombian military against a group of guerrilla organisations known as the *Coordinadora Guerrillera Simón Bolívar* (CGSB), which included the FARC-EP, the *Ejército de Liberación Nacional* (ELN) and a dissident faction of the EPL. The attack forced the CGSB to request the initiation of peace talks from the Venezuelan embassy in Bogotá. Subsequently, representatives of the group and the Colombian government agreed to meet in 1991 in Caracas. However, a series of violent incidents and disagreements regarding the details of the ceasefire stalled the negotiations. The government recalled its representatives on March 21, 1992, marking the end of this negotiation attempt.

Between 2003 and 2005, in a very different process, the Colombian government negotiated a demobilisation agreement with paramilitary groups. More than 37,000 combatants from the 36 paramilitary factions demobilised, along with a small number of individual members from the still-active guerrilla groups. Those who acknowledged their crimes were eligible to receive reduced or conditionally suspended prison sentences as part of the 2005 Peace and Justice Law. However, case-by-case processing of the crimes was not an option, as the caseload was too great.

As of 2010, the FARC-EP and the ELN were the only remaining non-state armed actors in the conflict. The FARC-EP, the largest of all the guerrilla groups, was founded in 1964 and at its peak in 2002, was present in half of the country's municipalities, with more than 20,000 active combatants.

The government and the FARC-EP had undergone three failed attempts at negotiating peace, the most recent of which lasted from 1999 to 2002, during which time the government's good-faith strategy had allowed the FARC-EP to gain strength, both in terms of influence and members. By the end of the talks, public support had evaporated due to the perception that the FARC-EP had taken advantage of the negotiations to rearm and expand its territorial control.

During President Álvaro Uribe Vélez's time in power (2002-2010), the Colombian government greatly strengthened its security institutions, expanding control of the country's territory and protecting the population under the so-called "Democratic Security" policy. While the government succeeded in significantly weakening the FARC-EP, the policy was linked to various human rights violations, including extrajudicial killings of civilians by the Colombian military.

Nevertheless, the weakened position of the FARC-EP was a decisive factor in its willingness to enter into peace negotiations for a fourth time. Another crucial factor was that Venezuela, which had sympathised with and aided the FARC-EP over many years, encouraged the group to engage constructively in peace negotiations.

A year after the election of President Juan Manuel Santos in August 2010, the Colombian government adopted the "Victims' Law." With it, the government acknowledged the existence of an internal armed conflict for the first time.

In 2012, a secret exploratory phase of talks resulted in a General Agreement (*Acuerdo General*) between the government and the FARC-EP. The Agreement set out the structure, rules and agenda for the formal negotiation that began in September 2012 and that became known as the Havana talks. In parallel, the Colombian Congress adopted the Legal Framework for Peace (*Marco Jurídico para la Paz*), an amendment of the 1991 Constitution aimed at facilitating legal flexibility for an eventual peace deal.

The Havana talks officially concluded on 24 August 2016 with the announcement of the "Final Agreement". This text was later partially amended by negotiators following a single-use plebiscite, but this report focuses on the text that resulted from the Havana talks.

The Structure and Design of the Talks

This section examines a selection of the key elements of the structure and design of the Havana talks that proved crucial to their success.

1. Delegations

The delegations on both sides of the negotiation were composed of up to 30 people, out of which ten could actively participate in the sessions. Both delegations were accompanied by expert advisors on specific subjects.

In addition to state officials, the government's delegation included representatives from the private sector, the military and the police forces (not present in previous peace negotiations), all of whom reported directly to President Santos. The presence of high-level military commanders assured the FARC-EP that the negotiations were being taken seriously.

The FARC-EP delegation included old and new leaders representing the majority of the sections within the group. Unlike previous talks, it also comprised the most radical leaders who had initially opposed a negotiated end to the conflict. Although some important FARC leaders were not present at the beginning of the talks, they joined later as the negotiations progressed.

2. Process Design

The Havana process was designed with a specific goal in mind: to end the armed conflict and build stable and lasting peace. For the government, this meant the establishment of “territorial peace” focused on strengthening the local presence of the state in places where it was absent, promoting active citizen participation, and fostering social integration and reconciliation.

The peace talks were divided into two initial phases. The first, beginning in February 2012 and lasting for six months, was the covert exploratory phase which produced a six-point negotiating agenda and detailed procedural framework. The second was the overt (or “public”) phase, announced in September 2012 by President Santos and formally launched the following month, based on six agreed agenda items: comprehensive rural reform; political participation; the problem of illicit drugs; victims; end of conflict; and implementation.

“Comprehensive rural reform” was the first issue the negotiating parties tackled. Agreement on this item, which aimed to bridge the gap between urban and rural areas, was reached in May 2013. It encompassed a series of measures (land rights, public goods provision, etc.) geared towards improving the living conditions of rural Colombians, especially in the areas most affected by the armed conflict.

“Political participation” was negotiated next. The agreement, announced in November 2013, sought to break the link between “bullets and ballots”, strengthen pluralism and the political system, and enhance the status and rights of opposition parties and various social groups that

had been especially marginalised by the conflict. The agreement also sought to reinforce civil society participation on matters of public interest.

The “Problem of illicit drugs” – particularly coca crops and their links to organised crime – was discussed third. The cultivation, production, trafficking, and consumption of drugs were addressed, as well as the prosecution of organised crime. After six months of negotiation, the parties reached an agreement in May 2014.

