

Challenges facing the Colombian peace negotiations

By Jorge Orlando Melo

■ Executive summary

Peace negotiations between the Colombian government and the Revolutionary Armed Forces of Colombia (FARC) started in 2012 and have advanced slowly but surely. The rules of procedure – no ceasefire, extreme confidentiality on the discussions, a limited agenda, direct negotiations without civil society participation or international mediation – have helped to isolate the talks from the pressures of everyday reality.

In May 2013 the parties announced an agreement on point 1 of the agenda, which deals with the land problem. Negotiations on point 2 – the political participation of the guerrillas – started in July 2013. Four further points have to be discussed: the drugs business, the end of armed conflict, justice and compensation for victims, and the procedures for implementing the agreement.

Both sides have used peace negotiations to build up their political image. The FARC, besides supporting or promoting social protests of coca-growing peasants, miners, and other groups with social grievances, has made some proposals not in the agenda, such as the convening of a constitutional assembly or a general reform of the state, but has shown flexibility and for the moment has withdrawn most of these proposals.

The negotiations will last longer than previously announced, but both sides have good reasons to maintain them beyond the March 2014 elections, provided that progress is made and there are no extreme provocations by the FARC.

The new peace talks

In November 2012 the government of Colombia, headed by President Juan Manuel Santos, opened formal talks with the Revolutionary Armed Forces of Colombia (FARC) guerrillas to end an internal armed conflict that started in 1964. The previous round of negotiations took place under the government of Andrés Pastrana (1998-2002), but during the Álvaro Uribe administration (2002-10) public policy changed to armed confrontation with the guerrillas. This policy had some success and the guerrillas experienced several serious defeats. However, the end of the conflict did not seem to be any nearer and a long war between a weakened but resilient guerrilla movement and the government seemed likely.

Rules for the negotiations

In August 2012 the government and the FARC announced that they had defined the procedures and agenda for the peace talks. The political context created some hopes for the talks' success and the military successes of the government had reduced the FARC to a defensive posture. The government had adopted some measures that created common ground with the FARC and separated the Santos government from that of its predecessor. It accepted that an internal conflict, in the sense defined in the Geneva Conventions, existed in the country and supported a Law on Victims and Land Restitution that accepted restitution and compensation for victims of state actions.

Finally, in August 2012 the government obtained approval for a reform of the Constitution defining a Framework for Peace (*Marco para la Paz*) intended to create forms of transitional justice and establish a legal basis for offering special treatment to former guerrillas and allowing them to take part in politics if a peace agreement were reached.

The Uribe strategy

In 1990 several guerrilla groups, like M19 and the Popular Liberation Army, signed a peace agreement that led to their participation in the Constitutional Assembly of 1991. The FARC did not sign, and entered in a new round of peace talks with the government in 1988. A large demilitarised zone was agreed on in which the FARC had control; the talks included discussions on public policies with the participation of representatives of the church, political parties, economic enterprises and private organisations. The arrogance of the FARC and the perception of government concessions as a sign of weaknesses led public opinion, which had supported peace talks for 20 years, to change. From 2002 onwards it supported President Alvaro Uribe's strategy aimed at the military defeat of the guerrillas.

Uribe's policies included an agreement with private armed organisations, known as paramilitaries, that joined the war against the FARC from 1994 to 2002. The dissolution of most paramilitary groups and a more effective military effort reduced the levels of homicides in the country by more than 40% from 2002 to 2007. However, after 2007 the efficacy of the war against the FARC declined and by 2010 its final defeat, often announced, seemed remote.

A defined agenda

The 2012 announcements of new talks avoided previous mistakes. The negotiations would be confidential, civil society organisations and leaders were not to take part, and the international community – whether organisations or governments – was expected to co-operate once peace has been signed, not during the discussions. However, Cuba and Norway are involved as guarantors of the peace process.

The negotiations are to be conducted amid continuing military operations. A bilateral ceasefire like the one signed in 1984 was rejected by the government, because it would have been used by the guerrillas to build up their strength. Moreover, no demilitarised areas like those instituted in 1998 would be created. Also the distracting problems of compliance and responsibility for any violations of the ceasefire were avoided.

Finally a limited and well-defined agenda containing only six topics was established. The government did not want to have a debate on the economic and social context of the conflict, which could give support to the FARC's declared objective of the peace talks: achieving peace with social justice. However, two points closely linked with the history

of the FARC were included. The first has to do with agrarian policies. The FARC, which started as a peasant guerrilla movement, laid down some vague land policies as the core of its political programme and most of its guerrillas are of peasant origin. The other point is drug trafficking. From the early 1980s the FARC abandoned its principled stand against drugs and gradually made the drug business the central source of its income.

