

**Innocenti Working Paper**

**TRANSITIONAL JUSTICE AND THE  
SITUATION OF CHILDREN IN  
COLOMBIA AND PERU**

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The Children and Transitional Justice Working Paper Series is intended to generate dialogue and consensus, and to better inform children's protection and participation in ongoing or planned transitional justice processes in diverse country situations. Based on experience, the papers document and identify challenges, dilemmas and questions for further debate and formulate recommendations to better protect the rights of children involved in transitional justice processes.

The research conducted has created broad interest and visibility, helping establish a child rights-based approach to transitional justice that addresses advocacy, policy and programme concerns within UNICEF and among partners. Key areas of focus include:

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The identification of topics and authors in this Working Paper Series was undertaken in the context of strategic partnerships with the Human Rights Program at Harvard Law School, and the International Center for Transitional Justice (ICTJ). The review of the Series was guided by a peer review oversight panel, chaired by Jaap Doek. A network of practitioners, academics, legal experts and child rights advocates participated in the peer review. The Series was initiated and overseen by Saudamini Siegrist, with the support of Ann Linnarsson.

An Expert Discussion on Children and Transitional Justice was convened by UNICEF Innocenti Research Centre (IRC) in June 2008 to provide comments to individual authors and to assess the range and coverage of the Series. A subsequent conference on Children and Transitional Justice was jointly convened by the Human Rights Program at Harvard Law School and IRC in April 2009 in Cambridge, MA USA.

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This series of Working Papers supports and complements the publication *Children and Transitional Justice: Truth-Telling, Accountability and Reconciliation*, edited by Sharanjeet Parmar et al., published by the Human Rights Program, Harvard Law School, Cambridge, MA, March 2010.

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# Transitional Justice and the Situation for Children in Colombia and Peru

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**Summary:** This working paper provides an overview of the transitional process in Colombia and Peru, focusing on the situation of children. The adoption of judicial and administrative measures to deal with human rights violations from the past (Peru) and the present (Colombia) is a tool towards the consolidation of democratic institutions. While individual initiatives have been undertaken in both countries, addressing the situation of children in an integrated, comprehensive way is a persistent challenge, as is the exploration of legal tools as a means to demand responsibility.

**Keywords:** transitional justice, children, Colombia, Peru, Truth and Reconciliation Commissions

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## Contents

<b>1. INTRODUCTION .....</b>	<b>1</b>
<b>2. TRANSITIONAL JUSTICE IN COLOMBIA AND PERU.....</b>	<b>2</b>
<b>3. CHILDREN AND THE TRUTH AND RECONCILIATION PROCESS.....</b>	<b>4</b>
3.1 THE PERUVIAN EXPERIENCE.....	5
3.2 THE COLOMBIAN EXPERIENCE .....	10
<b>4. THE FAILURE TO PROSECUTE VIOLATIONS AGAINST CHILDREN .....</b>	<b>10</b>
<b>5. PUBLIC POLICIES AND REPARATIONS TO CHILDREN: A PERSISTENT CHALLENGE.....</b>	<b>12</b>
<b>6. CONCLUSIONS.....</b>	<b>14</b>
<b>REFERENCES.....</b>	<b>16</b>



# 1. INTRODUCTION

This working paper analyses the measures adopted in Colombia and Peru to address children who have been victims of violations of human rights and international humanitarian law. Due to the gravity of the crimes committed, it is important to address the administrative, legal and judicial measures adopted to in bringing peace to these countries.

The main period of the conflict in Peru was 1980 to 2000, when *Sendero Luminoso* (Shining Path) and the *Movimiento Revolucionario Tupac Amaru* (MRTA) guerrillas initiated a conflict against the State. According to the Peruvian Truth and Reconciliation Commission, the conflict gave rise to approximately 69,000 victims, mainly in rural areas of the Andes. Children were recruited by guerrillas and were victims of human right violations such as extrajudicial executions, torture and enforced disappearances. The main period of violence was the late 1980s and the early 1990s, before the principle leaders of the guerrilla groups were arrested and convicted on grounds of terrorism and treason.

In Colombia, the conflict has been focused on (but not limited to) the *Fuerzas Armadas Revolucionarias de Colombia- Ejército del Pueblo* (FARC), *Ejército de Liberación Nacional* (ELN) and paramilitary groups, commonly known as *Autodefensas Unidas de Colombia*. Over nearly 50 years this conflict has been characterized by a combination of attacks on civilian populations, violations of international humanitarian law, terrorism and drug trafficking activities. The main crimes committed against children have been recruitment by armed groups and kidnapping, forcing the displacement of approximately 2.8 million people, according to the United Nations High Commissioner for Refugees.<sup>1</sup>

Two key elements in this assessment are the role of international law in consolidating democratic institutions and the interpretation of international obligations relative to each country's constitution. Regarding international law, in both countries international human rights treaties are part of the Constitution itself (*bloque de constitucionalidad*) and can be enforced directly by national tribunals. The interpretation of these legal instruments vis-à-vis children could have a significant role in the pursuit of truth and compensation for victims, most of whom live in rural areas, are poor and belong to a vulnerable group, such as women, children and indigenous communities.

