UNICEF
Innocenti Research Centre

DRAFT

Innocenti Working Paper

TRANSITIONAL JUSTICE AND THE SITUATION OF CHILDREN IN COLOMBIA AND PERU

Salvador Herencia Carrasco

unite for children

unicef

1. INTRODUCTION

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[1] (hereafter, "IACHR") 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 do *discovering or knowing the truth.*

2. COLOMBIA AND PERU'S TRANSITIONAL OVERVIEW

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 jurisdiction[2], the subscription and ratification of the Rome Statute of the International Criminal Court and the creation[3] of the Truth and Reconciliation Commission (hereafter "TRC")[4].

---

[1] See: http://www.corteidh.or.cr

[2] 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.

[3] See: Decreto Supremo No. 065-2001-PCM, adopted on June 4, 2001.

[4] See: http://www.cverdad.org.pe

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 transition[5], which means that the shaping of policies show a tension between the war and peace struggle and the peace-justice-reconciliation relationship divides society, having the debate of the Justice and Peace Law[6] as an example of this situation[7].

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 Reconciliation[8]; (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.

As previously stated, it is in the judiciary that the most significant advances in transitional justice have been made. Constitutional Courts, followed by the judiciary, have spearheaded this transition, whether it is under the interpretation of international treaties like the Protocol Additional II to the Geneva Conventions; the application of an IACHR ruling regarding antiterrorist legislation; the acknowledgement of a right to truth in favor of victims; or the put into practice of a public policy regarding displaced children affected by armed conflict.

One characteristic common to judiciary proceedings is that due to the absence of internal legislation at the time that the crimes were committed, judges and prosecutors must

[5] Among others, see: UPRIMNY, Rodrigo (et al). ¿J*usticia Transicional sin transición? Verdad, justicia y reparación para Colombia*. Bogotá: Centro de Estudios de Derecho, Justicia y Sociedad, 2006.
[6] See: Corte Constitucional de Colombia. Sentencia C-370/06. Adopted on May 18, 2006.
[7] 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.
[8] See: http://www.cnrr.org.co/

interpret and apply International Criminal Law, International Humanitarian Law and International Human Rights Law directly from treaties or customary practices.

This has led to a problematic situation wherein concepts such as crimes against humanity, non-statutory limitations, and the conditions for the granting of amnesties, pardons and immunities, are not being applied uniformly, resulting in their discretionary, selective and unforeseeable application by members of the judiciary in different countries of Latin America[9].

The solution that has been adopted is to use the IACHR standards, but interpreted under the parameters set by the Constitutional Courts. In countries where Constitutional Courts do not exist (like Argentina), or have a more limited mandate (like Chile), Supreme Courts have delimited such scope, leaving the concrete application to the criminal chambers or specialized Courts.

Regarding non-judiciary measures, Colombia and Peru, under different contexts and to different extents, have adopted Truth and Reconciliation Commissions, and DDR programs, as well as reparation initiatives. In this sense, the following could be the framework for Colombia and Peru:

	Colombia	**Peru**
Judiciary measures	- Constitutional Court - Peace and Justice Law system[10] - Supreme Court of Justice	- Constitutional Tribunal - Sala Penal Nacional[11] - Supreme Court of Justice
Non-judiciary measures	- National Commission on Reparation and Reconciliation (NCRR) - Reparation program established under Law 286 of 1995 and the NCRR - DDR- Social programs	- TRC: Final report published in August 2003 - National Reparation Council - Psychosocial attention to victims - Adoption of Human Rights National Plan in December 2005
Oversight	Rulings of the Inter-American Court of Human Rights	

Lack of resources and political divisions have hindered the full implementation of these measures. Nevertheless, transitional justice in Colombia and Peru has facilitated the insertion of the human rights situation into the political agenda, and underlined the importance of addressing the truth-reconciliation-peace relationship.

[9] See: AMBOS, Kai, MALARINO, Ezequiel, ELSNER, Gisela (editors). *Jurisprudencia Latinoamericana sobre Derecho Penal Internacional*. Montevideo: Fundación Konrad Adenauer and Georg-August-Universität-Göttingen, 2008.

[10] In charge of prosecuting defendants (mostly paramilitary members) that are willing to confess all of their crimes.

[11] In charge of prosecuting defendants charged for terrorist activities and grave human right violations.

It must be taken into account that the transitional justice process is contributing to the consolidation of democratic institutions, despite persistent political and social divisions. Furthermore, questions have been raised as to the limits of these prosecutions, leading some to consider that the acknowledgment of a right to truth has created a situation wherein fundamental constitutional rights of alleged perpetrators are diminished in favor of the truth and the best interests of the victim, creating a *de facto* new form of Enemy Criminal Law.

Under this scenario, the situation of children in the transitional process in Colombia and Peru differ from one another. In Peru, the TRC documented crimes committed against children, including recruitment practices by Sendero Luminoso and MRTA subversive groups, as well as by the military. Unlike other conflicts, the situation of children was not as visible as in the case of Sierra Leone or Colombia.

A possible explanation could lie in the fact that during the most difficult part of the conflict in Peru, (especially during the 1980s), international treaties had not been ratified by the State and violence against children was not a priority issue. Although during that period, United Nation Resolutions over the matter had been adopted and the International Covenant on Civil and Political Rights as well as the International Covenant on Economic, Social and Cultural Rights were in force. However, their knowledge or application was practically inexistent. In Colombia and Peru, as well as in other countries in Latin America, the application of International Law only began with the adoption of new Constitutions (Colombia in 1991 and Peru in 1993) or substantial reforms during the 1990s.

The publication of the TRC contributed to a better understanding of the scale of the Peruvian conflict and emphasized the vital importance of the adoption of non-judiciary measures. In terms of children's issues, the challenge remains about how to apply International Law (including reparation programs) to a situation that took place before Human Rights and International Humanitarian Law obligations were in force.

In Colombia, the nature of the conflict has underlined the plight of children caught in the conflict, considering that a significant part of the 2.8 million displaced persons are children, and that illegal armed groups continue to forcibly recruit minors, constituting a war crime under the Rome Statute of the International Criminal Court. The challenge is how to overcome a turbulent and conflictive present, not only the past, and how to apply effective reintegration and reparation programs.

In this sense, a 2004 ruling by the Constitutional Court[12] ordered the government to implement an integrated program that would protect internally displaced persons, after analyzing a local remedy (acción de tutela). The Court determined that the situation of displaced persons was an *état de choses unconstitutionelle*, determining that the government was incapable of protecting such people, especially children. The ruling has forced all branches of government and welfare programs to report on a periodical basis to

[12] See: Corte Constitucional de Colombia. Sentencia T-025 del 22 de enero de 2004. Referencia: Expediente T-653010 y acumulados. Magistrado Ponente: Manuel José Cepeda.

the Constitutional Court on the implementation of public policies for the protection of the displaced[13].

As a preliminary conclusion, despite the lack of integral programs for children in Colombia and Peru, the current awareness and understanding of International Law, as well as its standing, allow international organizations, human rights organizations and the Ombudsman's Office, among others, to push in practice for the adoption of transitional justice programs. The experience of these two countries provides evidence that public policies need not always pass through the Executive or the Legislative, and that the Judiciary, mostly the Constitutional Courts, can be a key catalyst.

3. CHILDREN AND ARMED CONFLICT IN THE ANDEAN REGION

3.1 International Legal Framework for the Protection of Children

The protection of the rights of the child has had a significant advance in International Human Rights Law, particularly since the adoption of the 1989 United National Convention on the Rights of the Child[14]. This treaty recognizes that children, as human beings, have all the rights, liberties and guarantees assigned to the latter, without any form of discrimination. In addition, its articles 2 and 4 establish the obligation to provide specific protection to children by signaling that children have rights to the measures of protection that their condition requires, from their families, society, and the State[15].

The situation of children in the context of an internal armed conflict is subject of protection under International Humanitarian Law. Common article three of the 1949 Geneva Conventions establishes that children enjoy the fundamental guarantees and the general protection provided to individuals that do not participate, or no longer participate, directly in the hostilities. For its part, Article 4.3 of the Second Optional Protocol of the Geneva Conventions categorically prohibits the recruitment and use of children under the age of fifteen in hostile actions.

