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**Dealing
with the Past**

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Reflections on the role of the victim during transitional justice processes in Latin America

KATYA SALAZAR AND MARIA CLARA GALVIS¹

In Latin America, the institutions and conceptual categories of transitional justice have become a part of the public debate. This is not only the case in countries that suffered from internal armed conflicts, such as El Salvador, Guatemala, and Peru, or dictatorships, such as Chile, Argentina, and Uruguay, but also in countries like Colombia in which the armed conflict is ongoing and the existence of a true transition is placed in question in various social sectors and by human rights organizations.

Beyond the discussions on whether a case reflects a real, partial, limited or incomplete transition, it

is clear that during a transitional justice period the role of the judicial system is vital in at least two ways that are closely intertwined: ending impunity and guaranteeing the rights of the victims. Both elements are crucial in order to ensure a firm transition and enable the new regime to avoid a repetition of the actions of the past. In view of the importance of these transitional justice processes, and given that some time has passed since these were initiated – in some cases several years, and in others several decades – the time has come to ask whether the states, and specifically their judicial systems, have been complying with international standards in dealing with the past.

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In order to address this question, the Due Process of Law Foundation (DPLF) carried out a study to evaluate compliance with international standards on justice and victims rights in seven countries in Latin America: Argentina, Chile, Colombia, El Salvador, Guatemala, Peru and Uruguay.² This study set out to evaluate the transitional justice process from the perspective of the victims – not from an essentially subjective point of view focusing on polling victims about their level of satisfaction with sentencing in human rights cases of the past, but rather from a more objective point of view that considers the state's compliance with its international obligations, and in particular with the internationally protected victims right to justice. The study therefore focused strongly on the real ability and readiness of judicial authorities to incorporate the perspective and rights of the victims into the prosecution of persons responsible for past grave human rights violations. This article summarizes the study's findings.

The DPLF decided on this focus because it perceived that, in Latin America, judicial authorities tend to almost exclusively incorporate the perspective of the defendant into investigations and judicial procedures, in addition to their

² Las víctimas y la justicia transicional: ¿Están cumpliendo los Estados latinoamericanos con los estándares internacionales? (Victims and transitional justice: are states of Latin America complying with international standards?) Due Process of Law Foundation, Washington DC, April 2010.

own. Although it should be noted that the rights of the defendant are essential to the rule of law (investigations would not be legitimate without respect of due process guarantees and the right of defense of those accused), in a transitional justice framework it is also essential for the rights of the victims to be duly considered and afforded the same level of importance. Evaluating the incorporation and respect of these rights in judicial procedures is a first step towards identifying deficiencies and strengthening victims rights in the courts of law.

Furthermore, the study set out to compare progress in the prosecution of past human rights violations in the countries under examination with the goal of comparing and disseminating positive and successful actions. Another objective was to underscore the challenges, difficulties and obstacles that judicial systems have faced in conducting investigations and trials of persons accused of grave human rights violations, and in guaranteeing the rights of victims to justice, truth and reparation. Based on the successes and unattained goals of the judicial transition processes examined in this study, recommendations on how to best comply with international standards were also made.

Characterization of violence and definition of victims

The study identified two types of countries among those examined, based on the different situations in which human rights violations were committed, and from which the movement towards democracy was made or attempted. The first type concerns countries that have suffered from state terrorism (Argentina, Chile and Uruguay), while the second type concerns countries that have been described as having suffered from internal armed conflict (El Salvador, Guatemala, Colombia and Peru). This does not mean that the crimes committed by state agents in countries in which armed confrontation has been considered a source and characteristic of violence have not been, or could not be, considered state terrorism. The difference we noted is that in the countries of the Southern Cone the widespread and grave human rights violations have been explained solely within the context of criminal state action, while in the Andean and Central American countries (although there are differences between these that will be addressed later) the occurrence of violence can also be explained within the context of crimes committed by illegal armed groups who challenge(d) state power, or have a pro-system character, such as in the case of the paramilitaries in Colombia.

At one end we have Argentina, Chile, and Uruguay, which have characterized the real violence as a product of military governments and dictatorships. Then we have the cases of El Salvador and Guatemala, where it is asserted that the violence originated both from the state and from subversive organizations, but where in reality the majority of the violations (95% and 93% respectively) have been attributed to state agents. Next we have the case of Peru, which inverts the proportion and attributes the majority of violations to armed organizations on the fringes of the law (53.4%), but without excluding state violations from judicial investigations. Finally, at the other end we find Colombia, where according to the Justice and Peace Law, violations committed by illegal armed groups³ (paramilitaries and guerillas) should be investigated, but not the violations attributed to the state, which should be investigated under ordinary justice.