Interpretation of international obligations in light of the constitution has led to adoption of judiciary and administrative measures to consolidate the rule of law in both countries. In addition, rulings of the Inter-American Court of Human Rights (IACHR) have established a precedent that domestic human rights proceedings must apply, in accordance with the American Convention on Human Rights.

Neither country's government has adopted integrated policies to address the situation of children, nor have they allocated resources or institutional support to children affected by the conflicts. Programmes have been implemented addressing the situation of internally displaced persons and children recruited by armed forces, but as of today, a policy to address

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<sup>1</sup> See: [www.acnur.org/t3/crisis/crisis-humanitaria-en-colombia/desplazamiento-interno-en-colombia/](http://www.acnur.org/t3/crisis/crisis-humanitaria-en-colombia/desplazamiento-interno-en-colombia/).

the socio-economic harm on children caused by violence is yet to be adopted. In this sense, these measures are more reactive than preventive.

## **2. TRANSITIONAL JUSTICE IN COLOMBIA AND PERU**

Transitional justice has emerged in different contexts in the two countries. In Peru, transitional justice measures were adopted after the significant defeat of Shining Path and the MRTA. The transition embodied the restoration of a democratic regime after President Alberto Fujimori resigned and was declared morally unfit for office by Congress. A transitional government, headed by Mr. Valentín Paniagua, took office in November 2000. At this point the jurisdiction of the Inter-American Court of Human Rights was re-recognized, the Rome Statute of the International Criminal Court was ratified and the Truth and Reconciliation Commission (TRC) was created.<sup>2</sup>

The key elements of the mandate of the Peruvian TRC included (i) analyse the social, economic and political conditions that gave rise to the conflict; (ii) contribute to the establishment of the truth regarding the crimes committed by all parties involved; and (iii) establish a reparation programme for victims. In addition, the TRC was assigned to determine the relative responsibility for human rights violations committed by guerrilla groups, paramilitary groups and State agents, focusing on the perpetration of kidnapping, enforced disappearances and torture. Regarding the situation of children, a specific section of the TRC final report covered the violence committed against them by guerrilla groups and State agents (discussed later in this paper).

In Colombia, the transitional justice measures adopted or achieved to date include (i) the Justice and Peace Law; (ii) a National Commission on Reparation and Reconciliation;<sup>3</sup> (iii) demobilization of paramilitary groups; and (iv) implementation of disarmament, demobilization and reintegration (DDR) programmes. The situation is somewhat unorthodox in that, because the conflict continues, the country is not undergoing a typical transition towards a democratic regime. Rather the complex process involves demobilization of combatants and an effort to incorporate them into civilian life, disarmament, assistance to victims, efforts to understand the truth, and the search for reparation, both economic and moral. It is “a complex process with formulas and mechanisms of transitional justice, but not in itself a process of transitional justice.”<sup>4</sup>

This ‘transition process without a transition’<sup>5</sup> means that, despite significant advances in terms of security, demobilization of paramilitary groups and key military victories against the FARC and the ELN, the conflict persists. Especially affected are those in rural areas, with continuing recruitment of children by FARC, leading the internally displaced to migrate to

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<sup>2</sup> See: Decreto Supremo No. 065-2001-PCM, and Decreto Supremo No [101-201-PCM](#), available at [www.cverdad.org.pe](#).

<sup>3</sup> See: [www.cnrr.org.co/](#).

<sup>4</sup> Aponte Cardona, Alejandro, *Justicia de Transición en América Latina: El caso Colombiano*. Bogotá, 2008, page 4 (translation by the author).

<sup>5</sup> Uprimny, Rodrigo (et al.), ‘¿Justicia Transicional sin transición? Verdad, justicia y reparación para Colombia’, Centro de Estudios de Derecho, Justicia y Sociedad, Bogotá, 2006.

urban areas in search of security This means that policy development reflects the tension in the struggle for peace, and the peace-justice-reconciliation relationship divides society.

The debate over the Justice and Peace Law,<sup>6</sup> focused on the degree of truth and justice it could achieve, is an example of this situation.<sup>7</sup> Yet a number of transitional justice measures have been initiated. In addition to adoption of the Justice and Peace Law and its subsequent Decree 1290 regarding individual administrative reparations, the National Commission on Reparation and Reconciliation<sup>8</sup> has been formed, paramilitary groups have been demobilized and disarmament, demobilization and reintegration (DDR) programmes have been implemented.

The Colombian and Peruvian cases are complex and distinct. Although the time period of the conflicts has differed, it is interesting to analyse the role of international law in the implementation of transitional mechanisms and reparation programmes. In addition, it is worth mentioning that the conflicts share four common characteristics:

- The conflicts originated in an ideological struggle for power, not a struggle based on race, ethnicity or religion.
- These conflicts are or were between a national government and illegal armed groups in state territory.
- With few temporary exceptions, governments have maintained 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 children associated with armed forces, or internally displaced persons.

**Table 1 summarizes the transitional justice framework for Colombia and Peru:**

	<b>Colombia</b>	<b>Peru</b>
<b>Judicial Measures</b>	- Constitutional Court - Justice and Peace Law system <sup>9</sup> - Supreme Court of Justice	- Constitutional Tribunal - Sala Penal Nacional <sup>10</sup> - Supreme Court of Justice
<b>Non-judicial Measures</b>	- National Commission on Reparation and Reconciliation - Reparation programme established under Law 286 (1995) - Administrative reparations under Decree 1290 of 2008 - DDR and social programmes	- TRC: Final report published August 2003 - National Reparation Council - Psychosocial attention to victims - Adoption of National Human Rights Plan (December 2005)
<b>Oversight</b>	Rulings of the Inter-American Court of Human Rights and oversight by United Nations agencies.	

