

International Observatory on the DDR Process and the Justice and Peace Law

Fourth Report – September 2011

Executive Summary

The Justice Branch:

- In the fourth report, the Justice Branch focused its analysis on a number of critical aspects concerning the guarantees to the right to integral reparation in Colombia. The analysis refers to both the Justice and Peace Law and the broader transitional justice process.
- A fundamental fact observed by the branch is that all the instruments and regulations on reparations within the context of Colombia's transitional justice process face a common challenge: The creation of an effective public policy on integral reparation requires a greater harmonization of efforts, particularly in terms of victims' compensation.
- With this aim in view, the principles of both internal and external coherence should be incorporated into the design of a *general system of integral reparation in the context of transitional justice in Colombia*. Internal coherence refers to a program which distributes different benefits comprehensively, so that they mutually complement each other. External coherence refers to maintaining close links to other transitional justice mechanisms, including criminal proceedings and truth seeking efforts.
- The Victims and Land Restitution Law has advanced in the definition of effective integral reparation in Colombia through the envisaged National System for Assistance and Integral Reparation of Victims, driven by the principles of internal and external coherence. The design of the system and of its National Plan should take into account the reparations mechanisms foreseen in other transitional justice instruments, including Law number 975 of 2005.
- The *integral* character of the right to reparation should be implemented as part of an *integrated* public policy. However, and despite the efforts of institutions and operators, the branch has noted that, according to the integral reparation and property restitution hearings attended, victims' reparation measures lack both internal and external coherence.
- Moreover, there are a number of external challenges to the reparations mechanism: on the one hand, guaranteeing security for victims, both after land has been restituted and during their return; on the other hand, the lack of clarity regarding the different legal paths allowing victims to claim judicial and administrative reparation. These issues are often directly linked to the *sui generis* character of Colombia's transitional justice process. Besides, the persistence of the armed conflict limits the full enjoyment of victim's rights, creates situations of re-victimization, and impedes advancing towards guaranteeing non-repetition.
- Equally problematic is the fact that the majority of reparation efforts in the Justice and Peace process have to be carried out in contexts with a high number of victims, due to the macro-criminality pattern that characterizes Colombia's armed conflict. In addition, most victims usually belong to marginalized social groups, living in areas which are characterized by a near total absence of the state. This situation needs to be addressed through tailored-made responses, including the creation of specific reparation "standards".
- The latter issue is linked to an overriding phenomenon throughout the Justice and Peace process: Traditional rules concerning damage, liability and reparation, in national legislation and those related to international instruments, have taken on an oftentimes highly complex meaning when applied in the context of the Justice and Peace process.

- Firstly, there have been important variations in the concept of “damages”, particularly regarding the notion and implications of “collective damages”. Due to the absence of regulations on this issue, there is a lack of clarity about its content and scope, including questions related to the burden of proof and other procedural matters. The rectification of these problems should consider the provisions on collective reparations contained in Law number 1448, passed in 2011, and relevant proposals on the subject made by the National Commission for Reparation and Reconciliation (in Spanish, CNRR).
- To achieve this, debates on the matter must be guided by clear, complete and coherent legal criteria. These criteria should be as unambiguous as possible in assigning responsibilities and competencies, and creating proper mechanisms for inter-institutional communication. In view of the forthcoming reforms to the Justice and Peace Law, it is also worth questioning whether collective damages should be addressed under the integral reparation proceeding as provided by the referred law, or whether it would be more appropriate and efficient to address them through the Collective Reparations Program created by the Victims and Land Restitution Law.
- Secondly, taking into account that most of the crimes committed occurred a relatively long time ago, many victims do not have sufficient evidence to demonstrate the damages they have suffered. Therefore, the appropriateness of certain types of evidence should be considered, as well as the application of more flexible criteria for their admission, so as to ensure fair rulings. Resolving debates on the subject of evidence under the Justice and Peace Law requires comprehensive and coherent regulations, which would allow the judicial authorities to refer to unequivocal criteria on the issue.
- Thirdly, judicial authorities have ventured new means of reparation designed to be efficient, fair, and viable in practice. They aim to avoid creating false expectations in victims, which could lead to their re-victimization. However, the state continues to face not only the challenge of restituting victims to the situation they were in before the damage took place but also, and fundamentally, that of creating the necessary conditions to allow victims to regain confidence in the state and be able to exercise the fundamental rights guaranteed in a social and democratic state.
- Reparations in the Colombian context have therefore acquired particularly paradoxical connotations given that in practice there has been frequent confusion between mechanisms for reparation on the one side, and public policies aimed at re-establishing the rule of law and ensuring fundamental rights on the other. This confusion has direct and critical implications for the criminal proceedings under the Justice and Peace Law. Among others, it has assigned to the judges an *ad hoc* competence in practice to rule on the adoption of public policies measures related to both reparation mechanisms and to social policies. This is neither the most suitable nor the most efficient way to deal with the social inequalities that underlie the Colombian conflict, or to provide redress for massive human rights violations.
- As a possible way of bridging the mentioned gap, the Victims and Land Restitution Law proposes the concept of “transformational reparations”.¹ This concept has practical effects for overcoming individual and collective damages caused as a result of massive human rights violations, and it should be part of an integral and coherent reparations system in Colombia.
- As regards constitutional law, the victims’ right to reparation has evolved significantly in the context of transitional justice in Colombia. Specifically, the Constitutional Court has stated that this right - and the right to restitution in particular - can be considered as being fundamental.