Nevertheless, it is not until the coming into effect of the Convention of the Rights of the Child in 1990 and the Facultative Protocol of the Convention of the Rights of the Child regarding the participation of children in armed conflict in 2002, that the theme of the children linked with armed conflict acquired the relevance it has today. The current trial

[13] The last progress-report made by the Constitutional Court on this issue was in the Auto 251/08 of October 6, 2008.

[14] Convention on the Rights of the Child. Adopted by General Assembly resolution 44/25 of 20 November 1989. Entry into force: 2 September 1990.

[15] See: Article 25 of the Universal Human Rights Declaration (1948); the Declaration on the Rights of the Child (1959); Article 24 of the International Pact on Civil and Political Rights (1966); Article 10.3 of the International Pact on Social, Economic and Cultural Rights (1966); Article of the American Convention on Human rights, among others

for war crimes of Thomas Lubanga Dyilo[16] before the International Criminal Court for enlisting and conscripting of children under the age of fifteen is a step forward towards the abolition of this practice.

At this point, it is necessary to stress that since the entrance into force of the Convention on the Rights of the Child and its Second Optional Protocol[17], the legal scenario has significantly improved. The evolution of international law generated, on one hand, a set of fundamental principles expressed in the Cabo City Principles (1997), the Paris Principles (2007) and the Paris Commitments (2007) that emerge with the clear objective of establishing some parameters that permit the end of the recruitment of children in armed conflicts throughout the world.

On the other hand, a structure and some appropriate mechanisms were established that permitted international Human Rights organisms and civil society to directly intervene and demand guarantees of greater protection for children linked to conflict. This aspect is fundamental in understanding the normative international contexts that developed both processes and thus the space of action for international organizations in these scenarios. During the period of violence experienced by Peru, these instruments were not established, which marks a difference with the Colombian case.

In the case of the Inter-American System for the Protection of Human Rights, although it is correct to say that a legal instrument does not exist that specifically refers to the protection of the child, the American Convention of Human Rights signals in Article 19 that: "Each child has the right to the measures of protection that his condition as a minor requires, from his family, society and the State." This disposition establishes a sphere of special protection for the rights of children and adolescents, as well as earmarking special obligations for the State on this issue. In addition, the IACHR has adopted an Advisory Opinion regarding the situation of children[18].

3.2 The Rights of the Child and the role of International Organisms: Raising Awareness of the Conflict

In attending to this issue, the different international organisms of human rights have had a fundamental role, especially in the Colombian case, in raising awareness of the magnitude of the damage to children and adolescents linked to armed conflicts, and in bringing about commitments from States and civil society organizations regarding the fight against those practices that have a negative effect on the population of minors.

---

16 See: http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/democratic%20republic%20of%20the%20congo?lan=en-GB

17 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict Adopted by General Assembly Resolution A/RES/54/263 of 25 May 2000. Entry into force: 12 February 2002.

18 See: Inter-American Court of Human Rights. *Condición Jurídica y Derechos Humanos del Niño*. Opinión Consultiva OC-17/02 del 28 de agosto de 2002. Serie A No. 17.

One of the most successful aspects of the work of international organizations has been the application of the legal prohibition of the use of child soldiers in the Armed Forces. Despite the fact that the law prohibits the recruitment of minors, it has been a long-standing practice in these countries, and tacitly tolerated by the governments. The application of international law by the judiciary (principally the Constitutional Tribunals) contributed to the abolition of the practice in both countries.

Nevertheless, in Colombia the problem persists, and many children and adolescents are recruited by irregular armed groups (the FARC, the ELN and illegal armed groups that did not participate in the demobilization processes, such as the Peasant Self-Defense of the Casanare and the Cacique Pipinta Front). Colombian statistics indicate that these groups continue to recruit child soldiers with an average age of eleven. As well, the People's Ombudsman Office affirms that in 2007[19], the System of Early Alerts (SAT) of the Office put out 90 warnings of situations of risk (reports of risk and follow-up notes) and, in 60 percent of those, it warned about the possible risk of recruitment of children and adolescents by armed actors (the guerrilla, non-demobilized self defense groups, and post-AUC demobilization armed groups). In 2008[20], the Office emitted various risk reports warning of the risk of recruitment and use of children and adolescents in the departments of Guaviare, Risaralda, Quindío, Caquetá, Choco, Sucre, Norte de Santander, Vaupés Amazonas, Caldas and Tolima, among others. This situation could constitute an accusation of war crimes if held up to Article 8 of the Rome Statute of the International Criminal Court.

In the Peruvian case, United Nations organizations as well as the Inter-American System did not recognize the gravity of the conflict until the early 1990s, approximately ten years after the commencement of violence. Only after 1993 did reports, observations and recommendations appear regarding the negative repercussions that the political violence and terrorism represented for the situation of children in Peru.

Nevertheless, it is worth mentioning that the delay was not of the same magnitude in regards to the cases brought before the CIDH. The 1986-1987[21] annual report published seven individual cases of forced disappearance and killings committed by the security forces. In the 1987-1988 annual report[22], 13 of the cases corresponding to Peru included violations of human rights such as forced disappearance, extrajudicial killings, torture and sexual violations. The 1990-1991 annual report[23] referred to 49 published cases of forced disappearance.

The 2001 annual report[24] contained an important step. In that year, the CIDH decided to calculate the total cases of forced disappearance and extrajudicial executions between 1984 and 1993: 23 cases involving 119 individuals. This report was also of high

[19] See: http://www.defensoria.org.co/red/avisos/sat2.php
[20] Ibidem.
[21] See: http://www.cidh.oas.org/annualrep/86.87eng/toc.htm
[22] See: http://www.cidh.oas.org/annualrep/87.88eng/TOC.htm
[23] See: http://www.cidh.oas.org/annualrep/90.91eng/TOC.htm
[24] See: http://www.cidh.oas.org/annualrep/2001eng/chap.5d.htm

importance because the Commission determined that the Peruvian State was responsible for the extrajudicial execution of some of the victims and for the forced disappearance of the others. It found that Peru violated human rights of personal liberty, children's rights, personal integrity, judicial guarantees, judicial protection, special measures of protection and the legal entity embodied in Articles 3, 5, 7, 8, 19 and 25. The report urged[25] the Peruvian state to revoke the internal laws and judicial decisions that impede the investigation, processing and punishment of those responsible, and to implement serious, thorough and impartial investigations to determine the individual responsibilities and compensate family members. It recommended that the Peruvian State adhere to the Inter-American Convention on Forced Disappearance of Persons[26].

Furthermore, it is worth noting that it is in this scenario that the local human rights organizations began to interact with the Inter-American System of Human Rights. It also signals that "The Peruvian human rights community was strengthened by its participation in numerous hearings before the Commission on the general human rights situation in Peru and on individual cases, and by ongoing litigation in the Court. (…)For the Inter-American system, the human rights groups represented valuable and reliable interlocutors in the form of qualified petitioners and evaluators of the human rights situation in that country. This in turn strengthened the negotiating position of those groups vis-à-vis the state"[27].

On the other hand, the Colombian case, as previously signalled, is totally distinct. In a different situation to that of the 1990s, the work of the Committee of Protection of the Rights of the Child CCR and the General Assembly has been complemented by the actions that today is realized by the Office of the Special Representative of the General Secretariat for the issue of children in armed conflicts, which has a special mandate regarding the Colombian situation, and the Office of the High Commissioner of the United Nations in Colombia for Refugees, which has a special mission to deal with the situation of the thousands of displaced Colombians, particularly those that are children.

In 2005, the United Nations Security Council, for its part, through Resolution 1612 gave an important step forward in dealing with the serious problems observed around the world among child victims of armed conflicts. The resolution requested that the General Secretariat put in motion monitoring mechanisms and reports that would allow the monitoring of the most serious situations where children are being directly or indirectly linked to the armed groups that take part in the hostilities, Colombia being one of those situations. Nevertheless, only in February of 2008 did the Colombian government agree to the monitoring mechanism and reports established in Resolution 1612. The acceptance of the mechanism permits the working group of the Security Council on Childhood and Armed Conflict to examine country reports, make recommendations on possible measures to promote the protection of children against the impact of armed conflict, and direct petitions to other United Nations entities so that they can take measures to support the application of Resolution 1612.