The rhythm of the talks changed with the next topic: “Victims.” Its negotiation lasted over a year and a half, until an agreement was reached in December 2015, providing for a comprehensive system of transitional justice.

Most of this delay was due to the sensitivity and complexity of the topic, but also partly due to the insertion of new committees, activities and agenda items. These included victim hearings; a special historical research commission; and the creation of a gender sub-commission to ensure a gender perspective was incorporated in all agreements made.

Whilst the issue of Victims was being negotiated, talks also began on the final two items: “End of conflict” and “Implementation.” These encompassed everything related to 1) the terms of the bilateral ceasefire, the laying down of weapons, and the political, social, and economic re-incorporation of the FARC-EP; and 2) the establishment of mechanisms for the effective implementation, monitoring, verification, and endorsement of the final agreement. In August 2016, agreements were reached for the final two items, marking the formal end of the negotiations.

As in any negotiation, there were many elements of process design that shaped the parties’ latitude for reaching agreement (including rules of confidentiality, protocols of public engagement, the choice to hold the talks outside the country, and much more). Below we briefly discuss three that had outsized importance: 1) the principle that “nothing is agreed until everything is agreed”, 2) the choice of negotiation over mediation, and 3) the deliberate absence of a bilateral ceasefire.

2.1 Nothing is agreed until everything is agreed

Most peace negotiations collapse before a final agreement is reached. As such, in the absence of a special rule, the risk exists that one of the parties could insist on the implementation of a partial agreement that was never intended as an isolated promise. Likewise, as the negotiating parties move through a negotiation, they tend to prioritise different sets of issues. Ensuring the future fulfilment of all commitments, and not just some, is therefore important.

Inspired by the Northern Ireland negotiation of the 1998 Good Friday Agreement, the government of Colombia and the FARC-EP borrowed a general guiding principle to address these challenges: namely, that “nothing is agreed until everything is agreed.” This literally meant that partial agreements reached during the years-long process could not be considered agreements in and of themselves. Only upon the consummation of a comprehensive deal could they come into formal existence as agreements.

The application of this principle in the Havana talks was sometimes a complicating factor. This is because it was initially designed for the Northern Ireland process, in which the final destination was a short framework agreement, reached quickly, rather than a voluminously detailed

one. At the same time, the rule helped push the parties in Havana to become more active in the use of confidence-building measures (CBMs), given their collective inability to announce a final deal until years later. Some examples of such CBMs include the adoption of informal ceasefires, demining programmes, the release of child combatants, the commitment to find those who had disappeared or died in captivity, and the liberation of prisoners. These and other CBMs were tailored to the needs and nature of the negotiation, which aimed to achieve a mixture of objectives, such as: buying time with an impatient public, increasing mutual trust and the irreversibility of the process, and de-escalating violence.

2.2 Negotiation rather than mediation

The parties' similar level of commitment to a negotiated solution was a major factor in making the talks possible in the first place. Yet, their distrust of each other's intentions remained immense. As such, there was an understanding that external actors would need to facilitate (and legitimate) the process in some way.

While this expectation often and rashly leads parties to designate mediators – i.e., third parties that oversee the process, arbitrate disputes, and chair meetings – in Colombia's case there was a joint desire by the parties to retain greater control over the process and assume greater corresponding responsibility. As such, they adopted a method of direct negotiation, with Cuba and Norway acting as “guarantors” (rather than mediators) and the former serving as territorial host. Their engagement, supplemented by the “accompaniment” of Venezuela and Chile, proved vital to the success of the negotiations.

Among other things, Cuba and Norway attended all plenary sessions, monitored the parties' compliance, acted as the repository of negotiated texts, announced agreements to the public when requested by the parties, and facilitated the participation of independent technical experts on some of the more sensitive and technically complex issues. At times, they also proposed creative alternatives or enlisted additional international support when the parties encountered crises or struggled to resolve fundamental differences.

2.3 Deliberate absence of a bilateral ceasefire

Normally, the opening act (and operative precondition) of a peace negotiation is agreement on a bilateral ceasefire. Without one, it is assumed the negotiation will not advance, because the violent acts that are part and parcel of any ongoing armed conflict, will constantly threaten to derail the talks.

However, in the Havana process, the Colombian government made the unusual choice to negotiate in the continuous, deliberate absence of a bilateral ceasefire. It did so for at least three reasons. Firstly, in previous peace talks – especially the 1999-2001 Caguán process – the government was considered to have been ingenuous, allowing the FARC-EP to abuse the government's good faith by rearming and increasing its territorial control. In political terms, this made it virtually impossible for President Santos even to consider an early, bilateral ceasefire. Secondly, it was the government's view that the absence of such a ceasefire would help expedite the talks as a whole, since the human toll and dangers of the war would never be far from either side's mind.

In that regard, President Santos was fond of citing the related adage of Yitzhak Rabin from the time of the Oslo process, according to which, Israel purported to negotiate peace as if there was no war (or terrorism), and to wage war as if there was no negotiation.

Nevertheless, both sides needed to have a high degree of commitment to continue the talks without allowing external events to derail the process. With no bilateral ceasefire in place (and only periodic unilateral ceasefires by the FARC-EP), the public received contradictory messages about why the negotiations continued despite the persistence of hostilities. This uncertainty strengthened the misgivings of significant sections of society that questioned the FARC-EP's commitment to the process, notwithstanding the fact that the official rule of the talks was that they would take place on an “uninterrupted” basis.

