

EXECUTIVE SUMMARY

Transitional Justice and the situation of children in Colombia and Peru Salvador Herencia Carrasco

The majority of Latin American countries have had a history of human rights violations and the issue of *dealing with the past* has taken a significant role in these societies. In the Andean Region (Bolivia, Chile, Colombia, Ecuador, Peru and Venezuela), the Colombian and Peruvian case studies are the most significant, given the gravity and atrocity of the crimes perpetrated as well as the legal, judicial and administrative measures adopted to deal with these crimes.

The application of International Law in Latin America has made possible the investigation of grave human right violations committed during past dictatorships and/or authoritarian regimes. The interpretation of International Law vis-à-vis Human Rights, International Humanitarian Law and International Criminal Law has led to the adoption of judiciary and administrative measures in order to face these challenges and consolidate the rule of law. As a complement, the rulings of the Inter-American Court of Human Rights have set the benchmark that domestic human rights proceedings must apply, in accordance to the American Convention on Human Rights.

In this sense, the approach to transitional justice includes judiciary and non-judiciary measures. In Colombia and Peru, despite the creation of innovative non-judicial mechanisms, it is under the judiciary branch that the investigations of systematic and generalized human right violations by all parties in conflict have most contributed to *discovering or knowing the truth*.

It is worth mentioning that in both countries, the theme of transitional justice has emerged under different contexts. In the Peruvian case, transitional justice measures were adopted after the fight against Sendero Luminoso (Shining Path) and MRTA armed groups had diminished, following the arrest and conviction of their main leaders. The Peruvian transition itself embodied the restoration of a democratic regime after Mr. Alberto Fujimori resigned to the presidency and a transitional government, presided by Mr. Valentín Paniagua, took office in November 2000. Here, significant transitional figures adopted were the re-recognition of the Inter-American Court of Human Rights jurisdiction¹, the subscription and ratification of the Rome Statute of the International Criminal Court and the creation² of the Truth and Reconciliation Commission (hereafter “TRC”)³.

In Colombia, the situation was, and continues to be, different. Despite significant advances in terms of security, the demobilization of paramilitary groups and key-military victories against the FARC guerrilla group, a conflict situation still persists. This has led to singularize the Colombian case as a transition process without transition⁴, which means that the shaping of policies show a tension between the war and peace struggle and the peace-justice-

¹ The Peruvian governments withdraw such recognition on July 8, 1999 after the IACHR adopted the *Loayza Tamayo* and *Castillo Petruzzi* rulings. It is worth mentioning that Peru never officially denounce the American Convention on Human Rights.

² See: Decreto Supremo No. 065-2001-PCM, adopted on June 4, 2001.

³ See: <http://www.cverdad.org.pe>

⁴ Among others, see: UPRIMNY, Rodrigo (et al). *¿Justicia Transicional sin transición? Verdad, justicia y reparación para Colombia*. Bogotá: Centro de Estudios de Derecho, Justicia y Sociedad, 2006.

reconciliation relationship divides society, having the debate of the Justice and Peace Law⁵ as an example of this situation⁶.

Some measures regarding transitional justice that have been adopted so far in Colombia are: (i) the Justice and Peace Law; (ii) the adoption of a National Commission on Reparation and Reconciliation⁷; (iii) the demobilization process of paramilitary groups; and (iv) the implementation of Disarmament, Demobilization, and Reintegration (hereafter “DDR”) programs.

The Colombian and Peruvian cases are complex and distinct. Nonetheless, they share five common characteristics that mark their respective transitional processes:

- There are or were conflicts that originated through an ideological struggle for power, not a struggle based along lines of race, ethnicity or religion.
- These conflicts are or were between a national government and illegal armed groups located within the State territory.
- Governments, with few temporarily occasions, have had the control of the territory.
- The situation of children has not been dealt with as an integral part of a transitional process, but has been addressed through specific issues, such as the situation of child soldiers or internally displaced persons.
- Application of International Law, especially by the judiciary, has been the catalyst that facilitated the initiation of transitional justice mechanisms;
- The main entities responsible for the application of transitional justice have been the Constitutional Courts in Colombia and the Constitutional Tribunal in Peru.

Problems:

- Peru: How to apply International Law and international standards to cases and situations that took place before these obligations (in Human Rights and International Humanitarian Law) were in force?
- Colombia: The country can be characterized as a country with formulas and transitional justice mechanisms that cannot be clearly classified as a transitional process per se, which means that (i) the shaping of policies and programs show a great tension between the war and peace dichotomy; (ii) the challenge is how to overcome a turbulent and conflictive present, not the past; and (iii) the relation of Truth-Justice-Reparation has divided society, having the Justice and Peace Law debate as its clear example.

Challenges for Transitional Justice Mechanisms

- Government policies: despite specific programs, there has been a lack of holistic approach to transitional justice. In this sense, the role of Constitutional Courts has been fundamental in the adoption of programs and transitional oriented plans.
- In 2004, the Colombian Constitutional Court ordered the government to adopt an integrated program to protect internally displaced persons by declaring an *état de choses unconstitutionnelle* (between 2 and 2.5 million people) after deciding over a constitutional local remedy.

⁵ See: Corte Constitucional de Colombia. Sentencia C-370/06. Adopted on May 18, 2006.

⁶ See: COMISION COLOMBIANA DE JURISTAS. *Anotaciones sobre la Ley de Justicia y Paz: Una mirada desde los derechos de las víctimas*. Bogotá: Comisión Colombiana de Juristas, 2007.

⁷ See: <http://www.cnrr.org.co/>

- In Peru, the judiciary has established parameters to prosecute human right violations despite the lack of proper codification of international crimes on local criminal legislation. In this sense, alleged perpetrators found guilty are condemned for counts of murders, injuries and kidnapping, applying maximum penalties considering the context under which these were committed.

Perspectives

- Despite the lack of integral programs on children, current understanding and standing of International Law gives international organizations, human rights organizations; the Ombudsman, among others, to push for the adoption of transitional justice programs. Can single individuals promote the adoption of transitional justice actions?
- Public policies must not pass necessarily through the Executive or the Legislative but is the Judiciary, namely Constitutional Courts that may in practice adopt such programs.
- Judiciary proceedings have a common set of rules to prosecute alleged human rights violations: (i) amnesties on human right cases are void; (ii) application of non-statutory limitations to human right cases doesn't stand in courts; (iii) disregard of defenses bases on following orders or alleged obedience; and (iv) inapplicability of immunities as defense mechanism.

Challenges regarding transitional justice in the Andean Region

- The application of transitional justice, especially before the judiciary, has been seen as a new "enemy criminal law".
- The right to truth is acknowledged by both Constitutional Courts but there is a question of the existence of such right and another complementary question. What/whose truth are we talking about? The truth from legal proceedings or the truth of victims?
- Is it possible to prosecute every single combatant (30,000 paramilitaries demobilized) and if not, what measures must be adopted (amnesties for rebels that are not prosecuted for HR violations? Restorative justice?)
- How to assure that these demobilized members of illegal armed groups don't rearm themselves or serve drug trafficking organizations.
- Is it possible to harmonize Peace-Justice-Reparations?