The different characterizations of violence have an important consequence in terms of defining those who are considered to be victims. In countries where the violations are identified as state terrorism, victims are identified as those persons who have suffered from crimes of the state, while in those countries in which it is understood that abuses resulted from armed conflict, both those who suffered from state violence as well as the people who suffered at the hands of subversives are regarded as victims. Two points should be noted here. In Peru, although the Truth and Reconciliation Commission (CVR) Report did not distinguish between types of victims, the Reparations Council⁴ did not consider members of subversive organizations to be victims for the purpose of inclusion in the Unified Register of Victims (and therefore entitled to receive compensation). And in Colombia, the Justice and Peace Law does not consider those whose rights have been violated by the armed and security forces to be victims.

Grave violations of human rights

Grave human rights violations were committed in all the countries included in the study. Usually one

³ In reality, the majority of demobilized persons have been paramilitaries.

⁴ Law 28592 of 28 July 2005, through which the Integral Program for Reparations (PIR) was created, envisioned the organization and operation of a Reparations Council, which was conceived as a body attached to the Presidential Council of Ministries, with the mandate to create the Unified Registry of Victims, an instrument which would be utilized in the implementation of the Integral Plan for Reparations. The Reparations Council was created in October 2006.

type of violation was committed in a predominant manner or with greater intensity than the other types. In Argentina, for example, the main violation concerned the forced disappearance of persons (8,960 disappearances, according to the National Commission on the Disappearance of Persons, CONADEP), and the kidnapping of babies was an illegal practice that was characteristic of the years of violence in this country. In Uruguay, imprisonment for political reasons was predominant (5,925 cases, according to the University of the Republic), to the point that this country took first place in Latin America in terms of the number of political detentions relative to its population.⁵ In Chile, torture reached such a magnitude that a special body (the Valech Commission⁶) was set up specifically to document this type of grave attack against personal integrity, which was committed against 27,255 victims, according to the Commission's report.

In El Salvador and Guatemala, extrajudicial executions and forced disappearance characterized the era of armed conflict. In El Salvador, 54.4% (7,388) of the violations documented by the Truth Commission were homicides, and 14% (1,057) were forced disappearances. In Guatemala, the Historical Clarification Commission estimated that during the 36 years of armed conflict, 160,000 extrajudicial executions were committed and 40,000 forced disappearances occurred. The Report of the Historical Memory Recovery Project (REMHI)⁷ noted that the actual number of executions could exceed 200,000, while the number of forced disappearances could exceed 50,000.

In Peru, the predominant violations by state agents were extrajudicial executions and forced disappearances, while the violations committed by armed groups mainly took the form of assassinations and torture,⁸ whereas in Colombia the absence of a truth commission or a report on the acts of violence made it difficult to determine uniform facts. However, certain features of the Colombian conflict can be identified that reflect the magnitude of violence attributable to armed groups. The armed

confrontation has produced "the most grave and dramatic humanitarian tragedy in the hemisphere",⁹ which resulted in approximately 3.5 million internally displaced persons and the dispossession of 5.5 million hectares of land.¹⁰ According to information provided by these authors, Colombia is the country with the greatest number of victims of kidnapping and antipersonnel mines in the world. The violence in Colombia is also characterized by the "selective elimination of human rights defenders, administrators of justice, union and social leaders, journalists, and candidates in popular elections".¹¹ Between 1995 and 2004, more than 1,000 massacres were perpetrated in this country, involving around 6,600 victims, most of whom belonged to indigenous and afro-descendant communities.¹²

The role of the Inter-American System in protecting victims of human rights violations

The various institutions of the Inter-American System have continually recognized the responsibility of military regimes and dictatorial or authoritarian regimes for the violation of rights protected by the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights. Although we can distinguish different levels of impacts and effects in the countries examined in the study, the Inter-American System has contributed to the termination of old regimes and the advancement of democracy.¹³

As Valeria Burbuto notes in her chapter on Argentina, the 1979 *in loco* visit by the Inter-American Commission on Human Rights (IACHR) to Argentina was a "fundamental milestone", from which point onwards the media began to report on human rights violations. The IACHR became a forum "for pressuring the Argentine military government to stop committing crimes", and a vehicle for maintaining the hope that justice would be done, to the extent that for many victims this

5 Prats in *Las víctimas y la justicia transicional*, supra.

6 In view of the demands of victims, this Commission was reopened in February 2010 to receive testimony over six months, and afterwards it will have a period of six additional months in which to evaluate them.

7 While the Historical Clarification Commission was created by the Oslo Accords of 1994 that sought to bring an end to the nation's civil war spanning three decades, the Report of the Historical Memory Recovery Project was a project carried out by the Human Rights Office of the Archbishop of Guatemala.

8 Rivera in *Las víctimas y la justicia transicional*, supra.

9 Guzmán, Sánchez, and Uprimny in *Las víctimas y la justicia transicional*, supra.

10 Garay, 2009: 160, in Guzmán, Sánchez, and Uprimny in *Las víctimas y la justicia transicional*, supra.

11 Guzmán, Sánchez, and Uprimny in *Las víctimas y la justicia transicional*, supra.

12 García, 2009: 36, cited in Guzmán, Sánchez, and Uprimny in *Las víctimas y la justicia transicional*, supra.

13 Regarding the impact of the Inter-American System on the movement towards democracy, see also *Victims Unsilenced: The Inter-American Human Rights System and Transitional Justice in Latin America: The Cases of Argentina, Guatemala, El Salvador, and Peru*. Due Process of Law Foundation, 2007. Available at: <http://www.dplf.org/uploads/1190403828.pdf>.