A Brief Chronicle of the Negotiation

This section provides an overview of 1) what was agreed under each item of the negotiation agenda, and 2) an analysis of key sticking points and how they were resolved. The items are presented in the order in which they were tackled by the parties.

ITEM 1 Comprehensive Rural Reform

The agreement under this item took six months to be negotiated and seeks to transform living conditions and improve the wellbeing of rural communities. It incorporates a variety of measures to address the problem of land distribution, including the creation of a land fund and a subsidy programme which provides access to credit, as well as a number of mechanisms to improve the legal regulations around land ownership. In order to reduce poverty and promote the social and economic development of rural areas, the agreement also creates national and territorial development programmes to prioritise public investment in the areas most affected by the conflict. Measures to improve agricultural production were also established, as well as programmes to protect the environment and ensure the fulfilment of the ‘right to food’.

Reaching the agreement required overcoming at least three big sticking points.

Sticking Point #1

The concept of rural development

The parties held differing views about whether the lack of rural development was the root cause of the conflict or simply an important factor in its persistence over time. For the FARC-EP, land inequality and rural poverty were the primary conditions leading to the conflict. For the government, the country’s rural-urban gap – reflected in high rural poverty indicators and the weak provision of public goods in rural areas – was seen as merely one part of a comprehensive peacebuilding agenda.

How it was addressed

The difference was resolved by incorporating both perspectives into the introductory paragraphs of the final text. The government and FARC-EP agreed on the importance of relocating public resources to the countryside to fight inequality and to ensure non-repetition of the conflict.

The government had a progressive rural development, land restitution, and family agriculture agenda, which made it easier for the parties to find common ground. This provided the basis for the proposals presented by the government during the negotiations.

The two parties also wrote up a set of principles that reflected their shared understanding of the issue. The process of jointly developing these principles resulted in agreements that emphasise “inclusive development of the countryside,” “wellbeing,” “participation,” and “sustainable

development.” Reaching this initial consensus served as an early demonstration, to the government and the FARC-EP alike, that they had the capacity to reconcile their differences.

Sticking Point #2

The scope of the problem

The definition and scope of rural reform was the subject of direct tensions in Havana. For the FARC-EP, the issue required a broad discussion around natural resource exploitation, international trade, investment agreements, and territorial planning. By contrast, the government regarded rural development as a subject related exclusively to measures to improve the use of land. The government maintained that the issues raised by the FARC-EP, while relevant, were outside the scope of the negotiations and should be examined within the democratic institutions of the Colombian state.

How it was addressed

The parties agreed not to include broader macroeconomic, trade, and territorial planning issues within the final text, acknowledging that these should be debated during the peacebuilding and implementation phase. The FARC-EP produced a list of “exceptions” that were not addressed in the agreement and that subsequently became a part of the political programme of the FARC-EP. The tight wording of the 2012 General Agreement, which formed the basis of the negotiation agenda, further assisted in limiting the ability of FARC-EP to expand on the issue.

Sticking Point #3

Adequate use of land

From the exploratory phase until the end of the negotiations, the FARC-EP advocated for the inclusion of measures to reduce land concentration and its unproductive tenancy via large-scale land expropriations. Whilst recognising the need to redress inadequate land distribution and use as part of a broader rural development agenda, the government argued that such radical measures would be contrary to the existing institutional and legal system, and thus should not form part of the negotiations.

How it was addressed

The parties agreed to divide the discussion into “land access” and “land use,” and negotiate different measures for each. With regard to the former, they agreed to various measures for landless peasants, including the creation of a state-run land fund, as well as a programme to secure property rights in the countryside. On land use, they agreed to create a multipurpose Wregistry and a proper land appraisal system. The registry could also be used to increase property tax collection in rural areas and provide the basis for the development of further measures geared towards promoting adequate and sustainable land use.

THREE QUICK LESSONS OF NOTE:

1. Break particularly contentious matters into more concrete issues on which consensus can more easily be reached.
2. Disaggregate matters that, although legitimate, should not be part of the agreement, but can instead form part of the armed group's political agenda in its post-conflict future.
3. Don't always force agreement, especially on symbolic issues; "agreements to disagree" can sometimes be sufficient to resolve matters and allow the process to continue.

ITEM 2 Civic and Political Participation

This item focused on how to strengthen political pluralism, promote and enhance civic participation, and break the link between arms and politics. The agreement reached by the parties lays the groundwork for the establishment of a number of new citizen councils and institutions, with the purpose of advising the government on how best to approach issues such as guaranteeing the rights of the political opposition, expanding spaces for state-society interaction, and reforming the electoral system to be more inclusive and participatory.

The agreement also establishes a comprehensive security system for those engaged in politics (paying special attention to leaders of social movements and human rights advocates) and a system of special grants to be issued to community media workers. In addition, the agreement lowers the barriers to establish political parties and institutes mechanisms to include historically underrepresented communities. Finally, it establishes 16 new temporary electoral districts to represent the zones most affected by the conflict.

The process of reaching consensus on these issues required overcoming several sticking points.

Sticking point #1

The demand to expand an already modernised democracy

As already noted, the Colombian Constitution of 1991 arose through a constituent assembly process, held in the immediate aftermath of a series of peace agreements made between the government and various other rebel groups. The idea of an "extended democracy" in which political and civil participation was broadened through the inclusion of an ambitious rights regime and a broad range of participatory mechanisms, was intrinsic to the new Constitution.