<sup>6</sup> See: Ley 975 de 2005.

<sup>7</sup> See: Corte Constitucional de Colombia, *Sentencia C-370/06*, adopted 18 May 2006, and Comision Colombiana de Juristas, 'Anotaciones sobre la Ley de Justicia y Paz: Una mirada desde los derechos de las víctimas', Comisión Colombiana de Juristas, Bogotá, 2007.

<sup>8</sup> Under the Justice and Peace Law, the National Commission on Reparation and Reconciliation has the following mandate: (i) recommend the implementation of an institutional programme of collective reparations; (ii) assure the victims' participation in judicial proceedings; (iii) present a report regarding the origin of illegal armed groups and their activities; and (iv) verify the reincorporation of demobilized members of illegal armed groups.

<sup>9</sup> See: Ley 975 de 2005.

<sup>10</sup> Responsible for prosecuting defendants charged with terrorist activities and grave human rights violations.

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

The situation of children in the transitional justice process differs in the two countries. In Peru, the TRC documented crimes committed against children, including recruitment by Shining Path and MRTA as well as the military. The TRC estimated that approximately 40 per cent of the people forcefully recruited by Shining Path were children under the age of 18.<sup>11</sup> Yet the situation of children was not as visible as in Colombia. This may be because during the most difficult period of the conflict in Peru, especially during the 1980s, the country had not ratified international treaties, and violence against children was not a priority issue. Despite the fact that the 1959 United Nations Declaration on the Rights of the Child had been adopted and the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights were in force, knowledge about them and their application was practically non-existent. In Colombia and Peru, as well as in other Latin American countries, the application of international law only began during the 1990s, with the adoption of new constitutions (Colombia in 1991 and Peru in 1993) or other substantial reforms.

The publication of Peru's TRC report in 2003 improved understanding of the scale of the conflict and emphasized the vital importance of non-judicial measures such as institutional changes, collective reparation and the adoption of a National Human Rights Plan and DDR programmes. In terms of children's issues, the challenge remains how to apply international law, especially in terms of reparations, to a situation that took place before human rights and international humanitarian law obligations were in force.

In Colombia, the nature of the internal armed conflict underlined the plight of children caught in it, considering that a significant proportion of the displaced population are children and that illegal armed groups continue to forcibly recruit minors, which constitutes a war crime under the Rome Statute of the International Criminal Court. The challenge is how to overcome a turbulent present and how to apply effective reintegration and reparation programmes.

### **3. CHILDREN AND THE TRUTH AND RECONCILIATION PROCESS**

The protection of child rights has advanced significantly in international human rights law, particularly since the Convention on the Rights of the Child (CRC) came into effect (1990). With the entry into force of the Optional Protocol on the involvement of children in armed conflict (2002), the issue of children and armed conflict has achieved a higher profile and the legal scenario has improved.

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<sup>11</sup> *Truth and Reconciliation Commission Final Report*, vol. VI, section 4, chapter 1, subsection 1.8, 'The violence against boys and girls', p. 605.

The current trial for war crimes of Thomas Lubanga Dyilo before the International Criminal Court for enlisting and conscripting children under the age of 15 is a step towards the abolition of this practice. A conviction in this case could have implications for Colombia, considering that the seven-year moratorium on war crimes established by the Colombian government under art. 124 of the Rome Statute expired on 1 November 2009.

On the one hand, the evolution of international law has generated a set of fundamental principles – expressed in the Cabo City Principles (1997), Paris Principles (2007) and Paris Commitments (2007) – whose clear objective is to establish parameters supporting the end of recruitment of children in armed conflicts throughout the world. On the other hand, the establishment of a structure and some appropriate mechanisms permits international human rights organizations 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 opportunity for action by international organizations. In contrast to the Colombian case, during the period of violence experienced by Peru, these instruments were not established.

In the case of the Inter-American System for the Protection of Human Rights, although it is correct that no legal instrument specifically refers to the protection of children, the American Convention on 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.

The TRCs have played different roles in Peru and Colombia. In Peru, the TRC revealed the dimensions of the violence and its impact on children. Therefore, its conclusions and recommendations, although not binding on the State, established a framework for prosecuting crimes against humanity and determining reparation schemes.

The impact of the Convention in Peru shaped the TRC section on violence against children by stating that the terminology employed would be the same as that established in the treaty and that the CRC was the minimum standard and should be applied along with other international human rights conventions. Of special consideration, the obligations stated in the Optional Protocol on children in armed conflict became the legal framework for analysing the responsibilities of all parties in the conflict regarding the recruitment of children.

Colombia’s TRC is still operating. So far it has published only one report, which does not address the situation of children. But that does not preclude the Commission from addressing children in the future, if the necessary legal and administrative changes are adopted. The purpose of this section is to present the main recommendation of the Peruvian TRC regarding the situation of children and to explore the benefits that adoption of a similar measure could bring in the case of Colombia.