---

[25] See: http://www.cidh.oas.org/annualrep/2001eng/chap.5e.htm. Paragraphs 144-147.

[26] See: VILLARAN, Susana. Perú. En: AVILA, Mónica (Ed.). *Victims Unsilenced: The Inter-American Human Rights System and Transitional Justice in Latin America ú*. Washington: DPLF, 2007, pages 95-126.

[27] Ibidem, page 98.

Regarding the role that the entities of the Inter-American System have assumed, we can signal that, similar to the global system, there are more and better mechanisms for the protection of children linked to Armed Conflict[28]. In this sense, not only have a greater number of reports been published referring to the situation of children in Colombia, but we have also seen a Special Declaration on the Rights of Children in the framework of the CIDH.

3.3 Children and Armed Conflict: The case of Peru

As stated before, in the Peruvian case, transitional justice mechanisms involved criminal proceedings and administrative measures. Regarding the application of criminal legislation, the enforcement of Common Criminal Law and Differential Criminal Law was a common trend of this scenario. The main administrative measure has been the Truth and Reconciliation Commission.

The use of a differential Criminal Law: One of the measures that the government adopted to dismantle the terrorist groups and pacify the country was through the use of *repentance laws*[29]. This Decree considered the terms by which the benefits of the reduction, exemption, remission, or attenuation of the sentence were conceded to those individuals who had voluntarily left a subversive group and were responsible of committing acts of terrorism. In exchange, those individuals had to provide information that permitted the security forces to dismantle the terrorist cell and the capture of its leadership. It also established a standard under which Shining Path or MRTA leaders could not benefit from these provisions.

Looking back, we can assess that the law did indeed contribute to the dismantling of subversive groups, but the force of the law was weakened by the fact that many 'repentful' terrorists who took advantage of it were not necessarily involved with the terrorist groups or provided evidence that could not be corroborated, which meant that their testimony could not, ultimately, be used as evidence to arrest and prosecute high-ranking terrorist leaders.

It is worth noting that the issue of children was not contemplated in any of the requirements prescribed for these laws. They did not enforce the collection of information about the number and location of the number of children that were found recruited to terrorist groups, let alone to use the laws as mechanisms to guarantee the children's separation from those groups.

[28] See: CIDH. Informe sobre la situación de los Derechos Humanos en la Republica de Colombia. Documento OEA/Ser.L/V/II.53 del 30 junio 1981; CIDH. *Las Mujeres Frente a la Violencia y la Discriminación Derivadas del Conflicto Armado en Colombia*. Documento 67. OEA/Ser.L/V/II. Del 8 de octubre de 2006; MAPP/OEA. Noveno Informe trimestral del Secretario General al Consejo Permanente sobre la Misión de Apoyo al Proceso de Paz en Colombia. Documento OEA/Ser.G - CP/doc. 4237/07 del 3 julio 20; CIDH. Informe Anual de la Comisión Interamericana de Derechos Humanos 2007 – Capítulo IV: COLOMBIA

[29] See: Decreto Ley No. 25.449 of May 12, 1992.

The use of Common Criminal Law: The Final Report indicated that the Peruvian justice system was one of the principal institutional actors of the conflict. The TRC sustains that during the conflict the judicial apparatus abdicated its mission directly or indirectly had a negative effect on the rights it was supposed to protect. On the basis of those considerations, the TRC promoted the necessity of establishing a specialized system for the defense of human rights that processes the crimes and human rights violations committed in zones most affected by the internal violence.

In this sense, the Executive Council of the Judiciary[30] created a specialized system of human rights, giving attributions to the National Criminal Chamber (*Sala Penal Nacional*) and to Specialized Judges of Terrorism Crimes (*Juzgados Penales Supranacionales*) to try crimes against humanity as described in the Peruvian Criminal Code and the common crimes connected to those crimes that may have constituted human rights violations.

To prosecute these cases, the Public Prosecutor's Ministry[31] (*Ministerio Público-Fiscalía de la Nación*) constituted the National Superior Criminal Prosecutor's Office (*Fiscalía Superior Penal Nacional*), specialized in the investigations of terrorism, enforced disappearances, extrajudicial executions and human rights violations[32].

It is worth noting that since 2003 approximately 46 criminal processes have been opened for human rights violations, of which half were cases presented by the TRC. Nevertheless, none of those processes is directed towards punishing the systematic violations of rights of the child victims of armed violence in Peru.

The international human rights organizations did not make significant efforts to supervise Peru's process of overcoming the past violence, much less raise any awareness about the importance of involving children, in a manner that is active and respectful of their rights, in the processes being implemented. As previously noted, the influence of the Inter-American Commission and the IACH provided impetus for the action and impact of national human rights organizations, as well as legitimizing human rights defenders within the transitional justice process being implemented.

As it can be seen, 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.

[30] See: Consejo Ejecutivo del Poder Judicial. Resolución Administrativa No. 170-2003-CE-PJ

[31] See: Ministerio Público-Fiscalía de la Nación Resolución No. 2034-2003-MP-FN of December 12, 2003.

[32] See: Instituto de Democracia y Derechos Humanos de la Pontificia Universidad Católica del Perú. *Procesamiento de Violaciones de Derechos Humanos en el Perú. Características y Dificultades.* Lima: Pontificia Universidad Católica del Perú, 2006.

Establishment of the Truth and Reconciliation Commission: The TRC began to function on June, 2001 and presented its final report on August 2003. This Commission was formed with the purpose of bringing to light the process, the facts and responsibilities of terrorist violence and the human rights violations produced between May 1980 and November 2000 by both the terrorist organizations and agents of the State, as well as to propose initiatives to foment peace and harmony between Peruvians.

The TRC, through an unprecedented effort, obtained a precise and deep understanding of the process of violence, working in historically marginalized areas and using the native language of the particular community. The TRC based its conclusions and recommendations in the first-hand knowledge of the events, deploying its personnel to undertake public audiences, collecting testimonies and creating a data-base, analyzing human rights crimes and violations, and exhuming bodies.

In its final report, the TRC gave an account of the serious human rights violations committed during the internal conflict, the form in which the State acted in that conflict, the possible responsible parties, and recommendations to ensure that the events are not repeated. The main problem is, however, that international law, in particular human rights and international criminal law, was not in force when the presumed crimes took place. Therefore, the main debate presently focuses around how to apply those laws retroactively without violate criminal and constitutionally fundamental rights. The judiciary has resolved this question on a case-by-case basis[33].

The period of political violence experienced by Peru between 1980 and 2000, at a time when the principal international treaties on the protection of the rights of the child had yet to come into force, "left the country with many social wounds and scars […] in which children were the principal victims due to their lesser capacity to respond to a lack of protection"[34]. In August 2003, the final report of the TRC was presented, including a special chapter[35] about what Peruvian children lived through during the era of internal armed conflict, describing in a chilling way the extreme violence to which they were submitted.

Of the 69,000 victims of the conflict estimated by the TRC; 8,832, or 12.8% of the total were children that were subjected to torture, forced recruitment, murder, forced kidnapping and sexual violence, at the hands of both members of the Peruvian Army as well as the subversive groups Sendero Luminoso and the MRTA[36]. The Commission reported 2,952 cases of violations of the rights of children, committed by agents of the State, the Shining Path and the MRTA, as it can be seen in the table below[37].