Nevertheless, the FARC-EP did not feel that its values and vision were duly recognised in the Constitution, and it therefore pushed for far-reaching constitutional reforms. Unlike the government, the FARC-EP advocated for the establishment of a new constituent assembly process. In its view, the negotiations should lead to the creation of a new constitution that would reflect a

broader concept of governance, involving the redesign of institutions and new political and civil participation guarantees and mechanisms.

By contrast, the government rejected the idea of developing a new constitution. Although it accepted that the existing Constitution needed some revisions and had not achieved all of its intended results (due in part to the continuation of the armed conflict), it insisted, *grosso modo*, on constitutional continuity. As such, it was open to discussing how the implementation of the Constitution could be improved in some areas vis-à-vis the country's post-conflict future, provided that the existing framework and mechanisms continued intact.

How it was addressed

The parties decided to postpone their main disagreements about constitutional reform, until reaching item six of the agenda. In the interim, they agreed on a series of measures to put into practice some key aspects of the existing Constitution, such as mechanisms to foster citizen participation and encourage the exchange of experiences between social organisations.

Sticking point #2

The legitimacy of the peace process as a venue for reform

In addition to the difficulty of identifying common ground regarding measures that could increase the scope of political and citizen participation, the parties disagreed about whether the Havana talks were a suitable place for such decisions to be made in the first place. For the FARC-EP, the Havana process was the proper venue; for the government, the democratic institutional framework of Colombia remained the ultimate authority for such decisions.

How it was addressed

The parties agreed on a system of roadmaps to be put in place in Colombia, rather than establishing, from Havana, the instruments or mechanisms to increase political and citizen participation. The roadmaps included, among other things, guidelines regarding the creation of a special statute for opposition groups, security measures for political parties and community leaders, and measures aimed at promoting respect and tolerance.

Sticking point #3

The political participation of the FARC-EP

In the 2012 General Agreement, it is stated that the political reincorporation of the FARC-EP would be addressed during the discussions on item three ("End of the Conflict"), rather than under the umbrella of item two. Nevertheless, the FARC-EP raised the issue in advance. The government, by contrast, warned of the sensitivity of the matter and sought to maintain the agreed upon sequence of discussions. The most controversial elements for the public, the media, and the political opposition, were the number of congressional seats to be guaranteed to the FARC-EP, plus the fact that its top commanders would participate in politics.

How it was addressed

It was broadly established that the FARC-EP would transition from an illegal armed group into a legal political party with guaranteed congressional seats for a limited period of time. However, it was decided that the issue regarding the number of seats would be studied, discussed, and agreed upon at a later point in the negotiation.

Sticking point #4

The fear of political violence

Colombia has had an alarming history of political violence, especially against left-wing movements (e.g., the case of the Patriotic Union party) and particularly in those regions of the country most affected by the armed conflict. Because this legacy had complicated previous peace processes, the FARC-EP were adamant about the need for security guarantees upon their transition into politics.

The government argued that it had already made considerable efforts in terms of improved security for the people whose lives had been threatened, including ex-combatants, victims, and political and community leaders. Creating another security body or entity seemed excessive. Instead, the government considered that issues of socio-political intolerance and hate should be addressed, because it was these issues that aggravated the risk of political violence.

How it was addressed

A number of compromise measures were agreed upon, including an education campaign to discourage political violence; a public policy on tolerance, respect, and stigmatisation; a new security policy to ensure political participation, covering both elected officials and candidates; mechanisms to guarantee greater access to mediums of communication and information; mechanisms designed to strengthen social organisations; and capacity-building measures to ensure women's participation in the political process.

THREE QUICK LESSONS OF NOTE:

- 1.** Constitutionalism can be enhanced through a peace process, by agreeing on limited revisions that allow for its customisation to the specific needs of a post-conflict future.
- 2.** Establishing the means to a final result, but not the final result itself (i.e., its specific content or dispositions), helps achieve a reasonable balance between the internal needs of a negotiation and the external respect of the democracy outside the negotiation room.
- 3.** On the conditions for the armed group's transit into politics, it is important to distinguish between provisions intended to create a more inclusive democracy and those intended to benefit the group specifically.

ITEM 4 The Problem of Illicit Drugs

The next issue the parties tackled was the problem of illicit drugs, including disentanglement of the relationship between the armed conflict and drug cultivation, the production and commercialisation of illicit drugs, and the issue of money and asset laundering.

The final agreement established different approaches for dealing with the cultivation, commercialisation, and consumption of illegal crops. Firstly, it created a national programme for the substitution of illicit crops as a new chapter of the Comprehensive Rural Reform accord. Secondly, it included substitution and non-replanting agreements, as well as legal alternatives for small growers. Thirdly, the parties agreed to the creation of a law enforcement strategy regarding the commercialisation of narcotics. Finally, the parties agreed to the formation of a state policy on the consumption of illicit drugs as a matter of public health.

Illicit drug cultivation, consumption, and trafficking were central to the conflict. However, the negotiations on these topics proved difficult given their obvious sensitivity in the Colombian context, with its extensive and intertwined history of conflict, crime and drugs. The debates within Colombian society were complex and included, for instance: whether it was legitimate to be in peace talks with an organisation accused of drug trafficking, what kind of information should be provided by the FARC-EP regarding its ostensible participation in such activities, how to approach negotiations with the FARC-EP when the illicit drug production and trade persisted in certain territories, how to address the mass money laundering that was understood to be connected to these activities, and whether drug trafficking should be considered a political or common crime for purposes of the law and reincorporation.

These issues were part and parcel of the negotiation's sticking points, as discussed below.