Commission was the first authority that “heard them without doubting their stories”.¹⁴

The role of the judicial systems in the protection of victims

We can point to two tendencies regarding the judicial institutions and structures for investigating past human rights violations. One approach is to create and put into practice special judicial structures designed particularly to complete the work of investigating human rights violations committed during the previous regime, while the other approach is to investigate violations and conduct criminal proceedings via the judicial institutions that existed during the civil war or dictatorship.

A brief review of the processes of judicialization (criminal prosecution) that have taken place in different countries, both with and without specialized structures, enabled us to come to certain conclusions regarding the use of the instrument of specialized justice and its implementation in different political contexts. Among the countries examined in the report, only Peru, Colombia and Guatemala stand out for having set up specialized units or systems within the normal judicial system that conduct investigations of human rights violations committed during their respective armed conflicts.

However, the practices examined here show that specialized justice has not always been a determining factor in advancing the prosecution of violations. The cases of Argentina and Chile, for example, where the judicial systems have not been adapted to judge such violations, demonstrate that a significant number of cases can be investigated and processed by the institutions of the previous regime. It has often been stated that beyond institutional designs the key appears to lie more in political will and the existence of a favorable political context to eliminate impunity.

Obstacles to justice within the judicial systems

Among all legal obstacles, there is one that has been constant and present in all the countries covered by

this study, except Colombia:¹⁵ amnesty laws. In the Southern Cone as well as in Peru and the Central American countries, these types of laws have been passed under a variety of titles: “amnesty law” in Peru, “amnesty law decree” in Chile, “Full Stop and Due Obedience Law” in Argentina, “statute of limitations for state claims” in Uruguay, “General Amnesty Law for the Consolidation of Peace” in El Salvador, “Law of National Reconciliation” in Guatemala.¹⁶

The obstacle posed by amnesty laws has been confronted in all the countries examined in the study in the form of strong, persistent measures and political and legal strategies in which the perseverance and determination of the victims and/or their representatives, the Inter-American System and local courts have all been crucial in eliminating the effects of these laws in general, or at least for limiting their application in specific cases. Unfortunately, once this barrier has been overcome, the path to justice does not necessarily immediately follow.

It is important to note that amnesty laws have not been the only obstacles to securing victims right to justice. The analyses of the countries examined in the study reveal the existence of other forms of legal obstacles, as well as obstacles of an institutional, political, cultural or other nature, which hamper the right of victims to justice. Some of these obstacles are related to the lack of political will of governments and administrators of justice, while others are attributable to the lack of independence of investigators and judges; the slow nature of procedures; the lack of special investigative strategies for human rights trials; the judicial culture, which frequently places procedural forms and rituals above the goals of judicial processes to

15 In Colombia, some have considered the Justice and Peace Law to be a law of impunity. However, both the Colombian Constitutional Court and the Inter-American Court of Human Rights have held the contrary view (Guzmán, Sánchez, and Uprimny, *infra*). The Inter-American Court had the opportunity to analyze this law in the case of the massacre of La Rochela and it found that the law was not in and of itself in violation of the American Convention. However, it recommended, *inter alia*, that the Colombian state should allow for the participation of victims in specific cases in all phases of the processes of justice and peace, and that it should interpret the principles of favorability, proportionality, and *res judicata* in conformity with the jurisprudence of this high tribunal.

16 This is not the same as an amnesty law, but its application by Guatemalan tribunals has had a similar effect. See Mónica Leonardo’s article, *infra*, and the sentences of the Inter-American Court in the cases of Myrna Mack Chang, Tiu Tojín, and massacre of Dos Erres, all against Guatemala.

14 Barbuto in *Las víctimas y la justicia transicional*, *supra*.

discover the truth and assign responsibility; the persistence of actors and sectors of the political and military powers interested in maintaining impunity and obstructing investigations; the lack of protection for judicial administrators, victims, and witnesses; and the economic and geographic barriers, as well as hurdles to legal defense encountered by victims.

The role of the victim in the pursuit of justice

The persistence and perseverance of victims have been essential factors in the achievement of goals and progress in every transitional justice process. The role of victims has been important in various ways: keeping the need to prosecute unlawful actions of the past on the public agenda; driving investigations and processes so that victims can give testimony in court, provide evidence or demand diligent evidentiary investigations; and putting forward strong and convincing arguments of fact and law so that judicial officers can accept and apply them to resolve cases.

