



## *Inclusion of combatants: Colombia as a case study*

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During the various constitution-building and peacebuilding processes that have occurred in Colombia, what specific issues had to be addressed in relation to the inclusion of combatants?

Throughout the different peace processes in Colombia, the reincorporation of combatants into civil society has been the government's objective. Combatants, for the most part, have disagreed about this being the ultimate objective of the negotiations as they had traditionally considered that the Colombian armed conflict had 'objective causes', and thus the goal of a peace treaty would be much more ambitious than the mere reincorporation of former combatants. Put simply, the Colombian government had seen the peace talks as cease-fire negotiations, while guerrillas have tried to portray them as a complete constitutional overhaul.

The inclusion of combatants received some criticism from certain sectors of civil society and, to a lesser extent, by the Revolutionary Armed Forces of Colombia (FARC in the Spanish acronym) guerrilla itself. Some political groups in Colombia believed that allowing combatants to be readmitted into civil life would reward the commission of grave international crimes.<sup>1</sup> The guerrilla, on the other hand, rejected the concept of 'inclusion' or 'incorporation' as it was premised on their actions being illegal, while they maintained that in the sixty years of armed conflict they were merely exercising their right to self-determination against an illegitimate State.

Currently, those political sectors of society which objected to the peace agreement have come to power, and they still maintain that the inclusion of combatants back into civil society should undergo a much more stringent process in order to punish grave crimes. FARC, however, has transformed into a legal political party and thus now sees its participation in civil life as a benefit of the agreement.

At what point(s) in the process were combatants included?

There were two defining moments for the inclusion of combatants. The most significant one occurred at the very beginning of the negotiation, while the peace process was still confidential, and the FARC agreed to discuss the disarmament, demobilization, and reincorporation ('DDR', in the negotiating parlance) of the combatants. Traditionally, FARC were sharply against even agreeing to discuss their own DDR, and so their decision to include it within the agenda for the peace negotiations was, perhaps, one of the most significant steps that led to the installation of the public negotiation, which took place in Cuba.

The second important point came towards the end of the negotiation. Contrary to the advice of some international consultants, particularly of the Harvard model for negotiation, the government chose to postpone the issue of DDR – the most controversial topic – until the very end of the negotiation. The

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<sup>1</sup> One of the difficulties when negotiating this point was the fact that all the FARC leaders were already convicted for war crimes and crimes against humanity in the Colombian jurisdiction.

idea was that the momentum gathered by an agreement on every other topic in the agenda (political participation, drug trafficking, rural and agrarian reform, and transitional justice) would help to overcome the difficulties of DDR, which eventually proved to be a successful strategy.

### Were (some) categories of combatants excluded?

There was no categorisation of combatants, considering that the protracted conflict had spilled over to virtually every criminal enterprise of the country. Therefore, there were some groups which were widely believed to be contrary to the concept of 'combatants', most notably people who would be considered mere drug traffickers. This was, and remains to this day, one of the most controversial points of the negotiation, considering that the armed conflict was fuelled mainly by the revenues of the drug trade. Practically speaking, it would have been impossible to devise an abstract differentiation between drug traffickers and FARC combatants, which is why both parties agreed to make any drug-related crime a political offence and thus subject to an amnesty at the successful termination of the peace process.

It should be noted, however, that the different peace processes in Colombia have engaged specific armed guerrillas and not a monolithic counterpart. The Constitution of 1991, for example, was a product of the negotiation with the M19 group in the early 1990s. The 2004 peace process involved only the right-wing paramilitary groups, though, in practice, a small number of guerrilla members have been adopted by that same process. The 2012 negotiation involved only the government and FARC, notwithstanding that one of the other major guerrillas, the National Liberation Army ('ELN' in its Spanish acronym), was increasing in strength and had a different, secret negotiation underway. This latter negotiation effort was later abandoned after the ELN set off an explosive device in the police academy of Bogotá on 17 January 2019, killing more than twenty people and injuring more than sixty.