Sticking point #1

Disagreements about the scope of what could be negotiated

The parties debated on how to address the issue of illicit drugs at the domestic level, whilst acknowledging that there were also significant international dimensions present. The FARC-EP insisted that to address the problem, international actors needed to be involved, particularly the United States and other countries with high levels of illicit drug consumption. By contrast, the government wished to limit the discussion to solving local and regional problems related to the production and trade of illicit drugs, acknowledging nonetheless that it was a transnational issue.

How it was addressed

The parties recognised the need to promote an international debate on best practice for addressing the problem of illicit drugs. As such, Colombia would promote an international conference, within the UN framework, evaluating the war on drugs. In addition, the parties agreed to a set of ambitious domestic measures that could effectively tackle the problem by transforming socio-economic conditions in the regions historically affected by coca crops; strengthening the state's capacity to fight organised crime and its support networks; and developing initiatives to prevent and treat drug consumption through a public health approach.

Sticking point #2

Addressing the problem of illicit crops

The parties had different perspectives on how to solve the problem of illicit crops. The FARC-EP pushed for subsidies to be the key element, whilst the government thought it to be only a short-term strategy. The latter insisted on a broader intervention: a territorial approach aimed at transforming the conditions that encouraged illicit crop production, including the development of sustainable projects with the active participation of the communities, along with certain subsidies.

How it was addressed

The parties agreed on the creation of a national programme that included both immediate actions to guarantee the livelihoods of small coca producers, and medium and long-term measures geared towards the transformation of the structural conditions underlying illegal production. A key principle of the programme was its integration with the accord on Comprehensive Rural Reform. It was agreed that the measures were to be designed and implemented with the participation of the rural residents themselves.

Sticking point #3

Dignity vs. legitimacy

Initially, the FARC-EP was unwilling to officially recognise that drug trafficking had played a major role in the intractability of the armed conflict. They also resisted recognition of their own relationship with the illicit drug trade. However, for the government, it was essential that the final text contain an explicit reference to the relationship between drug trafficking and the armed conflict, and particularly the role that drug trafficking played in FARC-EP's armed struggle. In its view, this would strengthen the legitimacy of the accord and facilitate possible special legal treatment of FARC-EP members under future conditions.

How it was addressed

The government presented various drafts on this item to the FARC-EP. Ultimately, with the support of the guarantors, the parties agreed on a compromise text with two parts: a general one in which both parties acknowledged that drug trafficking had played a part in the armed conflict, and a specific one in which the FARC-EP stated that in an end-of-conflict scenario, they were willing to terminate any involvement they had in drug trafficking. In addition, the FARC-EP agreed to contribute proactively to resolving the illicit drug problem.

THREE QUICK LESSONS OF NOTE:

1. A breakdown of the different dimensions of a problem (in this case, drug cultivation, production, trafficking and consumption) can help in finding consensus on the whole.
2. As a mutual commitment mechanism, and as a means to create a more integrated post-conflict peace "system", it can be important to establish links across mechanisms established under different agenda items.
3. Rather than trying to separate the symbolic from the substantive, it can be more effective to acknowledge and address both, as they are intertwined.

ITEM 5 Victims of the Conflict

This item of the negotiation agenda resulted in the creation of the “Comprehensive System for Truth, Justice, Reparation and Non-Repetition.” Composed of various judicial and extra-judicial mechanisms, the system seeks to fulfil the rights of victims to the greatest extent possible; ensure accountability for what occurred during the conflict; afford legal guarantees to those involved in the conflict; and foster social coexistence, reconciliation, and non-recurrence of hostilities. The system is governed by the principles of comprehensiveness and conditionality. The former ensures that the mechanisms are connected in a coherent manner, and the latter makes certain that any special legal treatment at the individual level is conditional on contributions to truth, reparations, and non-recidivism.

This item was considered the most sensitive and complicated part of the negotiation, taking much longer to negotiate than all other items.

Sticking point #1

Jus ad bellum vs. jus in bello

The tension between *jus ad bellum*, the law governing when recourse to war can be justified, and *jus in bello*, the law governing war once it is underway, was noticeable in the negotiations.

The FARC-EP used an ends-justify-means logic. They claimed that, insofar as they held a legal right to go to war, the actions they carried out during the conflict were justified. They also claimed that the right to peace (a Colombian constitutional right) was absolute and sufficient to exclude transitional justice mechanisms, which had never formed part of peace negotiations in the country. The rebel group at times also claimed for itself the status of victims.

For its part, the government asserted that both national and international standards should be taken into account and that the mere existence of *jus in bello* is evidence that just recourse to violence, if it existed, is insufficient to legitimise subsequent actions. In this regard, the government also noted that millions of the conflict’s victims were the result of actions of the FARC-EP, for which they must take responsibility.

How it was addressed

Agreeing on a set of general principles to guide and frame the negotiations on this item was an important initial step (achieved in June 2014). The principles included commitments by both parties to recognise victims, acknowledge responsibility and accountability, incorporate victim participation in the negotiations, and advance truth-seeking and reparations. The participation of victims during the negotiations was also key: 27,000 proposals were received and a diverse group of 60 victims gave in-person testimonies over five separate visits. All of this reinforced the fact that the parties were in Havana to address the consequences of the war on victims, and not just questions about root causes or their own legal situations.