---

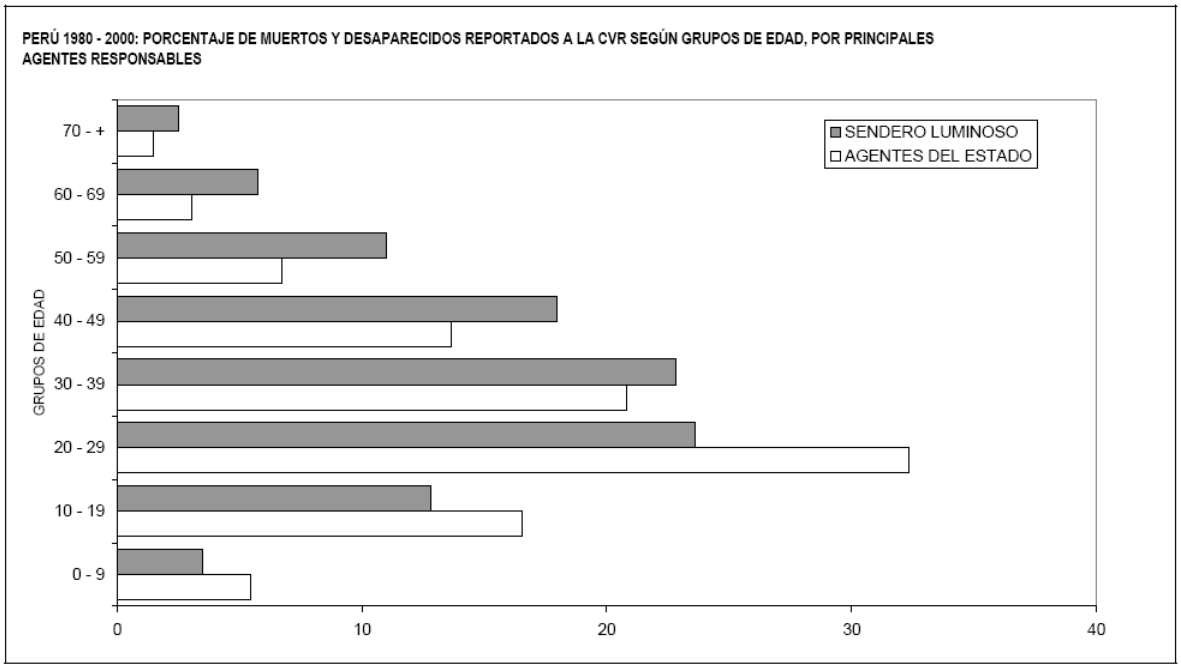
[33] Of special interest, refer to the Constitucional court ruling on the Anti-terrorist legislation. See: Corte Constitucional. Sentencia 0010-2002-AI of Juanary 3, 2003.

[34] See: Comisión de la Mujer y de Desarrollo Social del Congreso de la Republica. *Los niños y niñas de la Guerra: décadas del 80 – 2000. Para que no se repita nunca más. Violencia contra niños y niñas. Texto del informe final de la Comisión de la verdad y reconciliación.* Lima: 2004. Pág. 3

[35] See: Truth and Reconciliation Commission Final Report: Book VI, Section 4, Chapter 1, Subsection 1.8 "The violence against boys and girls", pages 585-626. In: http://www.cverdad.org.pe/ifinal/index.php

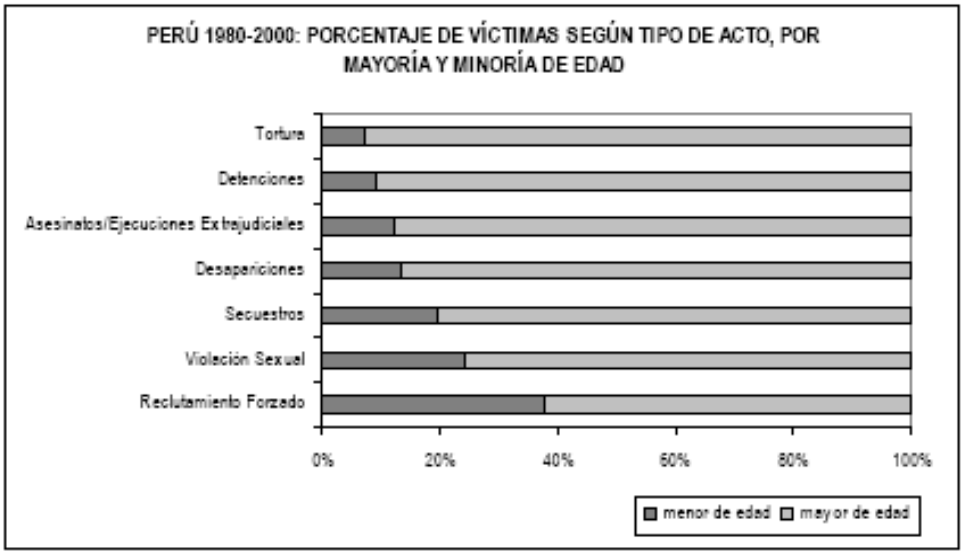
[36] Ibidem, page 585.

[37] See: Truth and Reconciliation Commission Final Report. Ob. cit., page 172.



SOURCE: PERUVIAN TRUTH AND RECONCILIATION COMMISSION

The TRC documented that during the internal armed conflict, the violence did not discriminate between adults and children. Crimes such as torture, forced disappearances, sexual violence, extrajudicial executions, arbitrary detention, among other crimes were committed against children by all parties in conflict, as it can be seen in the table below[38]:



SOURCE: PERUVIAN TRUTH AND RECONCILIATION COMMISSION

[38] Ibidem, page 586.

One point that must be highlighted is that the TRC recognizes that forced recruitment and kidnapping were focused on children. In the case of the Sendero Luminoso, children were caught and forced to participate in war activities and indirect tasks that permitted the conflict to continue[39]. The Peruvian Army, on the other hand, had as its habitual practice the immediate arrest of minors that were not carrying documents, leading to the detention and subsequent disappearance of hundreds of adolescents between the ages of 16 and 17[40].

The TRC estimates that 13.19% of all forced disappearances perpetrated during the armed conflict were committed on children[41]. In addition, many were interrogated to obtain admissions of guilt, tortured to terrorize the population and obtain information about their family members, and some were obliged to witness abuse and extreme violence committed against their parents, family, neighbors and friends.

In regards to the forced recruitment of children by State agents[42], the TRC considered it a systemic and generalized practice. In Peru, legislation prohibits the enlistment of persons under 18 years old. However, as the Commission concluded, "the Armed Forces used *raids* as a means of compulsory enlistment, imposing military service on children between 15 and 17 years of age, most coming from the rural and poor zones of the country, contravening national law, international human rights laws and international humanitarian law"[43]. In this manner, thousands of children from different parts of the country were 'raided' and taken to emergency zones to participate in anti-subversive actions, including as members of Comités de Autodefensa[44].

Regarding the recruitment and kidnapping of children, the TRC states that it constituted 42.34% of the crimes committed by Sendero Luminoso against children[45]. In the case of MRTA, this represented the 47.8%[46]. These practices were focused in Ayacucho, Huancavelica, Huanuco, Ucayali and Junin, departments that even today have the greatest indicators of poverty and social exclusion. The purpose of this action was to use them as child soldiers, messengers, and spies as well as to form the new generation of soldiers and members of the subversive groups.

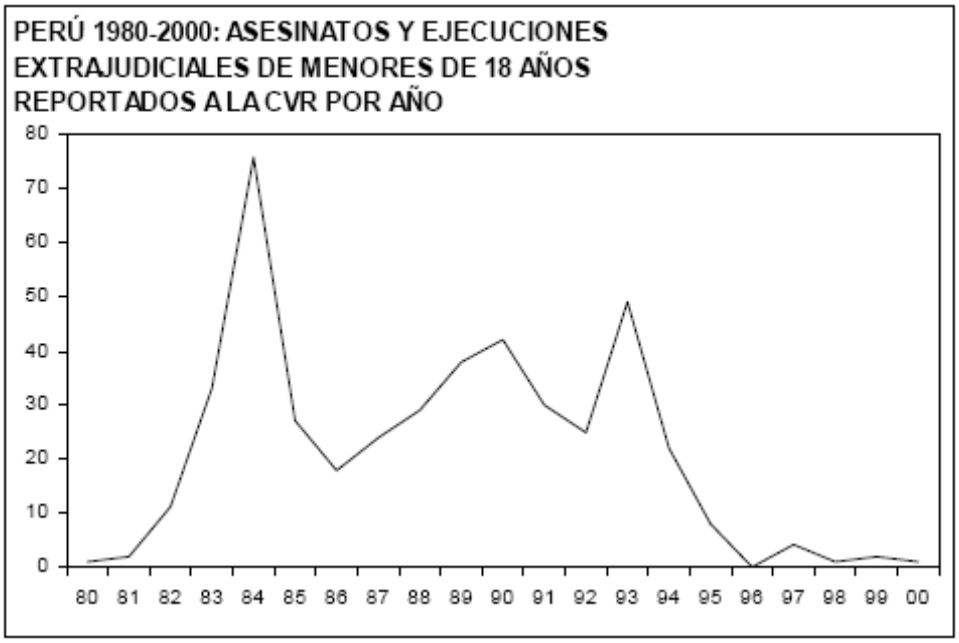
In another context, sexual violence also had as its target children and adolescents. In the case of State agents, sexual violence was used as a method of torture to obtain information from the victim or from one of the victim's family members[47]. The TRC has

[39] Ibidem, pages 612-620.
[40] Ibidem, pages 593-595.
[41] Ibidem, p. 593.
[42] Ibidem, p. 602-604.
[43] Ibidem, page 602. Unofficial translation by the author.
[44] These Committees were formed by representatives of local communities that were in charge of aiding the military on their fight against terrorism. Their support was fundamental to secure parts of the territory that were under the influence of subversive groups.
[45] Truth and Reconciliation Commission Final Report. Ob. cit., page 612.
[46] Ibidem, page 618.
[47] Ibidem, p. 601.

registered 85 cases of sexual violence, of which 70.59% are attributed to the State[48] and 18.82% to Sendero Luminoso[49].