Several of the authors who collaborated in the study underscored the role of victims and human rights organizations in judicial processes and in the resulting progress. Carlos Rivera (author of the chapter on Peru) reminds us that Peruvian human rights organizations have had the need for the prosecution of the gravest crimes committed by and during successive governments on their agenda since the 1980s. In this regard, NGOs proposed the creation of a sub-system for the prosecution of human rights violations. Regarding the role of victims in Peruvian judicial processes, Rivera affirms that, given the complexity of the crimes, it is "highly probable that the investigations would not have advanced significantly were it not for the impetus of the victims and their lawyers. Considering that these or their families frequently serve as witnesses in the investigated events, their testimonies are vital in shedding light on cases". But the contribution concerns not only testimonies, but also the persistence of the involvement of victims over time. On this point, he notes: "One must highlight the role of living memory, the source of information and the direct testimony that the victims and their families provide".¹⁷

In her chapter on Argentina, Valeria Barbuto points out that the judgment of those responsible for crimes has been made possible thanks to the demands and persistent actions of human rights organizations, many of which are victims organizations.

In Argentina, nearly all the criminal charges originated with a complaint by a victim or organization, not by the state itself. These players have been active providers of evidence concerning what occurred, since the perpetrators offered very little information. Barbuto also notes: "They were determined actors in the construction of legal arguments that achieved judicial recognition of the right of victims to truth, justice, reparation and memory". During the more than twenty-five years of democracy, "human rights organizations have brought forward clear strategies to confront the successive policies of impunity. The principle that guided these actions has been that of obtaining justice in terms of punishment for those responsible, as a manner of making amends for victims and their families, but also with an institutional sense for all of society."¹⁸

The same also applies to Chile. Mayra Feddersen tells us that judicial progress in Chile is attributable to "the incessant work of human rights organizations and of victims families, through a team of lawyers who over the course of thirty years have been dedicated to proving, denouncing, and prosecuting those responsible for these terrible events".¹⁹ And with respect to Uruguay, Martin Prats maintains that although "there remain pending issues and matters without resolution, it can be considered that victim participation has been fundamental in these advances", and that "the actions of victims were central to keeping this issue alive in public opinion and in the attention of the political system during these twenty-five years; it is due to their initiative that judicial cases were reactivated, through novel legal strategies".²⁰

With regard to the role of victims in El Salvador, it should be noted that the two recent rulings by the Constitutional Chamber of the Supreme Court²¹ which allowed forced disappearances to be investigated "would not have been possible without the insistence and courage of victims", and that "their authentic and constant fight has begun to raise awareness and provoke change".²² In Guatemala, "the participation of victims in criminal

18 Barbuto in *Las víctimas y la justicia transicional*, supra.

19 Feddersen in *Las víctimas y la justicia transicional*, supra.

20 Prats in *Las víctimas y la justicia transicional*, supra.

21 The first was pronounced in June 2009 and related to the disappearance of Sofia Garcia Cruz on 4 July 1981 when she was 10 years old. The second decision was made in December 2009 concerning the case of Maria de los Angeles Ortega, who disappeared on 4 November 1983.

22 Cuéllar in *Las víctimas y la justicia transicional*, supra.

17 Rivera in *Las víctimas y la justicia transicional*, supra.

proceedings concerning violations of human rights during the armed confrontation made the difference in their result. This is due to their persistence and the tenacity that they gained as the processes advance". In El Salvador, the interpretations of facts, legal principles and evidence are the outcome of factual, legal and evidentiary discussion that the victims put forth.²³

Regarding the role of human rights organizations in Colombia, the study indicated that the "inclusion of victims rights in negotiation policies was able to become a reality thanks to the achievements of Colombian human rights organizations in "translating" in a creative manner international standards into the Colombian debate, which has not only decisively strengthened their political and legal claims against impunity but has also considerably influenced public opinion regarding this matter". Before the process that led to the adoption of the Justice and Peace Law, the Colombian public debate did not really include victims rights.²⁴

Participation of victims in the judicial processes

The national investigations included in the comparative study refer both to theoretical and practical aspects of the participation of victims in judicial processes, i.e. both constitutional and/or legal regulation, and the level of effective compliance with these regulations.

In almost all the countries examined in the study, the participation of victims in judicial processes is guaranteed by law (though not always to an equal extent). In Chile and Guatemala, for example, regulatory limits apply to the participation of victims in judicial processes. In Chile, victim participation "is very limited by procedural rules that govern processes related to the dictatorship".²⁵ In Guatemala, victim participation is legally and constitutionally established, but with certain limitations. Participation is manifested in procedural figures such as the querellante adhesivo (ancillary complainant), complainant, petitioner and plaintiff. The limitations arise from the unequal regulation of the rights and abilities of the ancillary complainant with respect to the accused. For example, to be able to participate in the public hearing at the trial stage, the victim must request prior written authorization, while the accused can automatically participate.

23 Leonardo in *Las víctimas y la justicia transicional*, supra.

24 Sánchez, Guzmán and Uprimny in *Las víctimas y la justicia transicional*, supra.

25 Feddersen in *Las víctimas y la justicia transicional*, supra.

The ancillary complainant is excluded from participation at the sentencing stage, and regarding the conditional liberty or termination of punishment of the convicted.