### **3.1 The Peruvian Experience**

The Peruvian TRC was formed to (i) bring to light the facts about and responsibilities for terrorist violence and human rights violations between May 1980 and November 2000 by

Shining Path and MRTA as well as by agents of the State and (ii) propose initiatives to support peace and harmony among Peruvians. The TRC accumulated extensive information about the events, deploying its personnel to undertake public hearings, collect testimonies, create a database, analyse human rights crimes and violations, and exhume bodies. The TRC began its operations in June 2001 and presented its final report in August 2003. Although children did not participate in hearings, due to the timeline between the acts of violence and the creation of the Commission, the TRC report had a specific section that analysed the conditions suffered by children, especially in the Andes, and the main crimes committed against them.

The report gave an account of the serious human rights violations committed, the role of the State, the responsible parties and recommendations to ensure that the events are not repeated. However, international law, in particular human rights and international criminal law, was not in force when the crimes took place. Therefore, the debate presently focuses around how to apply those laws retroactively without violating the law and constitutionally pledged rights. The judiciary has resolved this question on a case-by-case basis.<sup>12</sup>

The political violence “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.”<sup>13</sup> The TRC’s final report included a chapter<sup>14</sup> about what Peruvian children lived through during the conflict, describing the extreme violence they were subjected to. Of the 69,000 victims of the conflict estimated by the TRC, 8,832 (12.8 per cent) were children, who were subjected to torture, recruitment, murder, kidnapping and sexual violence, at the hands of both the Peruvian Army and the subversive groups.<sup>15</sup> The Commission reported 2,952 cases of violations of the rights of children, as shown in figure 1.<sup>16</sup>

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<sup>12</sup> Of special interest is the Constitutional court ruling on the anti-terrorist legislation. See *Corte Constitucional. Sentencia 0010-2002-AI* of 3 January 2003.

<sup>13</sup> 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 niña’, *Truth and Reconciliation Commission Final Report*, Lima, 2004, p. 3.

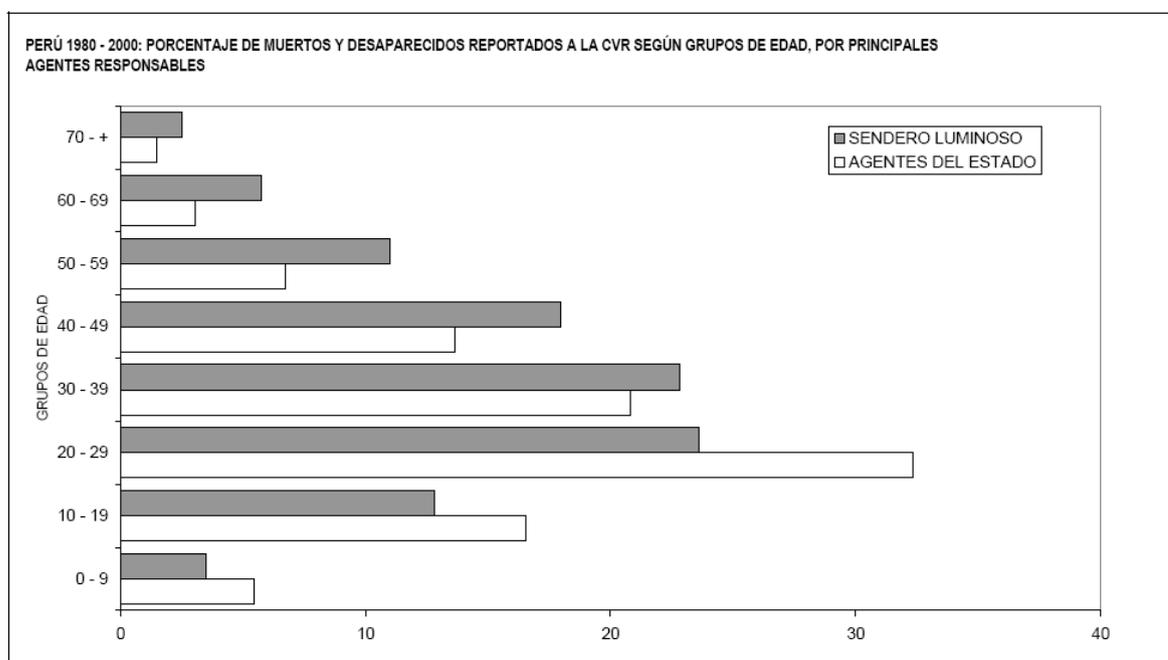
<sup>14</sup> See: *Truth and Reconciliation Commission Final Report*, vol. VI, section 4, chapter 1, subsection 1.8, ‘The violence against boys and girls’, pp. 585-626 available at [www.cverdad.org.pe/ifinal/index.php](http://www.cverdad.org.pe/ifinal/index.php).

<sup>15</sup> *Ibid.*, p. 585.

<sup>16</sup> *Ibid.*, p. 172.