Nevertheless, the parties went a step further, agreeing to create a mid-negotiation “Historical Commission on the Conflict and its Victims” comprising twelve members who were jointly nominated (six by each side). The commission’s aim was to provide input on the multiple causes of the conflict, allowing the parties to acknowledge its complex origins (i.e., the *jus ad bellum* side)

without detracting from the importance of their conduct during the conflict (i.e., the *jus in bello* side). By establishing the commission, the parties were able to peel off disagreements over the causes of the conflict and concentrate on addressing its consequences.

Sticking point #2

Dignity vs. legal certainty

Central to the self-image of the FARC-EP was the premise that they had not been defeated in the armed conflict and should be recognised and treated as an equal party at the negotiation table. They also maintained that they were a group with political ideals and motivations, and that as such, should receive the amnesty and other forms of legal leniency such groups deserve, in conformity with the country's centuries-old legal standards for "political crimes".

By contrast, the government argued that the concept of political crimes had narrowed as a result of domestic jurisprudence, such that it would be insufficient to provide legal certainty for perpetrators of the serious crimes committed. The government also asserted that, quite apart from any domestic or international legal considerations, accountability of some kind was necessary for its own sake in light of the gravity of the violations that had occurred. As such, it sought to focus discussion on designing a procedurally fair and mutually applicable accountability process, the features of which would help imbue dignity on all sides, while also ensuring the satisfaction of victims' rights.

How it was addressed

The parties did not achieve progress on this issue for a long time. However, they eventually agreed on a system offering a balance of legal certainty and institutional/organisational dignity that both sides could live with. A key factor in reaching the agreement was the mutual guarantees the system offered, including: transversal due process protections, a common legal standard for all conflict crimes, the use of legal incentives (e.g., a sliding scale of leniency privileging those who voluntarily confess), special independent appointment mechanisms, and the use of constructive ambiguities to smooth over especially sensitive points.

Sticking point #3

Ordinary vs. extraordinary measures

As the FARC-EP did not consider itself defeated, its leaders rejected the idea of ordinary courts trying conflict-related crimes because they viewed such courts as biased: "the justice of the enemy." The rebel group also resisted any mechanisms that would expose its members to jail time.

Although the government also considered it necessary to create a new mechanism suited to post-conflict transitional justice, it insisted that the ordinary courts, as independent bodies, could not be fully side-lined. The government also argued that the perpetrators of the most serious crimes should be subject to prosecution and punishment, pointing out that over 80% of the Colombian population consistently expected jail time for FARC leaders, according to a decade of polling.

On top of all this, the parties had to develop a shared vision on the relationship between, and sequencing of different ordinary and extraordinary mechanisms, in particular the truth commission vis-à-vis any parallel criminal investigation or prosecution.

How it was addressed

It was agreed that a special jurisdiction outside of the ordinary criminal justice system would be created and that the mechanism for the election of the judges would be jointly defined by the parties. (After the government lost the plebiscite on the peace deal, this became one of the most contentious issues of the re-negotiation. It was eventually agreed that whilst the special jurisdiction was indeed a separate entity, it must be carefully harmonised with the ordinary justice system.)

The parties also agreed on three types of sanctions to be imposed on those responsible for conflict-related crimes, each of which would be subject to duties of non-repetition, disclosure of the truth, and reparations to victims. This became the foundation of the “Comprehensive System”, which connects both judicial and non-judicial (as well as ordinary and extraordinary) mechanisms. As such, the final text reflects a recognition of the existing institutionalised reality of Colombia’s judicial branch and victim-related laws and agencies, as well as the concomitant need for new measures and mechanisms to accommodate the exigencies of the negotiation and the new possibilities that future peace unlocks.

THREE QUICK LESSONS OF NOTE:

- 1.** Removing from the negotiation table the debate on the causes of the conflict – in this case, through the creation of an outsourced, mid-negotiation historical commission – can be critical to the progress of peace talks.
- 2.** Knowing that compromises on justice will be necessary, the use of victim consultation and participation mechanisms can increase the parties’ understanding of what is at stake and the adequacy and legitimacy of what is finally agreed.
- 3.** Making legal benefits conditional on prior acts (e.g., disarmament and confession) is an important way to increase perpetrator participation in the transitional justice system, provided it is accompanied by ordinary and extraordinary verification mechanisms.

ITEM 3 End of the Conflict

Bringing an end to the hostilities between the armed forces and the FARC-EP (and any hostile actions directed towards civilians) was the central goal of the talks. Among other things, this required reaching an agreement about the conditions of any bilateral and definitive ceasefire and the laying down of weapons. To that end, during the negotiation of item five (“Victims”), the parties agreed to create a separate Technical Sub-Commission that would work intensely for almost two years on item three. Active military officials and members of the FARC-EP – all high-ranking – participated in this.

Three main topics were covered. Firstly, the parties addressed the demobilisation and reincorporation of FARC-EP combatants into civilian life, including former members who were imprisoned. Secondly, they agreed on a set of measures to provide security guarantees for FARC-EP members. Thirdly, they reached consensus on procedures for the movement and deployment of the FARC-EP into special temporary areas set up for their return to civilian life. The agreed system, called “Local Transitional Zones for Normalisation” (*Zonas Veredales Transitorias de Normalización* – or ZVTNs), encompassed technical procedures for everything from the laying down of weapons, to their collection, storage, removal, and disposal.

Sticking Point #1

A bilateral ceasefire

Although the FARC-EP declared unilateral ceasefires (and the government used de-escalation measures) at different points in the negotiation, reaching an agreement on a bilateral ceasefire was very difficult. For the FARC-EP, the term implied total cessation of operations by the military forces opposing them. Yet, for the government, completely suspending military operations was neither acceptable nor feasible. In its view, an effective ceasefire required implementing a “separation of forces,” but without suspending operations that would be necessary to deal with the verification of the FARC-EP’s disarmament, as well as the ongoing fight against myriad other illegal armed groups.