Many extrajudicial executions, in fact, were preceded by sexual assault. Other forms of sexual violence were reported such as slavery or child sexual exploitation on military bases[50]. In subversive groups this practice was less frequent; nevertheless, the number of victims in comparison to adults was significant. The TRC indicated that despite rhetoric of the leadership of the subversive groups that sexual assault was not allowed, it was the leadership that most commonly committed this crime. Sexual assaults against children and adolescents were also perpetrated during withdrawals.

Murder of children was also a common practice during the conflict, especially by Sendero Luminoso. Of the 891 documented murders perpetrated against children, 49.72% were caused by this armed group[51]. The following graph shows the number of murders per year, where 1983 and 1988 were the most violent against children[52]:



SOURCE: PERUVIAN TRUTH AND RECONCILIATION COMMISSION

As it can be seen, the perpetration of crimes against children constituted almost 13% of all human right violations committed during the 1980s and 1990s in Peru. The peaks of violence against children were between three different periods. The first one was between 1983 and 1985, where the conflict began to substantially escalate. The second period

[48] Ibidem, p. 600.
[49] Ibidem, p. 611.
[50] Ibidem, p. 602.
[51] Ibidem, p. 605.
[52] Ibidem, p. 606.

refers to 1988-1990, singularized by the dirty war and the urbanization of the conflict. The third period would be between 1992 and 1994, possibly as a result of counterinsurgency practice against illegal armed groups.

Considering the time difference between these periods of violence and the instauration of the TRC, most of the children that suffered the consequences of the conflict were adults when they rendered their testimonies, as it can be seen from the table below:

TESTIMONIES PROVIDED TO THE TRC, DIVIDED INTO AGE GROUPS

AGE OF THE PARTICIPANTS	***TOTAL***	***REGIONAL SIEGES***				
		SEDE LIMA	***SEDE SUR CENTRAL***	***SEDE CENTRO***	***SEDE NOR ORIENTAL***	***SEDE SUR ANDINA***
TOTAL	***16382***	***2218***	***5742***	***3167***	***3392***	***1863***
18-24	*634*	***82***	***217***	***145***	***124***	***66***
25-34	*2634*	***340***	***911***	***527***	***573***	***283***
35-44	*4354*	***593***	***1376***	***870***	***992***	***523***
45 – 54	*3829*	***595***	***1293***	***733***	***762***	***446***
55 – 64	*2720*	***340***	***989***	***521***	***553***	***317***
65 and more	*2211*	***268***	***956***	***371***	***388***	***228***

SOURCE: PERUVIAN TRUTH AND RECONCILIATION COMMISSION

The challenge that still persists is the implementation of reparation programs and relocation measures to those children that were force to take arms by illegal armed groups and military forces and that were forced to migrate to urban areas in seek of safety and protection from violence.

In this sense, regardless of the advances in the prosecution of human right violations, the pending challenge remains in the enforcement of administrative measures. The fulfillment of the recommendations of the TRC should be reinstated in the political agenda. The main problem is that over the years, the TRC has suffered a politization campaign, where certain sectors of society have associated the institution and its former members as “pro-terrorist”. The consequence of unfounded accusations is that the adoption of public policies is deterred, in detriment of the population that have a right to access to reinstitution, reparation and reintegration programs.

In addition, the question that remains is what mechanism exists to push for the adoption of such policies. Independent of the political wills of a particular government, the

fundaments for the application of transitional justice in Peru originate from international legal obligations and the Constitution itself. As an example, Peru adopted in 2005 a Human Rights National Plan that as-of-today it has been implemented on a limited level. Considering that this has been enacted as a law and that it constitutes a public State policy, its enforcement and application should be taken into account by government agencies, the Ombudsman and civil society organizations.

Therefore, legal strategies via de instauration of local proceedings, especially those acknowledged by the Constitution, should be analyzed. The example of Colombian Constitutional Court's ruling regarding the situation of internally displaced children should be considered as a model to follow.

3.4 Children and Armed Conflict: The case of Colombia

The development of the process in Colombia is markedly different from that of Peru, not only in terms of the model used, which at the beginning had as its only objective to end the armed conflict, but also because that model evolved, due to pressures from the different international organizations and the Constitutional Court, in order to adjust itself to the dynamics demanded by transitional justice.

Colombia has implemented a set of legal reforms that have created a hybrid justic system that can be described as being a part of the transitional justice process, but which does not fulfill all the characteristics of transitional justice. That said, we must recognize a more active participation of children in the processes implemented by the Justice and Peace Law, and the creation of a special structure implemented by the different international human rights organizations capable of accompanying the Colombian process.

In this sense, the present scenario is "an unorthodox case, that the country is not living a process of overcoming the past as conceived in the traditional sense, like an effective transition toward a democratic regime. (…) There are complex mechanisms of a demobilization of actors, of a search to incorporate those actors into civilian life, of a neutralization of the war machines, of interesting adjustments in favor of the victims, of an understanding of the truth, of the search for reparation, both economic and moral. In conclusion, a complex processes with formulas and mechanisms of transitional justice, but not in itself a process of transitional justice"[53].

Out of this context emerged the Justice and Peace Law as well as a Truth Commission. The participation of children is not an issue in the Truth Commission, since the investigation is restricted to the events that occurred in the Palace of Justice in 1985, perpetrated by the M-19 irregular group, events in which no children were involved.

The Justice and Peace Law, enacted through Law 975 of 2005, has as its antecedent Law 782 of 2002, or the Pardon Law, which permits the amnesty or pardon of individuals

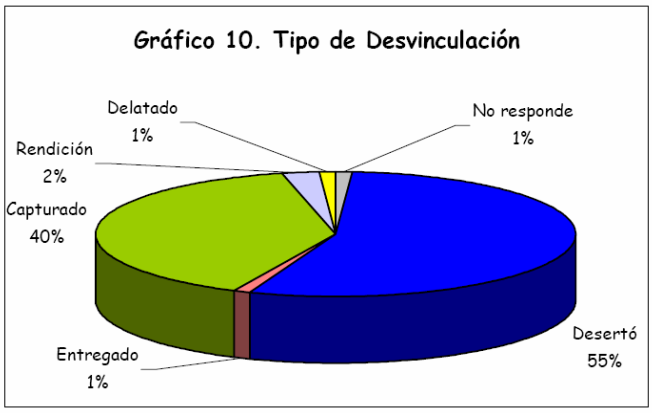
[53] APONTE CARDONA, Alejandro. *Justicia de Transición en América Latina: El caso Colombiano. Bogotá*, 2008, page 4. Translation by the author.

belonging to armed groups, but only referring to political crimes. Nevertheless, given that in the law the components of justice, truth and reparation were not explicit, these elements were progressively incorporated, through intense debate and due to great pressure from the international community, leading to the modifications established by the Constitutional Court through Sentence No. C-370 of 2006. This process gave birth to the Justice and Peace Law, a mechanism that attempts to incorporate minimum international standards and minimum content regarding peace, justice and reparation.

Under the Justice and Peace law, demobilized combatants must provide testimony, freely given, that provides information about their membership in the group and the activities they engaged in with that group. They also have to confess to all the crimes they have committed, to the best of their knowledge. If they omit a crime, or if they do not accept the charges given by the Attorney's Office, the case passes over to the ordinary justice system, causing a rupture in procedural unity. On the other hand, if crimes are confessed to that fall under Law 782 of 2002, the benefits of that law can be extended to the defendants.