**Figure 1: Peru 1980-2000: Percentage of people killed and disappeared reported to the TRC, by age groups and main perpetrators.**

Dark shading: Shining Path  
 Light shading: State agents  
 Vertical axis: age groups



Source: Truth and Reconciliation Commission Final Report, vol. VI, p. 589

The TRC documented that crimes such as torture, forced disappearance, sexual violence, extrajudicial execution and arbitrary detention were committed against children by all parties in the conflict, as shown in figure 2.<sup>17</sup> Children were forcibly recruited and kidnapped.<sup>18</sup> Shining Path caught children and forced them to participate in conflict directly and indirectly. The Peruvian Army routinely arrested minors without documents, leading to the detention and subsequent disappearance of hundreds of adolescents aged 16 to 17.<sup>19</sup> The TRC estimates that children made up 13 per cent of all forced disappearances perpetrated during the armed conflict.<sup>20</sup> In addition, many were interrogated to force admissions of guilt and tortured to terrorize the population and obtain information about their family members. Some were obliged to witness abuse and extreme violence against parents, family members, neighbours and friends.

<sup>17</sup> Ibid., p. 586.

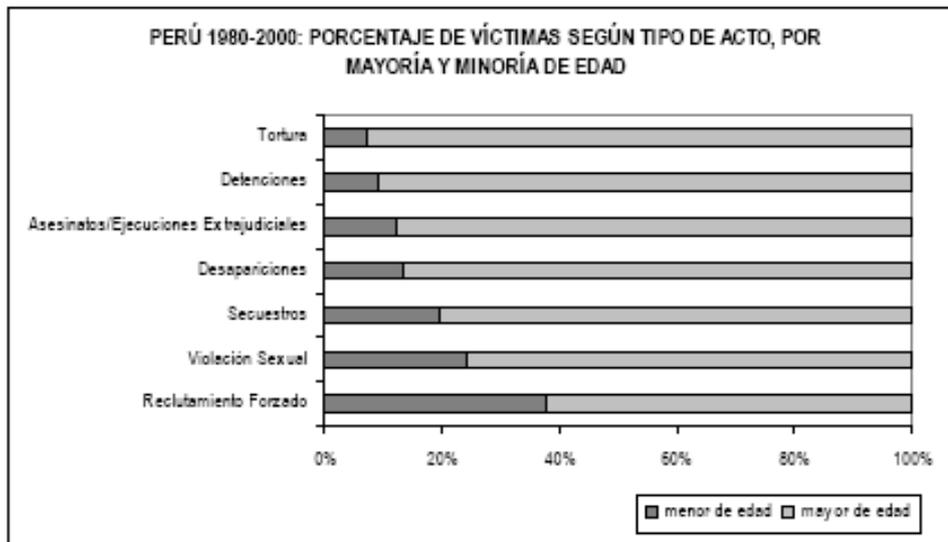
<sup>18</sup> Ibid., pp. 612-620.

<sup>19</sup> Ibid., pp. 593-595.

<sup>20</sup> Ibid., p. 593.

**Figure 2. Peru 1980-2000: Percentage of victims by type of crime and age group**

Key: dark shading: children; light shading: adults;  
 Vertical axis key:  
 Torture  
 Arbitrary detentions  
 Killings/extrajudicial executions  
 Enforced disappearances  
 Kidnapping  
 Sexual violence  
 Forced Recruitment



Source: Truth and Reconciliation Commission Final Report: vol. VI, p. 586

The TRC found systematic recruitment of children by State agents,<sup>21</sup> despite legislation prohibiting the enlistment of persons under 18 years old. 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.”<sup>22</sup> In this manner, thousands of children from different parts of the country were kidnapped and taken to emergency zones to participate in anti-subversive actions, including as members of *Comités de Autodefensa*.<sup>23</sup>

The TRC report states that recruitment and kidnapping constituted 48 per cent of the MRTA crimes against children and 42 per cent of such crimes by Shining Path.<sup>24</sup> These practices were focused in Ayacucho, Huancavelica, Huanuco, Ucayali and Junin, departments that

<sup>21</sup> Ibid., pp. 602-604.

<sup>22</sup> Ibid., p. 602 (unofficial translation by the author).

<sup>23</sup> These Committees, formed by representatives of local communities, were in charge of aiding the military in its fight against terrorism. Their support was fundamental to securing parts of the territory that were under the influence of subversive groups.

<sup>24</sup> Ibid., p. 618.

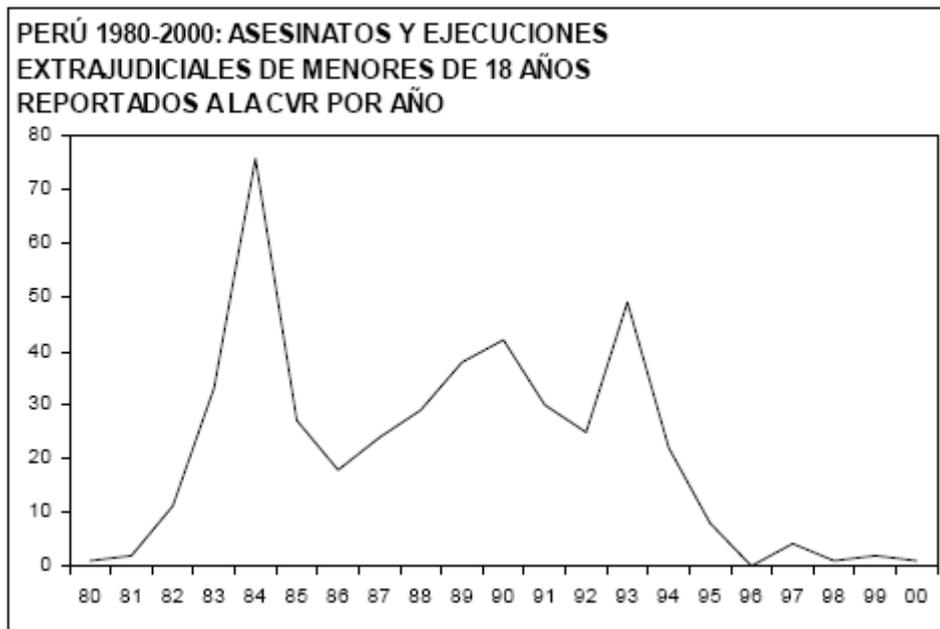
even today have the greatest poverty and social exclusion. The children were used both as messengers and spies and as fighters and members of the subversive groups.