### Was there opposition to the inclusion of combatants? What implications did such opposition have for the constitution-building and peacebuilding processes?

The inclusion of combatants was largely seen – even by those sectors that opposed the negotiation – as the prime objective of the negotiation for the State. There was no strong objection to this, even from the point of view of the guerrilla.<sup>2</sup>

Perhaps the only opposition, and it was the strongest opposition, came from those who saw in the FARC leadership not combatants but common drug-traffickers. This sector was self-proclaimed right-wing, and during the negotiations their rhetoric proved to be the most difficult obstacle to the negotiation. In fact, when the agreement was submitted for public approval through a referendum, different right-wing sectors, including political parties and religious establishments, campaigned against its adoption with a strong rhetoric that asked for people to see FARC members not as combatants but as drug-traffickers.<sup>3</sup> This campaign was very effective and the referendum adopting the peace agreement was lost, which forced the Government to re-negotiate it not with the FARC but with these political groups.

Ultimately, and after this non-substantial re-negotiation, it was the Congress of Colombia who formally adopted the peace agreement.

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<sup>2</sup> As noted above, the FARC did not object to the inclusion of combatants but rather to the inclusion of combatants as the paramount objective of the negotiation.

<sup>3</sup> Logically, for the government, these two were not mutually exclusive.

### What arrangements, if any, were discussed and/or agreed in relation to amnesty or immunity in relation to the inclusion of combatants?

One of the most difficult aspects of the negotiation was precisely to create some sort of system that could deal with thousands of people who would need to undergo some sort of judicial procedure in order to be readmitted into civilian life. As a consequence, the final agreement implemented what was called the 'Integral System for Truth, Justice, Reparation, and Non-Repetition', which included an entirely new transitory jurisdiction to judge anyone who had been involved with the armed conflict (the Special Jurisdiction for Peace, or 'JEP' for its Spanish acronym) and a Truth Commission which explicitly lacked jurisdictional powers.

The words 'amnesty' or 'immunity' were entirely banished from the negotiation as they would have played into the rhetoric that other right-wing groups were employing to discredit the negotiation. Other concepts, such as 'differential penal treatment' were adopted. For its part, punishment was discussed abstractly without assuming that it would entail incarceration. In some cases, this situation was referred to as 'limitations placed upon freedom of movement', which did not entail intramural incarceration but rather zonal concentration where alternative forms of punishment – such as the collaboration in the de-mining of the Colombian territory – would be carried out.

Relating to the logistical inclusion of former combatants, there were many technical agreements put into place – many of which remain confidential – referring to locations, coordinates, transportation, registration, and the storing of weapons. These protocols and agreements are in place to this day and many of its provisions are still in force.

### What lessons might be drawn from your experience for constitution building in countries in similar circumstances elsewhere?

In negotiating with the FARC and the ELN, I had the opportunity to discuss with countless international experts that had been involved directly in other peace negotiations, including those in Ireland (Good Friday Accords), El Salvador, and South Africa. After long discussions and years of negotiation, it was clear to me that every process is different and there is no rule that may be abstracted, even on issues that may seem straightforward such as the need for some Truth Commission (the Good Friday agreement, for example, lacked such determination).

On the other hand, what came up recurrently in both the FARC and the ELN negotiations was a rhetorical dispute over the use of words. Both guerrillas sharply objected to the characterisation of our civil war as an 'armed conflict', and the language of the final agreement and even in the course of deliberations, this term would be strongly objected to on the grounds that the conflict was not an armed one, but rather a political one.

Lastly, during the negotiation, it was important to constantly remind myself that the official delegation represented almost fifty million people that had elected the government democratically, while the FARC, for example, did not have more than seven thousand combatants (by the most generous of estimates). This meant that there was an important difference when it came to institutional legitimacy, and both for the etiquette at the negotiating table as for the available options to agree upon, it was important that we did not forget our own mandate.

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