Moving on to the practical aspect and the effective participation of victims in judicial processes, different situations become apparent. 1) In some countries (Colombia and El Salvador) there is a notable discrepancy between what is established in law and how it is applied. 2) In other countries (Argentina, Peru, Uruguay), reality coincides with or comes quite close to legal provisions. 3) In Chile, despite limitations in the law, in practice greater participation has been permitted because lawyers utilize the existing system (with all its limitations) in such a manner that their attitude and insistence enable them to overcome legal shortcomings and achieve concrete results in legal processes.

The group of countries in which there is the greatest discrepancy between theory and practice²⁶ includes Colombia and El Salvador. In Colombia, the discrepancy is such that victim participation is fairly limited, despite considerable normative progress that is the product of key legal and jurisprudential developments. Guzmán, Sánchez, and Uprimny (the authors of the chapter on Colombia) note that there has been significant progress at the legal level, but there are still serious difficulties in practice, which not only affect the participation of victims in judicial processes, but also simultaneously interfere with the process of litigating human rights violations as a whole. These difficulties coincide with some of the obstacles to judicialization cited above, including economic and geographic barriers, misinformation regarding judicial proceedings, lack of awareness of rights and the complexity of the justice and peace processes, lack of psychosocial attention, lack of legal representation, and victims uncertainties regarding the possibility of obtaining a fair result under the Justice and Peace Law, which many see as an instrument that "contributes to impunity

26 The discrepancies, which are sometimes enormous, between legal provisions and their practical application, are a generalized characteristic in Colombia, and have been identified and cited by the Inter-American Commission on Human Rights, as well as by various rapporteurs and independent experts of the United Nations who visited the country this past year. To mention just one example, Gay McDougall, the United Nations independent expert for minorities, noted in February 2010 that the Colombian legal framework is "impressive and praiseworthy", while its application is "unfortunately inadequate, limited, and sporadic".

and strengthens victimizers to the detriment of victims".²⁷

El Salvador is another country in which participation of the victim is provided for by law, but where in practice it "is limited to only obtaining information of advancements, since almost all of the attention is centered on protecting those allegedly responsible, to the point that facts are not investigated and cases founder".²⁸

The group of countries in which victim participation in judicial processes is adequately regulated (although potentially with certain deficiencies) includes Argentina, Peru and Uruguay. In Argentina, the participation of victims became a reality in the procedural figure of the complainant, as stipulated in the Criminal Code. This legal enshrinement has formally given victims, their spouses (and even their partners) and the ancestors and descendants of disappeared persons the necessary legal standing to participate in criminal cases directly or through their legal representatives. Here, even human rights organizations "have been recognized as interested parties and with standing to bring complaints as long as their statutes include the goal of achieving justice". This power has been fully exercised in practice, in a manner in which the majority of processes rely on "a particular claimant that initiates the accusation, presents evidence, participates in investigations and, during the trial phase, makes accusations, in representation of victims".²⁹

Peru is another country with adequate legislation governing the participation of victims in judicial processes, which specifically establishes this right in the preliminary investigation phase, during pre-trial proceedings and at the actual trial. The complaint and testimony are the two primary forms of participation, which have great relevance for litigation in that "the facts are set out and initial theories are raised regarding those responsible for the crimes". At the trial, victim participation is embodied in the procedural concept of "civil party", which grants victims broad margins of intervention and allows them to collaborate in the establishment of facts and regarding the involvement of those responsible, as well as authorizing civil reparation.³⁰

In Peru, victim participation in judicial processes brings "quite positive results", as is indicated by the numerous litigated cases as a consequence of complaints by victims and/or their families. Without these complaints, the processes would be different or simply would not exist at all. Examples of the relevance of the complaints and/or testimonies of the victims include cases of sexual violations in the regions where military bases existed during the armed conflict. The absence of victims testimonies explains why these crimes had remained invisible during the years of the conflict and there were no available statistics.³¹

Finally, in Uruguay victims have a broad capacity, as established in the Code of Procedure and in Law 18.026 of 2006, to participate in the judicial process and drive it forward beyond the level of complaint. From that moment onwards they can provide evidence as well as put forward arguments of fact and law. Victims can participate through their legal representatives, who can accompany them if they are summoned to testify. Since the adoption of Law 18.026, in cases of genocide, crimes against humanity and war, the claimant, victim, or their family can access all phases, propose evidence that they have at their disposal, and participate in all judicial actions. The courts are also obliged to notify them about all rulings.³²

Based on the above comments we can conclude that, no matter how well-formulated legal provisions may be, the constant impetus of victims is required for them to be effective. It is only if victims rights are taken seriously and they persist in demanding their comprehensive fulfillment that legal provisions can become truly effective. The situation in Chile, for example, demonstrates that where legal provisions are inadequate, the impetus and perseverance of victims can nonetheless achieve significant results, despite such shortcomings. As Carlos Rivera notes in his chapter on Peru: "Beyond the wide or narrow margins of intervention in a criminal case, the will of families in demanding justice continues to determine the existence of unresolved paths and the very concrete work to achieve this justice."³³