Children and adolescents were also targeted for sexual violence by State agents, who used it as a method of torture to obtain information from the victim or one of the victim's family members.<sup>25</sup> The TRC registered 85 cases of sexual violence, of which 71 per cent were attributed to the State<sup>26</sup> and 19 per cent to Shining Path.<sup>27</sup>

In many cases sexual assault preceded extrajudicial execution. Other forms of sexual violence were reported, including slavery and child sexual exploitation on military bases.<sup>28</sup> This practice was less common among groups identified as terrorist groups, yet the proportion of child victims was significant. The TRC report indicated that, despite rhetoric by the leaders of the subversive groups that sexual assault was not allowed, it was the leaders who most commonly committed this crime.

Murder of children was also a common practice during the conflict, especially by Shining Path, which was found responsible for half of the 891 documented murders perpetrated against children.<sup>29</sup> Figure 3 shows the number of murders of children per year.<sup>30</sup>

**Figure 3. Peru 1980-2000: Killings and extrajudicial executions of persons under 18 years old reported by the TRC, by year**



Source: Truth and Reconciliation Commission Final Report, vol. VI, p. 606

<sup>25</sup> Ibid., p. 601.

<sup>26</sup> Ibid., p. 600.

<sup>27</sup> Ibid., p. 611.

<sup>28</sup> Ibid., p. 602.

<sup>29</sup> Ibid., p. 605.

<sup>30</sup> Ibid., p. 606.

Figure 3 shows that violations against children constituted almost 13 per cent of all human rights violations committed during the 1980s and 1990s in Peru. There were three peaks in the violence. The first took place between 1983 and 1985, when the conflict began to substantially escalate. The second was the 1988-1990 period, characterized as the ‘dirty war’, a period when the conflict became more urbanized. The third peak, between 1992 and 1994, possibly resulted from counterinsurgency practices against illegal armed groups.

The challenge that remains is the implementation of reparation programmes and relocation assistance for families who were forced to migrate to urban areas in search of protection from violence. Today, economic and social inequities persist in the areas where the main violence against children took place. Despite the military defeat of the terrorist groups, the social conditions that contributed to the violence remain, and they have the potential to incite a new wave of violence, augmented by drug trafficking activities. This would put children, women and indigenous populations in the middle of a violent confrontation, contributing to the perpetuation of disenfranchisement and human right violations in the country.

### **3.2 The Colombian Experience**

The Colombian *Comisión Nacional de Reparación y Reconciliación* (National Reparation and Reconciliation Commission) was created under the Justice and Peace Law (Law 975 of 2005) with the purpose of assuring that victims could realize their rights to truth, justice and reparation; participate in judicial proceedings; and implement individual administrative reparations. The Commission does not have a mandate to analyse the complex political, economic and social elements that have made the Colombian conflict so long-lasting and complex. However, it is operating while violence persists, setting the stage for a truth and reconciliation commission in the future.

In this sense, the current Commission could address the impact of the paramilitary violence on children in relation to ongoing judicial proceedings under the Justice and Peace Law. Based on the structure of the Peruvian TRC, future work should focus on (i) recruitment of children; (ii) armed violence and forced displacement; (iii) main crimes perpetrated against children; and (iv) individual and collective reparations.

## **4. THE FAILURE TO PROSECUTE VIOLATIONS AGAINST CHILDREN**

No significant judicial proceedings have been carried out in Colombia or Peru to prosecute those responsible for the conscription of children or other human rights violations. However, significant efforts have been made in both countries to prosecute alleged perpetrators of crimes against humanity and, to a lesser extent, war crimes. There is a complex legal framework for prosecuting those with main responsibility for violations of human rights and international humanitarian law. It is a blend of international criminal law, international human rights law, constitutional law and domestic criminal legislation.<sup>31</sup>

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<sup>31</sup> Ambos, Kai, Ezequiel Malarino and Gisela Elsner (eds.), ‘Jurisprudencia Latinoamericana sobre Derecho Penal Internacional’, Fundación Konrad Adenauer, Montevideo, 2008.

In Peru, the main leaders of Shining Path and MRTA have been convicted on terrorist charges, while high-level political and military government leaders have been convicted for ordering torture, forced disappearances and other human right violations, including former President Fujimori.<sup>32</sup> 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 the rights of child victims.