Three other topics are closely intertwined. The first has to do with political participation in order to improve the quality of democracy. The problem is how to permit the political participation of the guerrillas after they have laid down their arms. The second deals with the victims of violence and the armed conflict, and involves questions of how victims will receive justice, including support and compensation, and how the truth about what happened during the conflict will be uncovered. The third topic, involving the definition of procedures and mechanisms for ending the conflict, establishing a ceasefire, and disarming and protecting the former guerrillas, includes the government compromise of reviewing the situation of all jailed guerrillas and those awaiting prosecution. A final item defines the rules and procedures for implementing a peace agreement once it has been signed. It is likely that a plebiscite or referendum will be presented to the population in order to give legitimacy to any agreement, although the FARC has insisted that the appropriate form for it is a constitutional assembly, which is out of the question for the government.

The agenda presents the FARC with several political opportunities: at least four agenda points (rural policies, political participation, drug trafficking and restitution for the conflict's victims) are of general interest to the whole of society and offer the FARC the opportunity to present its own proposals. The specific interests of FARC members are to be discussed within the framework of more general problems: security for the former guerrillas, a strong policy against paramilitary groups, and lenient judicial treatment for the crimes of FARC members.

The progress of the peace talks

The Havana talks started in December 2012 and focused on the drawing up of a programme for rural development (*desarrollo agrario integral*). On May 26th 2013 a joint statement announced that the two sides had reached an agreement on agrarian policies ranging from land access to nutrition policies for the peasantry. On June 21st the *First Joint Report on the Peace Talks* gave more detailed information that shows that the government and the FARC have compatible views on land and agrarian policies. This includes giving landless peasantry access to land, mainly by utilising land acquired by violent or illegal means. A Fund for the Distribution of Free Land will be created and the subsidy for acquiring homesteads will be supported. It is even possible that the FARC will accept policies that protect the properties of large rural landowners, provided that they use the land efficiently and obey the labour laws.

Many doubts exist as to the ability of the government to gather accurate information on the legal situation of most land and carry out the legal processes that the confiscation of illegally acquired land will require.

Although disagreements may exist regarding specific actions, the major one seems to be over the so-called zones of peasant reservation (ZRCs). Since 1996 the land administration institutions (INCORA or INCODER) have defined five or six (the information is not very precise) large areas of land as “peasant reservations”. Around 800,000 hectares of land are included in areas made up mostly of small and medium-sized land holdings. Created mostly as buffer or transitional zones for areas in which exploitation/farming of any kind is forbidden (forest reserves, national parks), these areas give peasants some defence against the concentration of property in the hands of large landowners (although titled holdings can be transferred, like any private property in the country) and will help the government to implement environmental conservation policies.

The FARC supported the demands of some peasant organisations for the creation of 50 new reserves totalling more than 9 million hectares. The government reacted strongly against this proposal, above all because the FARC suggested that these reserves should have legal autonomy and should not be under the jurisdiction of the police or the army.

The government fears that some of these reserves may become sanctuaries for the production of coca or provide refuge to the guerrillas. However, the idea of creating a large system of areas assigned specifically to the peasant economy is interesting and may provide a way for real and effective programmes to support the peasantry. Strong government support for these ZRCs, even without accepting any restrictions on police/military activities, may assist rural economic development and be acceptable to the guerrillas, and may even help to define areas in which some of the former guerrillas could receive land and go back to being peasants. The *First Report* states simply that the government will support existing and future ZRCs and abide by existing legislation. It is clear that the FARC did not press the issue of autonomy. In sum, the agreement on integral land reform is a remarkable success for the peace process.

Political participation

Given the existence of an opinion climate rather hostile to the FARC’s political participation (mostly on the grounds of the need to give justice to victims), conversations on this topic from July onwards seem to have followed an indirect approach, concentrating first on the general issue of the rights and opportunities for political opposition. This may give the opportunity to offer the FARC some policies – e.g. the right of access to radio and TV, and economic subsidies for political activity – that would make the move from armed struggle to legal political participation attractive.

The core problem, however, is how the guerrilla leaders will be allowed to run for office or put up candidates for election who were or are not part of the guerrilla movement. And even if they are able to participate, it is likely that public support for guerrilla candidates will be very low. The possibility of reserving a number of directly appointed seats for the guerrilla movements that sign the peace agreement, as was agreed in 1990, will certainly be an issue.