The role of investigations and criminal proceedings in discovering the truth and obtaining reparation

It may be stated that judicial processes are ideal and beneficial instruments for discovering the truth

27 Sánchez, Guzmán and Uprimny in *Las víctimas y la justicia transicional*, supra.

28 Cuéllar in *Las víctimas y la justicia transicional*, supra.

29 Barbuto in *Las víctimas y la justicia transicional*, supra.

30 Rivera in *Las víctimas y la justicia transicional*, supra.

31 Ibid.

32 Prats in *Las víctimas y la justicia transicional*, supra.

33 Rivera in *Las víctimas y la justicia transicional*, supra.

about acts of violence. However, national studies generally reveal that, although criminal trials have contributed to the reconstruction of the truth, this process has a complementary character to previously established facts. This means that trials assume a role that is above all symbolic, with positive and repairing effects. What is legally decided by the courts corresponds to victims knowledge or to discoveries by truth commissions and other such bodies.

Although this is the case in the majority of countries, some have specific characteristics that are worthy of note. For example Argentina, where for a long period of time the trials concerning human rights violations focused solely on the search for truth. Another example is Peru, where greater importance was attached to the impact of the truth obtained from a judicial trial in comparison with other countries.

Argentina is perhaps the case that best reflects the aptitude of the judicial system for establishing the truth. Here, the obstacle posed by the "Full Stop and Due Obedience Laws" for trying and sanctioning those responsible for grave violations of human rights was transformed by victims and their representatives into an opportunity to demand that judicial processes must be carried out with the aim of clarifying the facts and determining the truth of what occurred in each specific case heard by the judges. Thus between 1999 and 2003, judicial processes recognized the right to truth for victims, their families, and society in general. This judicial recognition of the right to truth relied on the impetus of the Inter-American System. Beginning with an amicable settlement agreement signed in 1999 between the government of Argentina and the petitioners in a case before the Inter-American Commission,³⁴ national judges protected families right to the truth and to mourning in the framework of judicial processes.³⁵

In Peru, the actions of the justice system have indeed helped to discover the truth about events. These thus perform an irreplaceable role. In many cases the preliminary and judicial investigations have signified an important contribution to clarifying the facts, taking into account that they have gone beyond the discoveries of the Truth and Reconciliation Commission and have enabled the identities of the perpetrators to be established.

In Chile, judicial processes have contributed to the reconstruction of historical truth. This has been the product of the combined efforts of various actors, which have permitted the reconstruction of the history of violations, the methods of repression, and the agents involved. Mayra Feddersen notes that this required "systematic work over 27 years to reconstruct in great part the history that branded the period between 1973 and 1990", and that this process had been possible largely thanks to attorneys and the families of victims, who "since the early days had utilized the courts of justice as a tool to learn more about the situation of their loved ones".³⁶ Although the participation of many authors still needs to be determined, there currently is clarity regarding the facts and circumstances, and this is mainly due to judicial processes.

In Uruguay, the contributions to truth in specific cases have been modest and the achievements of judicial processes in this respect are also more symbolic and emblematic, "since little is known about the true fate of the majority of the disappeared, about where to find their remains, or about who were directly responsible"³⁷. The historical truth in Uruguay has been constructed on the basis of different sources, such as civil society reports, victims families, university studies, contributions from political sectors, investigations by the press, and even reports by the armed forces. As already noted, the contributions of judicial cases have been modest. Despite their limitations, criminal investigations "are a necessary source for those who are trying to discover" the truth.³⁸

Given that a truth commission has not been established in Colombia, in theory judicial processes there would be the appropriate settings for establishing the truth. However, according to Guzmán, Sánchez, and Uprimny, "The possibilities of [the judicial processes] contributing to the truth are seriously limited by the practical conditions in applying the law [of justice and peace], the [few] incentives that exist for truth-telling, and the investigative capacity of the Prosecutor,"³⁹ all of which generate the risk of privileging the voice of victimizers and weakening the potential of the peace and justice process for securing knowledge of the truth. Moreover, due to the nature of the Justice

34 The case referred to is that of Carmen Aguiar de Lapacó, Case 12,059, Report no. 21/00 of 29 February 2000.

35 Barbutto in *Las víctimas y la justicia transicional*, supra.

36 Feddersen in *Las víctimas y la justicia transicional*, supra.

37 Prats in Feddersen in *Las víctimas y la justicia transicional*, supra.

38 Ibid.

39 Sánchez, Guzmán and Uprimny in *Las víctimas y la justicia transicional*, supra.

and Peace Law, which provides benefits to those who submit to it, the account of the truth depends on who renders the version, which means that these truths could be partial or incomplete.