However, such charges could be brought before the Inter-American Human Rights System.<sup>33</sup> The statistics compiled by the TRC on recruitment and forced disappearances of children by members of the armed forces could, at the very least, support a case around violation of the right to life and access to justice and judicial guarantees of the American Convention on Human Rights. The shortcoming is that the System can only bring cases against the State; other measures would be needed to bring to justice members of Shining Path and MRTA for crimes committed against children.

In Colombia, the adoption of the Justice and Peace Law in 2005 marked a significant (but insufficient) step to try paramilitary leaders who give up arms and confess their crimes. Its antecedent, Law 782 of 2002, or the Pardon Law, permits the amnesty or pardon of individuals belonging to armed groups, but only for political crimes, such as rebellion and sedition.

Nevertheless, given that the law does not explicitly name the components of justice, truth and reparation, these elements were progressively incorporated through intense debate and as a result of great pressure from the international community. This led to modifications by the Constitutional Court through Sentence No. C-370 of 2006, which in turn 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 this law, demobilized combatants must freely testify about their membership in the group and the activities they engaged in with it. They also have to confess to all the crimes they committed, to the best of their knowledge. If they omit a crime or refuse to accept the charges made by the Attorney's Office, the case passes over to the ordinary justice system. On the other hand, those who confess to crimes that fall under the Pardon Law receive the benefits of that law.

Proceedings under the Pardon Law have faced challenges and postponements, including the extradition of paramilitary leaders to the United States to face prosecution for drug trafficking. Several organizations have criticized such extraditions because they halt local prosecutions for crimes against humanity and other human rights violations.

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<sup>32</sup> The ruling against Mr. Fujimori for the crimes committed in the *Barrios Altos* and *La Cantuta* cases can be consulted at [www.pj.gob.pe/CorteSuprema/spe/index.asp?codigo=10409&opcion=detalle\\_noticia](http://www.pj.gob.pe/CorteSuprema/spe/index.asp?codigo=10409&opcion=detalle_noticia).

<sup>33</sup> The System consists of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. They complement one another; only when a State is unable or unwilling to act can the Inter-American system assume competence over a matter. The system determines State responsibility based on the 1969 American Convention on Human Rights.

The Inter-American Court of Human Rights has determined that in applying this law the State must<sup>34</sup> (i) observe due process and guarantee the principles of expeditious justice, adversarial defence, effective recourse, implementation of the judgment and proportionality of punishment, among other principles; (ii) directly provide redress to the victims of human rights violations; and (iii) ensure that the reparation claims of the victims of grave human rights violations do not face excessive procedural burdens or obstacles that could obstruct the satisfaction of their rights.

## **5. PUBLIC POLICIES AND REPARATIONS TO CHILDREN: A PERSISTENT CHALLENGE**

Allocation of reparations and implementation of non-repetition measures are the biggest ongoing challenges in the Colombian and Peruvian transitional processes. The main premise is that reparation is required for reconciliation, despite the efforts made to reveal the truth and prosecute the main perpetrators of violations of human rights and international humanitarian law. This reparation is both individual and collective.

In Peru, the Ombudsperson and the Reparation Council (*Consejo de Reparaciones*) have made efforts to follow up on the recommendations of the Peruvian TRC. Yet the lack of political will and insufficient resources have impaired efforts to implement institutional and pecuniary measures to compensate victims. The Reparation Council's registration of victims (*Registro Único de Víctimas*) has been halted due to lack of resources.

The situation in Peru is problematic in that victims continue to be treated as second-class citizens. Despite efforts to expand provision of basic health and education services, the gap between rich and poor continues to increase. Paradoxically, in 2009 Peru joined the list of countries with a 'high' level of human development, according to the Human Development Report prepared by the United Nations Development Programme.<sup>35</sup> Although the ranking is welcome news, the main areas affected by terrorist violence continue to be the poorest in the country. The ranking must not obfuscate the structural inequalities that persist and the need to address the situation of victims as a means to avoid a resurgence of violence triggered by social inequalities.

Colombia has implemented a system of reparation for victims of human rights violations, especially under the Justice and Peace Law, determined by Decree 1290 of 2008. Under this Decree, a victim is any person whose fundamental rights were violated by any illegal armed group before 22 April 2008 (when the Decree entered into force). Despite the importance of this measure, the extradition of the main paramilitary leaders to the United States and the time limit for receipt of compensation (10 years) will test this system. The mere existence of administrative channels for victims to claim reparation is an important step in the pursuit of reconciliation.

Nonetheless, a problem that persists in the treatment of children is the lack of integrated public policies. In Colombia, significant efforts have been made to address the situation of

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<sup>34</sup> Inter-American Court of Human Rights, *Masacre La Rochela v. Colombia. Merits, Reparations, and Costs*, Case No. 163, Ruling of 11 May 2007.

<sup>35</sup> See: <http://hdr.undp.org/en/statistics/>.

two of the most complex problems regarding children in conflict: recruitment and forced displacement.