¹ Originally proposed by the academics Rodrigo Uprimny and María Paula Saffón, transformational reparations (in Spanish, *reparaciones transformadoras*) take into account the fact that the restitution of victims to the position they were in before suffering damage may mean their return to situations of extreme poverty and vulnerability. Transformational reparations therefore, aim at transforming social and economic exclusion, which are often part of the causes of conflict, as part of a future-oriented process of reparation.

- The right to integral reparation has also undergone important changes over the last years in the field of international law, integral reparation having been favored over mere restitution. The branch specifically analyzed the jurisprudence of the Inter-American Court of Human Rights, highlighting the problems faced in advancing the implementation of the court's decisions regarding victims' reparations. The objective is to contribute to the necessary discussion on the merits and shortcomings of reparation as conceived by the Inter-American bodies.
- The branch has noted that national judicial authorities tend to base their decisions on the so-called international standards. This issue invites for a debate and analysis of the suitability of applying international principles to the domestic arena, to avoid the adoption of measures that may not be the most appropriate for the context of transitional justice in Colombia. Thus, the Inter-American bodies should bear in mind the *principle of reality* when deciding on cases against Colombia.
- Property restitution has been a particularly problematic issue affecting the effectiveness of the right to reparation under the Justice and Peace Law. Within the context of the general system of reparations to be set up, this issue must be urgently addressed so as to render possible an efficient restitution paired with real guarantees of non-repetition, complying with the principles of both internal and external coherence.
- Another controversial issue is the competence of the *Sala de Conocimiento* [Court that rules on the legality of charges] to give orders with respect to reparations to other institutions. The branch has consistently insisted on the limits of the criminal court judges vis-à-vis the demands of the victims and their representatives, which might exceed the scope of the reparation measures and relate to complex aspects of public policies.
- Finally, it has been stated that reparations through administrative mechanisms imply lower costs for the victims than reparation through judicial processes. However, considering the context in Colombia, it seems more adequate to create a unified and integral system of reparations. Such a system could integrate the administrative individual and collective reparation program foreseen in the Victims and Land Restitution Law with both non-judicial truth-seeking measures and judicial mechanisms aimed at guaranteeing the victims' right to justice.

The Disarmament, Demobilization and Reintegration (DDR) Branch

- Over the last two years a significant part of the debate about the relapse of some of the demobilized combatants' into illegal or criminal activities has been focused on the substantial differences in the numbers provided: Whereas the authorities calculated the rate of relapse at about 7.2% in October 2009, the Second Report by the CNRR of late 2010 increased that number up to 15.5%.
- Moreover, and notwithstanding the lack of consensus on the rate of relapse, the public perception of the phenomenon is seemingly shared among the civilian population and local authorities. Thus, numerous surveys have indicated that, since demobilizations began in 2003, the demobilized are perceived as being the main cause of the rise in insecurity in Colombian cities.
- This distorted perception can be explained by three general factors. Firstly, a lack of knowledge of who the demobilized combatants are, and what, if any, their relationship with the rise in insecurity really is. Secondly, persistent prejudices towards the demobilized, who often continue to be associated with illegal armed groups and common crime. And finally, the high visibility of captured demobilized combatants for having committed criminal activities, who are leading new illegal armed groups.
- In order to measure the degree of participation of the demobilized in illegal activities, other factors should also be included, such as socio-economic and political aspects and the consequences of the demobilization itself. Likewise, databases should be adjusted to avoid the existing differences on records.

- The main result of the investigation is that there is neither an evident nor a direct link between the presence of the demobilized and the levels of urban insecurity in the cities selected as case studies. While evidence seems to suggest some kind of relationship in Montería, this cannot be applied to the situation in Villavicencio and Bogotá.
- This is due to the existence of different grounds in each of the regions that can explain the relapse into illegal and/or criminal behavior, including, among other, the dynamics which led to the emergence and rise of paramilitarism. As a result, the rates in Córdoba are significantly higher than in the center of the country.
- In addition, the types of crimes committed by the demobilized vary from city to city. While in Bogotá they are mainly low impact (micro-trafficking, private security and robbery), in Villavicencio and Montería they are significantly more serious and include, among others, participation in an illegal armed group (defined by the Colombian Criminal Code as *concierto para delinquir*), homicide and extortion.
- Finally, other elements must also be taken into account, such as systemic or contextual factors (i.e. the threats posed by the post-demobilisation armed structures to the demobilized), and the personal situation of the demobilized population. In this sense, the branch verified that the rate of relapse is significantly higher among demobilized paramilitaries (with a greater presence in Montería) than among demobilized *guerrilleros* (in Bogotá and Villavicencio).