Two aspects may be cited regarding the use of judicial processes for obtaining reparation: the concrete measures ordered by judges in the region, and the significance of judicial instruments in terms of reparation. Regarding the former, the measures ruled by judges are intended as compensation (Guatemala, Peru, Argentina, Chile, Uruguay). The influence of Inter-American jurisprudence has not reached the point at which it enables judges in the countries examined in the study to order measures other than economic compensation, not even when this has been expressly solicited, such as in Peru. In Guatemala, the National Compensation Program recommended by the Historical Clarification Commission has still not managed to design policies of comprehensive reparation. Furthermore, reparation as the result of judicial processes is scarce. However, the exhumations ordered in the courtroom have had a reparation effect in Guatemala insofar as these actions have helped victims find out about the fate of their loved ones. According to Benjamín Cuéllar (author of the chapter on El Salvador), although victims in this country have the right to comprehensive reparation which should have been ordered in a judgment, “this judgment never arrived”.⁴⁰

In Uruguay, Law 18.026 of 2006 states that victims of crimes within the jurisdiction of the International Criminal Court are to receive comprehensive reparation through measures of restitution or rehabilitation which go beyond economic compensation. Although this provision has still not been applied by the judges, some progress has been made through its implementation. On 19 October 2009, Law 18.596 was adopted which has a greater reach in that in Article 3 it recognizes the right to comprehensive reparation for victims of state terrorism during the period from 27 June 1973 to 28 February 1985. In addition, the Ministry for Education and Culture is establishing a special commission charged with processing petitions submitted under this Law.

Regarding the second aspect, i.e. the significance of judicial processes as a means of obtaining reparation, criminal proceedings have become instruments for recognizing and dignifying victims in almost all

countries. The findings of the authors of the national studies are clear. Carlos Rivera illustrates the significance of a legal action in Peru in the following terms: “The existence of a preliminary investigation, and even more so the criminal process for human rights violations, is very significant, because it allows victims, who usually passed through unperceived or were simply ignored by the justice system due to their social or economic condition, to be able to not only move and create a reaction from one of the most rigid state machineries, but also to obtain concrete results: causing the investigation or prosecution of persons who in other circumstances occupied positions of power”.

Similarly, Martín Prats notes that for victims in Uruguay “the possibility of presenting claims, of accessing tribunals, and of confronting the accused in court has signified small “moral vengeance”. He adds: “To see the victimizers, formerly omnipotent and unpunished, seated in the dock of the accused, enter the court in handcuffs, or confined in detention centers, demonstrates how the judicial processes can become settings for repairing and dignifying victims”.

Conclusions

One conclusion that can be drawn from the study is that the results that have been achieved through investigations and criminal proceedings are very precarious and are still a long way from meeting international standards. If we compare the number of sentences pronounced in Argentina and Chile, i.e. those countries with the highest number of convictions for crimes of the past (68 and 59 respectively), with the number of victims from these countries years of dictatorship (30,000 and 31,425 respectively), it is clear that the results are inadequate and that the great majority of victims have not received an acceptable judicial response to their violated rights. In the case of Guatemala, there are only three rulings that sustained the conviction of ten individuals in an armed conflict that left at least 160,000 dead and 40,000 disappeared. In Peru, nine individuals have been convicted in cases related to a conflict that left approximately 69,000 victims. The results are even more shocking in El Salvador or Colombia, where there are no convictions at all in cases related to the extensive and brutal armed conflicts.⁴¹

⁴⁰ Cuéllar in *Las víctimas y la justicia transicional*, supra.

⁴¹ More information can be found in the national chapters of the publication referred in footnote 2.

Another important conclusion is that, although the state, according to international obligations, has a duty to satisfy the victims right to justice through the investigation, prosecution and punishment of grave human rights violations, in the vast majority of cases compliance does not occur as the result of action by the state. In most cases, compliance has been repeatedly demanded of the state by the victims, making them the essential motor of the trials and of any results that may be achieved. As Carlos Rivera notes in connection with Peru: "The legitimacy that the victims have today was not given by the State, but is a recognition earned and owned by the victims themselves".

As already noted, criminal proceedings concerning past human rights violations face obstacles of a normative, political, institutional, cultural, economic and ideological nature. This leads to a third conclusion, namely that the victims have undoubtedly been the motor that has kept the judicial processes going and thanks to their persistent efforts at least some of these obstacles have been confronted and to some extent overcome. However, it should also be noted that other national and international actors have played important roles in confronting and overcoming obstacles to criminal prosecutions in the long term. In some countries (e.g. Peru), the role of international actors such as the Inter-American System of Human Rights⁴² has had a greater impact in specific criminal cases than in any other country. In fact, findings obtained in Peru by the Inter-American Court on Human Rights have directly influenced the course of specific judicial procedures. Some cases have been reopened and laws and judicial decisions have been discarded on the basis of other decisions by this international authority. At the same time, in countries like Argentina, Chile, and Colombia, advances in judicial procedures have been led mainly by national judicial institutions, such as the constitutional court, the supreme court, and individual judges or prosecutors.