Proceedings under this Law have faced different challenges and postponements, including the extradition to the United States of paramilitary leaders, in order for them to be prosecuted under charges of drug trafficking. This has been criticized by several organizations in the way that such extradition would halt local prosecutions for crimes against humanity and other human right violations.

One aspect that is worth referring to is demobilization of children that were part of paramilitary groups. Despite the considerable number of child soldiers, the Ombudsman published a report criticizing the lack of surrender of children and adolescents during such demobilizations. In this sense, the Ombudsman reported that paramilitary leaders ordered children to return to their homes, preventing their participation in official demobilization acts. According to their statistics, only 1% of demobilized children were surrendered by paramilitary groups under the terms of the Justice and Peace Law[54].



Source: Colombian Ombudsman (2007)

[54] Nota de prensa de fecha 28 de agosto de 2008 de la Defensoria del Pueblo de Colombia. Ob. CIt.

Another aspect that is worth mentioning is that the Justice and Peace law incorporates measures for the protection of victims and witnesses. The law states that judiciary authorities must create a special system to assure special protection mechanisms according to the age, gender, health, dignity and privacy of all parties in the proceeding[55].

Regarding the participation of children, judges may determine that when a child or adolescent renders its testimony, this may be done in a private environment or via audio-video devices. This is of special importance when dealing with children that have been victims of sexual crimes[56]. Overall, the Special Prosecutor's Office must adopt necessary mechanisms to protect children and women intervening under the Justice and Peace Law[57].

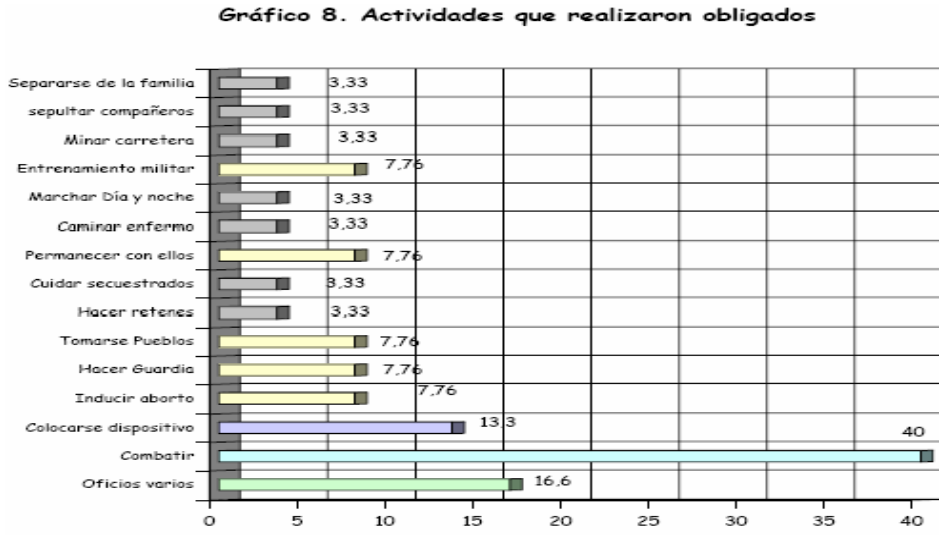
Despite this legal framework, security of victims and witnesses has not been fully protected. The Constitutional Court stated on its T-496/08 ruling that the Special Protection Program of the Justice and Peace Law (*Programa Integral de Protección de Victimas y Testigos de la Ley de Justicia y Paz*) had failed to fulfill its purpose, ordering the General Prosecutor's Office and the Ministry of Justice and Interior to adopt the necessary measures to correct structural problems in the protection and participation of witnesses and victims.

In addition, despite considerable improvement in social and economic indicators in recent years, the prevalence of armed conflict (which has lasted more than forty years) has worsened, growing in magnitude and intensity, managing to spread itself over all the national territory, and involving an ever growing number of social actors[58]. The evolution of the Colombian armed conflict has caused high human, social, economic and political costs, as well as violations of Human Rights and International Humanitarian Law[59].

In this context, millions of Colombian children linked to the armed groups involved in hostilities have had their right to life and integrity and personal and sexual freedoms negatively affected, as well as other violations that have put them in a state of vulnerability. The Colombian Intersectorial Committee for the Prevention of forced recruitment of children estimates that there are between 8000 and 14000 children linked to illegal armed groups[60].

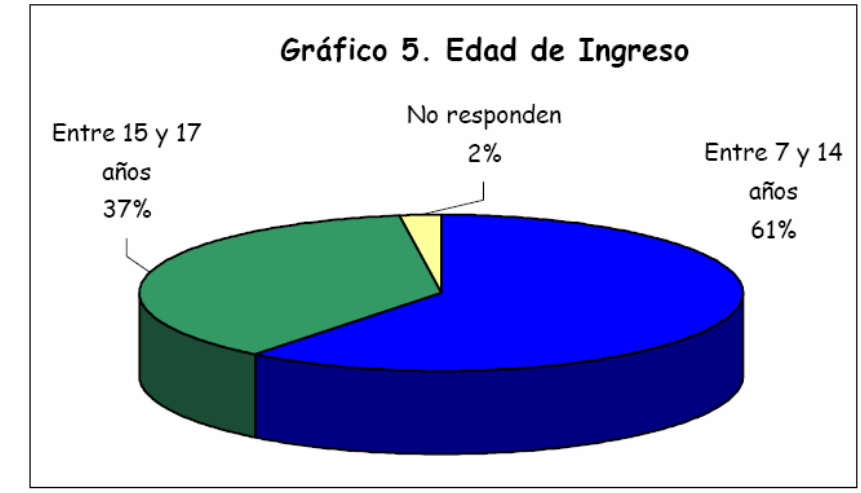
[55] Ley de Justicia y Paz de 2005. Articulo 38.
[56] Ibidem. Articulo 39.
[57] Ibidem. Artículo 41.
[58] See: Colombia's Third Report to the Committee on the Rights of the Child. CRC/C/129/Add.6 del 24 de agosto de 2005, paragraph 81. According to this report, in 1985, 17% of the municipalities had the presence of illegal armed groups. In 1995, their presence was in 58% of the municipalities. If it were to include other armed groups, by 1995, 75% of Colombia municipalities suffered a direct consequence of the armed conflict.
[59] Ibidem, paragrpahs 81-83.
[60] See: Comisión Intersectorial para la Prevención del Reclutamiento y Utilización de Niños, Niñas y Adolescentes por grupos organizados al margen de la Ley. *Segundo Informe de gestión de la Secretaria Técnica*. Bogotá: Diciembre de 2008, p. 7-8.

In a report on the psycho-social conditions of such children elaborated by the Ombudsman's Office in 2005, 35% of the minors interviewed claimed to have felt obliged to participate in activities in which they did not want to participate, including: military training (96.51%), various tasks (86%), combat (81%) and killing (40%)[61].



Source: Colombian Ombudsman Office.

The main form of child victimization in war is their participation as combatants. In this regard, the Ombudsman's Office in Colombia has determined that children have been recruited by illegal armed groups in 27 of the 32 departments of Colombia, and that this recruitment occurred between the ages of 5 and 7, the average age being 12.8.



Source: Colombian Ombudsman Office

Moreover, the report sustained that 52.6% of children linked to the armed conflict experienced episodes of severe violence before their recruitment through massacres

[61] See: Defensoria del Pueblo. *La Niñez y el conflicto armado en Colombia*. Informe N° 9, Bogotá, 2007.

(48.9%), forced displacement or the forced displacement of a family member (24%), murder of a family member (37%), threats (22.2%), or family members in armed groups (60%). Other findings: 15% of boys and 25.2% of girls indicated that violence and lack of affection in their families were factors in their entrance into armed groups; the average education attainment was Grade 4.05; and 90% claimed to have realized at least one type of non-domestic or domestic productive activity before their entrance into the armed group. Additionally, the report noted with concern that 71.8% of the children mentioned that they had had their first sexual experience between 5 and 13 years of age, suggesting that they were victims of sexual crimes.