Victims, penal sanctions and amnesties

When dealing with victims, the agenda mentions only the need to protect their human rights and the obligation to establish the truth. It does not confront the problem of how to assign responsibility for the crimes committed by members of the FARC. It is evident that the text of the agenda avoided stating openly that the FARC is responsible for serious crimes, and it is significant that no mention is made of the right of victims to obtain justice through the penalisation of offenders, nor the right to reparations for the damage and suffering caused to the guerrillas’ victims. It is likely that the carefully worded text is designed to keep open the possibility of giving amnesties or suspended sentences to many guerrilla leaders for any crimes they have committed.

It is impossible to think of a peace agreement that does not give the guerrilla leaders some assurance that they will not end up in jail in Colombia or the U.S. (after being extradited to the latter as drug traffickers). In the present case the possibility that FARC members will be allowed eventual political participation depends on the possibility of giving them amnesties, which currently cannot be granted except for political and related crimes. For this to happen, many of their crimes – mostly kidnapping, child recruitment and murders outside combat – need to be accepted as political or politically related. This is strictly possible according to the Constitution, but goes against decisions of internal Colombian courts, which have interpreted international treaties as forbidding such amnesties.

In any event, any valid amnesty requires that the obligation to establish the truth be confronted; that reparations be made; and that the perpetrators of crimes against humanity, serious war crimes and violation of human rights receive an appropriate form of punishment. The granting of amnesties that cover crimes against humanity may be nullified by the courts, although some flexibility in the definition of what constitutes crimes against humanity may prevail. The Framework for Peace offers some solutions: a system of transitional justice and the possibility for a selection of crimes to be prosecuted, for the suspension of penalties and for the application of alternative forms of sanction. Currently most of the groups opposing the peace process and the organisations representing the victims of kidnappings, extortion and homicides carried out by the FARC oppose any lenient treatment of guerrilla crimes, and this may block a peace agreement.

Given the complexity of the topic, it is to be expected that the agenda items relating to political participation (the discussion of which started in July 2013) and the rights of the victims are going to be the more difficult areas, specifically those having consequences for the judicial situation of individual guerrillas. Although the magnitude of the paramilitaries' victimisation of the population is far greater than that which can be attributed to the guerrillas, it is easier to make reparations to paramilitary victims, usually poor peasants, while most of the guerrillas' victims are members of more powerful groups.

Regarding compensation for the victims, public resources may be used to provide an acceptable minimum amount, and the Framework for Peace has ordered the establishment of a Truth Commission. It is clear that peace will depend on the possibility of granting amnesties that are acceptable to the FARC, but that at the same time can satisfy the requirements of international justice, the criteria of national courts and the exigencies of public opinion. This is not a minor challenge.

A preliminary evaluation

After nine months of negotiations, some conclusions are possible:

1. In comparison with previous negotiations, this round has been conducted in a better way, and the rules on confidentiality have been respected. The FARC's attempts to use the negotiations to promote its political views have not been very successful and were to be expected.
2. The FARC initially insisted on a bilateral truce or cease-fire, but the government refused to accept it. In December 2013 the FARC announced a one-sided truce until January 20th 2013 that was largely obeyed by its various armed fronts. This is prima facie evidence of the degree of control that the FARC high command has over its subordinates. One of the major worries of observers is that, even if a peace agreement were to be signed, many lower-ranking members of the organisation could ignore it, and the truce experience may give some reason for optimism in this regard. Although some observers have argued that the reasons for the president's peace effort are self serving, it is clear that the costs of a final military victory would be very high and that the FARC, even if it were to experience major setbacks, can survive and fight for several years. If a negotiated peace is possible, the rational choice is to follow this route. Obviously, other costs are incurred in negotiating peace, mostly because of the political opposition it will produce. Given the importance of the peace process for the country, President Santos's chances of re-election will hang mostly on the result of the peace process.
3. Some hypotheses may be advanced as to the reasons why the FARC decided to negotiate. As a consequence of the paramilitaries' attacks on the organisation and the civilian populations in areas where it was active, it was forced to abandon several areas of influence. At the same time, a better prepared army was able to cause it several major setbacks. Several of its historical leaders have died in the last decade. To reconstruct the FARC's military power to 1998 levels after 15 years of decline is out of the question: the FARC is a defeated guerrilla organisation, even if it has not been finished off. The FARC held peace talks with the government in 1983, 1990 and 1998, and must know that if the Havana talks fail, no new opportunity will arise for a long time. The current FARC leaders are still part of the historical group committed to the organisation's political objectives. But in a few years they will be displaced by a new generation with less political motivation and stronger links with the drug trade. In light of this, continuing with the struggle does not seem to be a realistic option.
4. For the FARC to reach a minimally acceptable deal, it must renounce any objectives other than those contained in the present agenda. The organisation would be successful if it were able to achieve: (a) the establishment of a system of transitional justice with very strict definitions of crimes against humanity that mostly punished these crimes with jail terms, gave amnesty to less serious political and war crimes, and prescribed alternative punishments for common crimes related to political crimes; (b) the creation of two or three peasant reservations in which some former guerrillas could settle; (c) the adoption of a strong programme of support to the peasant economy; (d) the access of landless peasants to property in areas inside the land frontier, with subsidies and other forms of "low-intensity" land reform; and (e) facilities and protection that will allow the former guerrillas to participate in the normal political life of the country.
5. The FARC's participation in the 2014 elections seems unlikely, since the elections will be held in March of that year. The recent legalisation of the Patriotic Union (UP) – the movement created by the FARC during the 1983-84 talks – may facilitate the political participation of some of the FARC's leaders, together with doctrinal allies without concrete ties with the organisation. However, the time is too short to allow the FARC a good chance of a satisfactory result. A change to the election rules that would allow, for example, the creation of a "special district of peace" would require a constitutional amendment, which is unlikely to be approved in time for the elections. Therefore, if the FARC does not participate, either directly or through another political organisation, some temporary alternative may be found to allow the selection of non-voting members of Congress while new elections take place, or even in an extreme case to permit elections in the special district of peace at a later date. This procedure, however, would face serious constitutional difficulties.

6. Given the present state of the country, it is reasonable to think that an agreement will be complied with and will have positive effects. The abandonment of the war by the FARC will strongly reduce pressure on the army, which will in turn improve its ability to fight other criminal organisations. If the FARC complies with the agreement, the risk of a campaign of exterminations against its supporters, like the one that targeted the UP from 1987 to 1991, is unlikely. A political party supported by former guerrillas will probably receive the same treatment that M19 received after 1991. However, although a peace agreement will certainly reduce the levels of homicides and other forms of criminality, it will not have a significant short-term impact on drug dealing and others forms of common crime. The 2014 elections will be an indirect or direct plebiscite on the peace negotiations. If a reasonable deal is achieved before March 2014, the electorate's support is likely, provided that the concessions made to the guerrillas are limited and acceptable. Blanket amnesties, a new constitutional assembly and similar proposals would face the government with a high risk of defeat. If an agreement is not reached before the elections, this will have an impact on them, but how exactly the electorate will respond is an open question. The lack of an agreement may be seen as evidence of the failure of the negotiations and lead to the election of a government hostile to peace talks. The FARC is probably taking such a risk into account: if it evaluates it as very high, the organisation may push for a rapid agreement. However, because no strong alternative candidates to the president have emerged, the government may be able to win re-election even if no peace agreement has been reached. This appears to be the most probable outcome at present (August 2013).
7. The government has given signs that it strongly supports the peace negotiation. The president joined the massive public demonstrations in support of the peace talks on

April 9th 2013. Further proof of support for the government was given in July at the presentation of the *Report of the Commission on Historical Memory, Basta Ya* (No More), in which the president said that the state had to ask its victims for forgiveness.

8. Time is crucial for the negotiations. Discussion of the first of the five points on the agenda took five months, but some of the more difficult aspects are still to be discussed. The tone and declarations of both parties indicate that an agreement is possible and that both sides may win by signing it, but the time available to reach an agreement before the elections is very short. In light of this, the FARC may be considering the advantages of long negotiations that would give it political visibility and the opportunity to present various proposals to Colombian society. For this to be possible the FARC has to show a degree of flexibility and its timing has to be impeccable in order not to give the government reasons to end the talks if the political environment becomes very hostile to negotiations. For the government, a quick agreement is desirable. But if public opinion does not become very frustrated with the apparent lack of progress, the government may accept a slower process. In such a case, long talks with a pliable and even moderate FARC, characterised by alternating strong demands and concessions, but with care being taken not to provoke a dramatic rupture, appear to be possible.
9. In sum, the peace negotiations have advanced in such a way that there is ground for prudent optimism regarding their outcome, but it is unlikely that it can be reached before the 2014 elections, and the possibility of long-lasting negotiations is growing. ■

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