The Victims Branch

- Based upon field research carried out throughout 2010 and the first semester of 2011, the branch presents its assessment of the levels of satisfaction of victims' expectations concerning the five indicators developed by the Observatory in 2008. The indicators are the following: the fight against impunity, participation in the judicial process, reparations, truth seeking concerning international crimes, and truth seeking concerning homicide and forced disappearance.
- Concerning the *fight against impunity*, the branch points to a number of obstacles which persist in the course of the open confessions. These include the increased number of *postulados*, which affects the Attorney General's Office's investigative capacities; technical difficulties, particularly delays in the transfer of *postulados* to the confessions' rooms; and the unwillingness of certain *postulados* to participate in the process.
- The prolongation of the Justice and Peace process affects victims' expectations towards the fight against impunity. This situation is aggravated by their difficult economic situation and the shattering of their life projects.
- Concerning *participation in the judicial process*, the branch notes the increase of the number of victims registered at the Attorney General's Office by a 39%. However, only a small percentage is due to forced displacement –only 0.1% of the victims registered by *Acción Social* [the national institution in charge of social policies]-; and also a limited number is acknowledged by the *postulados* in their confessions -18%-.
- Likewise, the branch has established that in general, the *postulados* acknowledge far fewer victims in their confessions than the figures registered by the authorities. Thus the number of victims in the crimes under investigation is a mere 20% of the total; while only 10% appear in the confessed crimes.
- There is an urgent need to reinforce and improve the security and protection program for victims that participate in the process. The Ministry of the Interior and Justice has received 1,544 requests for protection, representing 0.4% of all the registered victims.

- As regards mechanisms for *judicial* reparations, in deciding the appeal against the sentence of alias “Diego Vecino” and “Juancho Dique”, the Supreme Court of Justice rejected the concept of equity (in Spanish: *criterio de equidad*) applied by the *Tribunal Superior de Distrito Judicial*. In doing so, the court recognized the extra-contractual civil liability of both former commanders, considering the material (pecuniary) damages and the non-material (non-pecuniary) damages.
- Concerning mechanisms for *administrative* reparations, by September 2010 *Acción Social* had paid COP 396,451 million to 20,387 families. Assuming an annual average of 10,419 payments over the next years, the process would come to an end in 29 years (in 2040).
- As to *truth seeking concerning international crimes*, by December 2010 the *postulados* had confessed committing 723 massacres. This figure represents about 28% of massacres between 1982 and 2007 registered by the Historical Truth Group (in Spanish: *Grupo de Memoria Histórica*) of the CNRR.
- *Truth seeking concerning homicides* has advanced significantly in the investigation of such crimes as part of the criminal proceedings under the Justice and Peace Law; 58% of the victims included in the confessions of the *postulados* relate to this crime.
- With regard to the crime of *forced disappearances*, the number of human remains found, identified and returned to the victim’s family increased in the 2009-2010 period. However, in their confessions, the *postulados* have only referred to 3.4% of the registered victims of this crime.
- The chapter concludes with a special analysis of institutional programs and other initiatives which focus on rehabilitation as a component of integral reparation of victims in Colombia.
- Regarding the institutional programs, the branch notes that the National System for Integral Assistance to the Displaced Population (in Spanish: *Sistema Nacional de Atención Integral a la Población Desplazada [SNAIPD]*) should be strengthened in the area of healthcare. This could include healthcare policies with mid- and long-term measures and a special treatment for victims of displacement under the National Health System’s rehabilitation and mental health programs. Moreover, assistance for rehabilitation under the Justice and Peace process is oriented mostly towards victims that attend to the judicial proceedings. This assistance should be expanded to cover victims in different circumstances.
- Concerning other initiatives, the branch emphasizes the important role played by non-governmental organizations in designing programs that go beyond focussing on the mere “pathology” of victims, and rather help them to regain their confidence, to rebuild and reshape their identities, and to fight the stigmatization they are frequently exposed to.
- The system of attention to victims of the armed conflict was reviewed by the Constitutional Court in 2010. In its sentence, the court highlighted barriers which exist both in the access to the service (due to the lack of clarity of the process and excessive administrative hurdles) and its implementation (missing specialized attention results in an erroneous diagnosis and thus in an inadequate treatment).
- As a solution, the court pointed out to the government the adoption of specific actions to provide psychological and psychiatric assistance, and the inclusion of a psycho-social component in the development of programs. Of these recommendations, only the former is reflected in the Victims Law.