Age of first sexual relation of children linked to illegal armed groups (2005)

Age	Gender			
	Female		*Male*	
	N	***%***	***N***	*%*
5	*1*	*0,6*	*3*	***0,9***
6	*0*	*0*	*2*	***0,6***
7	*1*	*0,6*	*18*	***5,3***
8	*6*	*3,8*	*12*	***3,6***
9	*2*	*1,3*	*10*	***3***
10	*7*	*4,5*	*43*	***12,7***
11	*13*	*8,3*	*45*	***13,3***
12	*25*	*15,9*	*96*	***28,4***
13	*25*	*15,9*	*38*	***11,2***
14	*41*	*26,2*	*42*	***12,4***
15	*29*	*18,5*	*14*	***4,1***
16	*1*	*0,6*	*7*	***2,1***
17	*0*	*0*	*3*	***0,9***
Doesn't know	*6*	*3,8*	*5*	***1,5***
Total	*157*	*100*	*338*	*100*

Sexual violence is another of the scourges that children find themselves subjected to at the hands of all groups in conflict in the country. According to the report of the Coalition Against the Participation of Children and Youth in the Colombian Armed Conflict, "paramilitary groups and State forces continue to realize actions that negatively affect the personal integrity of women, gravely affecting their sexual and reproductive rights, and making it very difficult for young women and girls to enjoy the right to a life free of violence." Amnesty International, in a report published in 2004, concluded that "in the course of the 40 years of the Colombian conflict, each of the armed groups – security forces, para-militaries, and guerrilla – sexually abused and exploited women, both civilians and their own combattants, making these women and girls into the hidden victims of the war." The report details, among other violations, sexual assault, forced abortion, forced contraception, sexual slavery and genital mutilation".

On the other hand, according to the Coalition against the Participation of Children and Youth in the Colombian Armed Conflict, there has been an increase in the extra-judicial killing of children by members of the security services, who, in some cases, have presented their bodies before judicial authorities and the media as insurgents killed in combat[62]. The Committee for the Rights of the Child expressed its preoccupation regarding "the numerous cases of violence committed by regular military forces in which children have been killed, and in particular cases in which the Army falsely reported that the children had been killed in combat, and the persistent pattern of existing impunity and the on-going tendency to remit cases of grave violations of human rights to the military justice system"[63].

The personal freedoms of children have also been gravely compromised. Coalition Colombia has been able to document a large amount of cases where the FARC-EP has taken children as hostages in order to extort money from their families. In 2006, "the illegal detainment of entire families accused of providing support to the FARC-EP, [presumably by paramilitaries], was denounced on various occasions. These cases reportedly occurred even when the paramilitaries were theoretically in a ceasefire. In some cases, moreover, these situations occurred only meters away from military bases"[64].

The forced displacement of the civilian population in the midst of the irregular war in Colombia is a phenomenon that acquires additional gravity since "it affects children and youth that, from a condition of severe vulnerability, confront situations of violence and uprooting that affect their rights, complicate their present, and make their future uncertain"[65]. The problem of displacement as a consequence of the worsening and expansion of the armed conflict represents one of the most serious violations of human rights. It also contributes to an increase in the conditions of poverty and vulnerability of the population, through the destruction of the bases of social organization, and through the deterioration of human capital, (as a result of a fall in income of the affected population and of the effect that the uprooting has on their capacity to be the agents of change in their own life)[66].

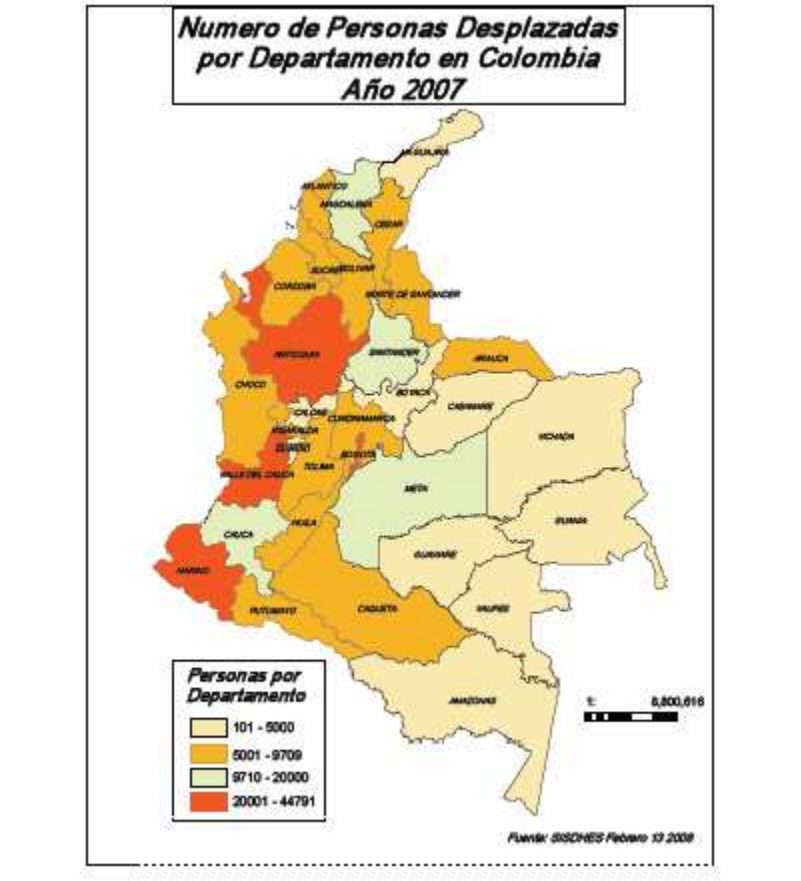
[62] COALICIÓN CONTRA LA VINCULACIÓN DE NIÑOS, NIÑAS Y JÓVENES AL CONFLICTO ARMADO EN COLOMBIA. Informe sobre la situación de niños, niñas y jóvenes vinculados al conflicto armado en Colombia: Falencias en el proceso de desvinculación de niños, niñas y jóvenes de los grupos paramilitares. Washington: CEJIL, julio de 2007.

[63] See: Amnistía Internacional. *Colombia: Cuerpos marcados, crímenes silenciados. Violencia Sexual contra las mujeres en el marco del conflicto armado.* AMR 23/040/2004, 2004.

[64] COALICIÓN CONTRA LA VINCULACIÓN DE NIÑOS, NIÑAS Y JÓVENES AL CONFLICTO ARMADO EN COLOMBIA. Ob. Cit, page 3.

[65] Consultoria para los Derechos Humanos y el desplazamiento (CODHES). *Esta guerra no es nuestra y la estamos perdiendo. Desplazamiento forzado y derechos de la infancia*. Boletín N° 32 de la Consultoría para los Derechos Humanos y el Desplazamiento. Bogotá, Colombia, 26 de enero de 2000. Pág. 2

[66] See: Comité de Derechos del Niño. Observaciones Generales al Informe presentado por los Estados, Colombia. Ob. Cit. Párrafo 89



SOURCE: CODHES, 2007.

CODHES, a local NGO, estimates that in the last two decades of armed conflict in Colombia, more than 2.3 million children and adolescents were victims of forcibly displaced[67]. As well, according to official statistics, the number of displaced persons grew from 1,056,008 between 1995 and 2002, to 1,243,581 in 2003. These statistics estimate that 48% of displaced persons are women and 44% are school-age minors between the ages of 5 and 14. In terms of ethnic group, 18% of the displaced population is Afro-Colombian and 5.4% is indigenous[68].

Regarding this situation, in 2004 the Constitutional Court determined that the condition of internally displaced persons, especially children, constituted a systematic violation of their fundamental rights. As a consequence, the Court ordered Ministries, Welfare programs and other governmental institutions to adopt concrete measures for the protection and reintegration of the displaced people. The Constitutional Court, according to the law, recognized its attribution to monitor progresses made on this field. The last report issued by the Court[69] was issued on October 2008, where it stated that despite the

[67] Consultoria para los Derechos Humanos y el desplazamiento. CODHES. *Desplazamiento Forzado y Enfoques diferenciales.* Documento CODHES N° 9, Bogota: 2008. Pág. 101
[68] See: Comité de Derechos del Niño. Observaciones Generales al Informe presentado por los Estados, Colombia. Ob. Cit. Párrafo 91.
[69] See: Corte Constitucional de Colombia. Auto 251/08 del 6 de octubre de 2008.

efforts made by the State, the situation of children and armed conflict has not significantly improved.