How it was addressed

After months of discussion, the Technical Sub-Commission created the ZVTN concept, agreeing to set up 26 of these zones in specific areas of the country where FARC-EP combatants could concentrate prior to demobilising. These temporary zones facilitated the separation of forces and served as safe areas for the laying down of weapons and demobilisation. The parties jointly decided on the location of the zones, mainly using security and logistical criteria. From the outset, it was agreed that this concentration of FARC-EP members would not affect the normal exercise of the state’s authority over the national territory. In addition, as explained below, the UN was given a key role in the verification of the disarmament process.

Sticking Point #2

Dignity vs. verification of disarmament

The FARC-EP wanted a disarmament process that did not undermine its political identity nor create a perception that it had been militarily defeated. Rather than speaking of disarmament (*desarme*), they considered the “laying down” (*dejación*) of weapons to be a preferable term, expressing their voluntary political decision to transition from a guerrilla group to a legal political party. The government was less concerned about terminology, and more about ensuring a detailed schedule by which the handing over of all FARC-EP weapons could occur both quickly and verifiably.

How it was addressed

The parties agreed upon a framework that respected the self-identity of the FARC-EP, while guaranteeing the effective collection and destruction of weapons. The key was the creation of a tripartite mechanism of monitoring and verification (“MMV”) that consisted of state forces, members of the FARC-EP, and representatives of a UN Mission of unarmed observers. The UN would serve as a neutral third party authorised to receive and certify the weapons, and store them in a safe place so that they could later be removed and destroyed. The government and the FARC-EP also agreed on a detailed timeline for the different phases of the process.

Sticking Point #3

Defining vs. deferring implementation details

One of the greatest challenges – on this and all issues – concerned disagreement over the level of detail that had to be settled in Havana. This was particularly difficult in the negotiation of item three, because it was the final item and the parties were under significant political pressure to end the talks. An agreement with a lower level of detail on the issue of reincorporation would mean more control of decision-making for state institutions during implementation, which troubled the FARC-EP. In contrast, an agreement with greater detail could bring additional clarity and consensus, but at the expense of further delays in the negotiation process.

How it was addressed

The parties established 21 detailed protocols regarding the movements of the FARC-EP, the ceasefire, and the laying down of weapons, including their collection, storage, removal, and disposal. However, the pressure of time precluded anything more than the setting out of basic guidelines on the components, activities, and timelines of the reincorporation programme. It established the “what”, but left the bulk of the “how” to the implementation phase. Thus, the text included elements such as the laying down of weapons, the transition of the FARC-EP into a legally acceptable entity, its reincorporation into the political system, economic support, and the establishment of a joint coordination body (i.e., the National Council for Reincorporation). However, most of the details and mechanics had to be left to the discretion of future implementation bodies, including the National Council for Reincorporation.

Sticking Point #4

Existing institutions vs. new capacities

The parties debated between the option of recognising the existing institutional and policy framework for reincorporation (i.e., the Colombian Agency for Reintegration) or in the alternative, adopting a new model that responded to the specific circumstances and characteristics of the peace process and the FARC-EP. The rebel leaders insisted on creating a new programme based on its concept of “collective reincorporation” (which contrasted sharply with the individualised reintegration approach of the existing model), placing particular emphasis on rural and territorial reincorporation. It was of the utmost importance for the FARC-EP to preserve certain levels of discretion and autonomy in the conditions of their own reincorporation. However, the government argued that the existing reincorporation framework should form the starting point, subject to reasonable adaptations, of any new process.

How it was addressed

The parties agreed to an option combining elements of the existing policy with new ones specifically created for the FARC-EP. The National Council for Reincorporation, in which both government and rebels participate, would allow the FARC-EP to take part in the design and follow-up of the overall strategy. The parties also agreed that both individual and collective reincorporation measures would be included, deferring discussion on how to combine them until the implementation phase.

THREE QUICK LESSONS OF NOTE:

1. Solutions to sensitive issues at the negotiation table are more likely to arise when there is recognition, direct or indirect, of the need of one or both sides to “save face” before key internal constituencies.
2. Reaching agreement on the “what” and the “why” is paramount, considering that it is often possible to leave much of the “how” to future implementation structures, rather than seeking to resolve every last detail in advance.
3. As disarmament and demobilisation are existential issues for any rebel group – and depend on leadership-level engagement – their participation in its design and rollout are critical.

ITEM 6 Implementation, Verification Mechanisms and Endorsement

Verifying compliance of the proper implementation of a peace agreement is of self-evident importance. In Havana, the parties agreed, among other things, to the creation of a “Follow-up, Progress and Verification Commission” (*Comisión de Seguimiento, Impulso y Verificación a la Implementación del Acuerdo Final*) consisting of representatives from both parties. They also agreed to a “Framework Plan for the Implementation of the Agreement” (approved by the Commission) which would clarify the purpose, objectives, priorities and recommendations for implementing the Final Agreement over a ten-year period.

Reaching consensus on this required overcoming at least three big sticking points.

Sticking Point #1

Endorsement mechanisms for the Final Agreement

The Colombian Constitution allows for an array of options for direct citizen endorsement of political and legal texts, each of which varies in its preconditions and posterior binding effects. The options include: referendums, plebiscites, a national constituent assembly, and consultative ballots.