With respect to national actors, it is important to note the significant role played by human rights and civil society organizations, which have designed legal

and political strategies to confront obstacles in the courts, respond to the public discourse and question state policies. Strategies against amnesty laws (which included national challenges and, when these failed, international challenges) aimed at repealing, annulling or deeming them inapplicable (depending on the country) are a prime example. Another example concerns campaigns denouncing laws and legal reforms that were intended to disadvantage victims, such as the Victims Law in Colombia or Peru's law granting public funds to cover legal defense costs for military personnel on trial for past human rights violations, without making such funds available for the victims. Measures favorable to the prosecution of human rights cases, such as the creation of special courts to prosecute human rights violations in Peru and Chile, have been actively promoted and supported by the organizations that represent victims in both countries.

By questioning the political and judicial decisions of investigators and judges that have favored impunity through the inappropriate use of criminal law instruments such as statute of limitations or *res iudicata*, the untiring efforts of the victims and the organizations representing them have in some cases made it possible for these decisions to be overruled. This has led to the continuation, reopening or initiation of investigations, even in the most complicated of contexts such as the dictatorships of the Southern Cone, the Fujimori dictatorship in Peru, and the authoritarian regimes following the civil wars in Central America, and even against the most powerful figures (former presidents, or former high-ranking military officials). National organizations have also been persistent, even in the most difficult circumstances, in insisting on prosecuting criminal acts by filing charges, submitting evidence, giving testimony, providing documents, putting forward factual and legal arguments, and by constantly urging judicial authorities to achieve the best possible result in the given context. Where, for example, amnesty laws prohibited sanctions, demands focused on the right to truth, as was argued and accomplished in Argentina.

Another example of the key influence human rights organizations have had at the national level is the role they played in promoting education campaigns aimed at breaching a rigid judicial mindframe and making judicial authorities more flexible and receptive to taking international law and jurisprudence into account in their judgments. Thanks to these efforts, in many Latin American countries the judicial stage is now no longer

⁴² The role of the Inter-American System has been promoted by the victims and the organizations that support them, who have intensely used the mechanisms of the Inter-American System of Human Rights since the first atrocities took place in the 1980s in the Peruvian armed conflict. For further information please refer to: *Victims Unsilenced: the Inter-American Human Rights System and Transitional Justice in Latin America*. Due Process of Law Foundation, Washington DC, 2007, available at <http://www.dplf.org/uploads/1190403828.pdf>.

exclusively for judicial officials and defense lawyers, and the victims perspective has become ever more essential and legitimate. Even though victims rights are still far from being satisfied, fewer people now question the notion that victims have rights that should be exercised in criminal proceedings.

Even though victim participation in criminal proceedings is, generally speaking, legally guaranteed (though at varying levels depending on complexity and/or normative evolution in each country), the main challenge lies in its actual realization. Once again, the consistent and creative demands of the victims have meant that, even in adverse circumstances and faced with differing norms and laws, it has been possible to modify judicial practices to allow victims and their representatives to intervene and defend their rights in each of the different stages of the investigation and criminal proceedings.

With respect to criminal proceedings as a means to reparation, the study addressed two aspects: concrete economic measures ordered by national judges, and criminal proceedings as a reparation measure per se. Unfortunately, the Inter-American System has had little success in convincing national judges to order measures other than monetary compensation. In most of the countries in the study, criminal investigation and trials have become a way to recognize and afford dignity to the victims. Criminal prosecutions are a valid way to uncover past truths. On the other hand, the study revealed that, in general, although criminal proceedings have contributed towards reconstruction of the truth, they have basically confirmed or complemented already known facts. They therefore play a significant symbolic role, with positive and reparational effects in that a personal truth finally becomes a historic, official one.

The existence of a criminal investigation followed by a judicial decision confirming deeds long alleged by an individual who has been historically ignored by the judicial system, is extremely important. The fact that these long-ignored individuals were finally able to make judicial authorities (as traditionally impenetrable institutions) move against and actually pin responsibility for atrocities on previously powerful and untouchable representatives of the state, is a very significant development in both historical and emotional terms. The judicial process thus extends beyond the punitive function of providing justice to giving the victim a new position in society with social and historic recognition.

Although it is true that the numbers (e.g. relating to convictions) still fall short, the transitional justice processes in Latin America should also be looked at from a different perspective, one that focuses on and recognizes the legitimacy and dignity earned by the victims through these processes. And legitimacy and dignity cannot be measured in numbers. Although far from complying with the spirit of the internationally recognized right to justice, this long road has served to reveal the facts about the practices of terror used during armed conflicts, military dictatorships and authoritarian regimes. The victims have, in their own right, gained legitimacy in the process of unveiling and denouncing these atrocities.

In spite of differing legal provisions, a lack of political will on the part of governments and judicial authorities, and in many cases the entrenched opposition of actors benefiting from impunity, the force that has brought about advances on the road to justice has been the consistent, dedicated and determined efforts of the victims who have not rested in denouncing, documenting, and insisting on finding those responsible, and in the creativity, imagination and judicial rigor of the organizations and individuals that have accompanied them. Criminal proceedings have not only played their natural role of sanctioning and giving facts historical recognition, but have also given the victims (who are usually forgotten and ignored by official institutions) the opportunity to denounce face to face and on equal terms the people previously more powerful than themselves who were responsible for violating their rights.