Moreover, the Court considers that the government's answer to the needs of displaced children and adolescents has been: (i) fragmented and not general nor systematic; (ii) not able to address the problem specifically; (iii) late; (iv) lacking the necessary resources to cover the needs and satisfy the rights of children; (v) merely legalistic and formal without proper execution mechanisms; and (vi) a failure in the implementation of prevention programs[70].

In this sense, the Court states that it will continue to monitor State actions on this field, ordering, among other things[71]:

- the design and implementation of a new prevention program directed to children and armed conflict;
- the design and execution of pilot programs in different cities and rural areas of the country, aiming to a nationwide application;
- the specific protection of children and adolescent displaced that have been identified and singularized by the Court;
- the application of a intersectorial program to solve the problem of landmines.

The significance of this action taken by the Court is that in practice, the judiciary has forced the government to enact, adopt and coordinate efforts to deal with the situation of the millions of Colombian displaced as a consequence of the armed conflict. This does not have an approach based on human rights obligations or the situation of children but if forces different agencies to determine a common parameter under which security, drug trafficking, military operations and human rights programs must be fulfilled in regards to the internally displaced people in Colombia. In addition, incompliance by the State could amount to international State responsibility, before the Inter-American system and before the United Nations.

The additional point that is worth considered is that the trigger-mechanism of this decision has been a petition made by representatives of enforced displaced people and their families. This could suggest that in countries with a strong and independent constitutional jurisdiction, a single claim could create a public policy over such matters, pushing forward transitional justice mechanisms.

4. CHALLENGES AND PERSPECTIVES

Transitional justice experiences in Colombia and Peru is a still on-going process. The importance of these cases is that the application of transitional justice mechanism can still be made. As it can be seen, despite specific programs, there has been a lack of holistic approach to transitional justice. In this sense, the role of the judiciary along with

[70] Ibidem. Section 2: Valoración constitucional general de la respuesta estatal. Free translation.
[71] Ibidem. Section 6: Decisión of the Court. Free translation

administrative measures must be strengthen in order to successfully adopt transitional justice programs.

However, transitional justice still have challenges to face and some of the problems that lie ahead in Colombia and Peru are the following:

- 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.

- 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.

- The oversight provided by the IACHR assures that the rights of victims, the enforcement of constitutional rights and the right to reparations must be met by governments. However, especially in the application of judiciary mechanisms, certain sectors begin to see that the IACHR jurisprudence do not respect the principle of equality of arms during criminal proceedings, considering that this differentiated criminal system has trends that resemble "enemy criminal law".

- The challenge of the IACHR in future cases is to assure that the right of defense and the rights of the victim are equally met and satisfied. In this sense, 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 (approximately 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?

5. BIBLIOGRAPHY

- **AMNISTIA INTERNACIONAL.** *Colombia: Cuerpos marcados, crímenes silenciados. Violencia Sexual contra las mujeres en el marco del conflicto armado.*

- **APONTE CARDONA, Alejandro.** *Justicia de Transición en América Latina: El caso Colombiano.* 2008.

- **ASOCIACIÓN PRO DERECHOS HUMANOS (APRODEH).** *Plan Integral de reparaciones. Informe final de la Comisión de la Verdad y Reconciliación.* Versión resumida. Lima: APRODEH, octubre de 2003; 40p.

- **_. «Hasta sus menorcitos ahora lloran...». 1980 - 2000: Violencia contra niños, niñas y adolescentes.** Selección de textos del Informe Final de la Comisión de la Verdad y Reconciliación. — Lima: APRODEH, 2004. 154p.

- **CATEDRA CIRO ANGARITA POR LA INFANCIA.** Niñez y Conflicto Armado: Desde la desmovilización hacia la garantía integral de derechos de la infancia. Memoria Anual 2002. Primera edición. Bogota: Universidad de los Andes, 2003. 96p.

- **CENTRO DE ASESORIA LABORAL DEL PERÚ.** *Plan nacional de derechos humanos del Perú.* Lima: CEDAL, diciembre de 2005. 138p.

- **COALICIÓN CONTRA LA VINCULACIÓN DE NIÑOS, NIÑAS Y JÓVENES AL CONFLICTO ARMADO EN COLOMBIA.** *Informe sobre la situación de niños, niñas y jóvenes vinculados al conflicto armado en Colombia: Falencias en el proceso de desvinculación de niños, niñas y jóvenes de los grupos paramilitares.* Washington: CEJIL, julio de 2007; 25p.

- **COMISION DE LA MUJER Y DESARROLLO SOCIAL DEL CONGRESO DE LA REPUBLICA.** *Los niños y niñas de la guerra. Décadas del 80 – 2000. Para que no se repita nunca más.* Lima: Congreso de la Republica, Noviembre de 2004; 64 p.

- **COMISION DE LA VERDAD Y RECONCIALIACIÓN.** *La violencia contra las niñas y los niños.* Informe Final. Tomo VI, sección cuarta, Capitulo 1. Lima: CVR, 2003.

- **COMISION INTERAMERICANA DE DERECHOS HUMANOS.** *Lineamientos Principales para una Política Integral de reparaciones.* Documento OEA/Ser/L/V/II.131 aprobado por la Comisión el 19 de febrero de 2008.

- Informe sobre el Proceso de Desmovilización en Colombia. Documento OEA/Ser.L/V/II.120 del 13 diciembre de 2004.

- Informe sobre la implementación de la Ley de Justicia y Paz: Etapas iniciales del Proceso de desmovilización de las AUC y primeras diligencias judiciales. Documento OEA/Ser.L/V/II.129 del 2 octubre de 2007.

- **COMISIÓN NACIONAL DE REPARACIÓN Y RECONCILIACIÓN, (CNRR).** *Recomendación de criterios de reparación y de proporcionalidad restaurativa.* Primera edición. Bogotá: CNRR, abril de 2007; 151p.

- **CONSULTORIA PARA LOS DERECHOS HUMANOS Y EL DESPLAZAMIENTO (CODHES).** *Tras las huellas del conflicto.* Serie Documentos CODHES Nº 8. Bogota: CODHES, febrero de 2008; 89p.

- *Desplazamiento forzado y enfoques diferenciales.* Serie Documentos CODHES Nº 9. Bogota: CODHES, febrero de 2008; 122p.

- **DEFENSORIA DEL PUEBLO.** *Caracterización de los niños, niñas y adolescentes desvinculados de los grupos armados ilegales; Inserción social y productiva desde un enfoque de derechos humanos.* Bogota: Defensoria del Pueblo, 2006; 325p.

- **DUE PROCESS OF LAW FOUNDATION Y COMISIÓN DE DERECHOS HUMANOS DEL DISTRITO FEDERAL (edit).** *Victims Unsilenced. The Inter-American Human Rights System and Transitional Justice in Latin America.* Primera edición en inglés. Washington, 2007. 269p.

- **INSTITUTO DE DEMOCRACIA Y DERECHOS HUMANOS DE LA PONTIFICIA UNIVERSIDAD CATÓLICA DEL PERÚ (IDEHPUCP).** *Procesamiento de Violaciones de Derechos Humanos en el Perú. Características y Dificultades.* Primera edición. abril de 2006.

- **MACHER, Sofía.** *Memoria, justicia y reparación, y su relación con el Estado.* PP. 166 – 169. En: COORDINADORA NACIONAL DE DERECHOS HUMANOS. *Memorias y justicia para la inclusión. Seminario Internacional, 21 y 22 de febrero de 2005.* Primera edición. Lima: CNNDDHH, abril de 2005; 169p.

- *Recomendaciones versus Realidades: Avances y desafios en el Post CVR Perú.* Primera edición. Lima: IDL, setiembre de 2007. 133p.

- **MAQUEL, Graça.** *The impact of war on children.* Malaysia: UNICEF, 2001; 230p.

- **SAVE THE CHILDREN SUECIA.** La violencia contra las niñas y los niños. Informe de la Comisión de la Verdad y Reconciliación. Primera edición. Lima: SAVE THE CHILDREN UK, junio de 2005. 94 p.

- **UPRIMNY YEPES, Rodrigo (coord.).** *¿Justicia transicional sin transición? Reflexiones sobre verdad, justicia y reparación en Colombia.* Bogota: CDJ, 2005. 179p.