The government insisted that the best way to endorse the Final Agreement of Havana would be through a plebiscite, whereas the FARC-EP pushed for a national constituent assembly. The government resisted the latter, inter alia, because there was no cause to replace or radically amend the 1991 Constitution, and because a national constituent assembly would likely take longer than the negotiation process itself.

How it was addressed

The issue was effectively removed from the negotiation table in Havana. In November 2015, the government supported a parliamentary initiative in Congress to create the “Special Plebiscite for Peace.” This single-use plebiscite required the participation of at least 13% of the electoral census (roughly 4.6 million voters), of which a majority of the votes would need to be favourable. In contrast, a regular plebiscite requires the participation of at least 50% of the electoral census (roughly 17.45 million voters) and an affirmative vote of at least half of those voters. The FARC-EP continued to insist on the validity of a constituent assembly, only accepting the single-use plebiscite as reasonable and viable in June 2016.

Sticking point #2

Implementation mechanisms for the Final Agreement

The FARC-EP advocated that its proposed constituent assembly serve as the body responsible for the implementation of the Final Agreement – something that would allow the rebel group an outsized influence on the future of the country, going well beyond the peace deal as such. However, for the reasons noted above, the government delegation strongly opposed this option and proposed different pathways to guarantee the end-objective: effective implementation.

How it was addressed

In 2016, the Colombian Congress approved a constitutional amendment that was put forward by the government delegation in Havana and based on prior consultations with the FARC-EP. It included the following items:

- **Special Procedure for Peace:** This offered a “fast-track” procedure for Congress to debate and approve constitutional amendments and laws related to the Final Agreement.
- **Presidential Powers for Peace:** This gave extraordinary powers to the executive branch for a six-month period during which the president could issue ordinary laws as decrees without having to go through Congress, provided they were for the implementation of the Final Agreement.
- **Multi-annual investment plan for peace:** This secured a special budget within the national development plan of the next two administrations, so as to guarantee fulfilment of the government’s commitments (particularly those in the most conflict-affected regions).
- **Law on the Legal Status of the Final Agreement:** In order to guarantee the legal security of the Final Agreement, this law obliged the Constitutional Court to take the Final Agreement into account when analysing the constitutionality of implementing any legislation.

Sticking point #3

Verification roles and responsibilities

The FARC-EP wanted to play a determining role in implementation, advocating for a mechanism jointly controlled by the negotiating parties that would be in charge of the monitoring, implementation, and verification of the Final Agreement. By contrast, the government felt that both parties should by and large fulfil their commitments individually and separately. Thus, the FARC-EP should lay down its weapons, be reincorporated into civilian life, and comply with the disclosure of truth, reparation, and non-repetition; the government should guarantee the legal and public policy reforms as well as the necessary funding for the implementation of the Final Agreement. A joint mechanism should be created only for monitoring and dispute settlement.

How it was addressed

The parties agreed to create different mechanisms for the planning, monitoring, verification, and implementation of the Final Agreement. For the planning, they agreed on a roadmap for fulfilling a list of legal priorities and creating certain instruments, such as the Framework Plan, which included goals, objectives, priorities, and indicators. They also agreed to create a joint body that would formally monitor and handle dispute resolution during the implementation phase, as well as creating two civil society institutions to promote effective implementation of the gender and minorities clauses. As for verification, the parties agreed that it would be carried out by a third party, and would have both a political and a technical dimension. They also agreed to assign specific countries and organisations the role of assisting with the implementation of each item of the Final Agreement.

Final Remarks

Without question, the plebiscite of 2 October 2016 marked a “before and after” moment in Colombia’s modern history. It was the day on which the population, by a margin of 0.43%, rejected the comprehensive peace agreement that the government and the FARC-EP had signed just days earlier in a lavish international ceremony in Cartagena.

The result naturally forced the parties to re-open the negotiations and take on-board many of the criticisms levelled by the accord’s opponents. This is precisely what the government and the FARC-EP did, resulting in the new “Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace”, signed on 24 November 2016. In total, more than 50 significant changes were made to the original agreement, including the exclusion of foreign magistrates from the Special Jurisdiction for Peace, and the strengthening of its links with the ordinary justice system. Additionally, FARC-EP leaders pledged to forfeit assets acquired through drug trafficking to compensate the victims of the conflict.

Nevertheless, the country’s main opposition party argued that these changes were insufficient, leaving the government in a political bind. In the circumstance, President Santos made the controversial choice to forge ahead with implementation. On 30 November 2016, his coalition used its majority in Congress to legislatively endorse the new agreement, while the main opposition party refused even to participate in the vote. The Constitutional Court subsequently approved the validity of the peace deal. However, the combined force of all these events served to deepen national polarisation around the peace process, which was reflected most recently in 2018 Congressional and Presidential elections.

However, none of the legitimate controversies surrounding the Havana process should diminish its many valuable – and occasionally extraordinary – lessons for negotiations in other parts of the world. In so many areas, it was at the cutting edge of negotiation practice – not least in the design of the process itself. As such, the Havana process is undoubtedly a case worthy of detailed study by any serious negotiator.

In that regard, this short publication cannot offer analysis of anything more than a sampling of its essential controversies and innovations. However, an original and much longer account, in Spanish, is forthcoming from IFIT, and will further underscore why Colombia’s negotiation with the FARC-EP is a case like few others.



INSTITUTE FOR INTEGRATED TRANSITIONS

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