Colombian children linked to the armed groups involved in hostilities have been made vulnerable through violations of their rights to life, dignity and personal integrity, as well as other violations of their constitutional guarantees. The Colombian Inter-sectoral Committee for the Prevention of Forced Recruitment of Children estimates that 8,000 to 14,000 children are linked to illegal armed groups.<sup>36</sup> In addition, the Office of the Prosecutor's Unit for the Justice and Peace Law estimates that 2,824 children were recruited by paramilitary groups between 1990 and 2005.<sup>37</sup> The Office of the Ombudsperson<sup>38</sup> has implemented a System of Early Alerts (*Sistema de Alertas Tempranas*) to warn about risky situations, including possible risk of recruitment of children and adolescents by armed actors.<sup>39</sup>

The forced displacement of the civilian population in Colombia's irregular war is especially serious since it uproots vulnerable children and youth, which affects realization of their rights in the present and makes their future uncertain.<sup>40</sup> The displacement resulting from the expansion of the armed conflict represents one of the most serious violations of human rights. It also worsens poverty and the vulnerability of the population by destroying the foundation of social organization, which in turn leads to deterioration of human capital.<sup>41</sup>

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 programmes and other governmental institutions to adopt concrete measures to protect and reintegrate displaced people. The law requires the Constitutional Court to monitor progress in this area. In its most recent report<sup>42</sup> (October 2008), the Court stated that, despite State efforts, the situation of children in connection with the armed conflict has not significantly improved. The Court also found the Government's response to the needs of displaced children and adolescents fragmented; narrow and not systematic; incapable of addressing the problem specifically; late; lacking the necessary resources to cover the needs and satisfy the rights of children; legalistic and formal, lacking proper mechanisms for implementation; and a failure in implementing prevention programmes.<sup>43</sup>

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<sup>36</sup> 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 Secretaría Técnica', Bogotá, December 2008, pp. 7-8.

<sup>37</sup> See: <http://semana.com/noticias-justicia/paramilitares-reclutaron-2800-menores-para-guerra/136860.aspx>.

<sup>38</sup> See: [www.defensoria.org.co/red/avisos/sat2.php](http://www.defensoria.org.co/red/avisos/sat2.php).

<sup>39</sup> In 2007, this system put out 90 warnings of situations of risk, of which 60 per cent were warnings about possible actions of armed groups regarding recruitment of children. In 2008, the Office released various reports warning of the risk of recruitment and use of children and adolescents in various departments of the country.

<sup>40</sup> Consultoría 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, 26 January 2000, p. 2.

<sup>41</sup> See: Comité de Derechos del Niño (op. cit.), para. 89.

<sup>42</sup> See: Corte Constitucional de Colombia. Auto 251/08, 6 October 2008.

<sup>43</sup> Ibid., section 2, Valoración constitucional general de la respuesta estatal.

The Court stated that it will continue to monitor State actions. It ordered (among other things)<sup>44</sup> (i) design and implementation of a new prevention programme directed to children affected by the armed conflict; (ii) design and execution of pilot programmes in various cities and rural areas, aiming for nationwide application; (iii) protection of displaced children and adolescents identified by the Court; and (iv) implementation of an inter-sectoral programme to solve the problem of landmines and unexploded ordnance.

The significance of the Court's action is that the judiciary has essentially forced the Government to enact, adopt and coordinate efforts to deal with the situation of the millions of Colombians displaced as a consequence of the armed conflict. This approach is not based on human rights obligations or the situation of children, but it forces agencies to collaborate in addressing security, drug trafficking, military operations and human rights programmes for internally displaced people in Colombia. Non-compliance could subject the State to responsibility before the Inter-American Human Rights System and the United Nations.

This decision was triggered by a petition made by representatives of displaced people and their families. This suggests that in countries with a strong and independent constitutional jurisdiction, a single claim can spark creation of public policy over such matters, pushing forward transitional justice mechanisms.

## **6. CONCLUSIONS**

Transitional justice in Colombia and Peru is an ongoing process. In Peru, violence against children took place before the adoption of the Convention on the Rights of the Child, but the CRC has played a seminal role in formulating the main framework for the TRC. The challenge for the State is to honour its international obligations to children and focus on reparation programmes, especially collective ones. In Colombia, the CRC and its Optional Protocol on children in armed conflict, as well as the 1977 Second Additional Protocol to the Geneva Convention, have framed the implementation of policies and programmes for children. The main challenge is to carry out reparation programmes and utilize these international standards to end the violence.

Common to both situations is the lack of a holistic approach, despite individual programmes. In both countries, the role of the judiciary and administrative measures must be strengthened. The challenges include:

- The need for integrated programmes of transitional justice focused on children and guided by international law. The main emphasis should be access to health, education and social investment.
- Limited application of transitional justice originates from international legal obligations and the Constitution itself. In 2005 Peru adopted a National Human Rights Plan, which has so far been implemented only to a limited extent. Considering that it is law and official State policy, its enforcement and application need to be taken more seriously by government agencies, the Ombudsperson and civil society organizations.

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<sup>44</sup> Ibid. section 6, Decision of the Court.

- In Peru, the work of the Reparation Council needs to be continued, along with its victim registration procedure, as a means to allocate individual and collective reparations. Of special importance should be social investment in the most shattered zones of the country, such as Ayacucho and Huancavelica. The social map of the Peruvian Andes in 2010 is similar to the map in 1980, before violence began. The failure to address ongoing issues could generate another conflict.
- In Colombia, truth-seeking mechanisms focusing on the situation of children should be a priority, and judicial mechanisms should concentrate on the prosecution of those responsible for conscripting children.
- In both countries, reparation programmes should be more expeditious and respond to the social needs of forcibly displaced families.

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