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Reflections on the role of the victim during transitional justice processes in Latin America¹

1. In Latin America the institutions and conceptual categories of transitional justice have become a part of the public debate not only in countries that have ended internal armed conflicts –like El Salvador, Guatemala, and Peru- or dictatorships –as in Chile, Argentina, and Uruguay- but also those –like Colombia- where the armed conflict continues and the existence of a true transition is questioned by various social sectors and 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 essential in at least two aspects that are intimately related: to stop impunity and guarantee the rights of the victims. Given this very important role, and after a number of years –and in some cases decades- since the beginning of various transitional justice processes, it is time to ask if the States, and specifically the judicial systems, have been complying with the international standards that regulate both key functions.

2. In order to address this question, the Due Process of Law Foundation (DPLF) -with the generous support of the Swiss Ministry of Foreign Affairs- last year undertook a study to evaluate compliance with international standards on justice and victims' rights in seven countries in the region: Argentina, Chile, Colombia, El Salvador, Guatemala, Peru, and Uruguay². The study seeks an evaluation from the perspective of the victims, but not from an essentially subjective point of view centered on polling victims on their level of satisfaction with sentencing in human rights cases of the past, but from a more objective perspective that considers the State's compliance with its international obligations, in particular its compliance with the internationally protected victim's right to justice. The study's emphasis, therefore, is on the real ability and compliance of the judicial authorities to incorporate the perspective and rights of the victims in the criminal prosecutions against those responsible for grave human rights violations committed in the past.

3. This focus makes a lot of sense in a region where judicial authorities tend, almost exclusively, to incorporate into the investigations and criminal procedures only the perspective of the defendant, in addition to their own. It is necessary to keep in mind that the rights of the defendant are essential to the rule of law, where investigations would not be legitimate without the respect of due process and the right to defense of those accused. But in a transitional justice framework it is essential that the rights of the victims be considered and given the same level of importance. Evaluating the incorporation and respect of these rights in

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² “Las víctimas y la justicia transicional: ¿Están cumpliendo los Estados latinoamericanos con los estándares internacionales?” “The victims and transitional justice: are States complying with international standards?” Due Process of Law Foundation, Washington DC, April 2010

criminal procedures is a first step to identifying deficiencies and advancing victims rights in the courts.

4. Furthermore, the study seeks to compare advances in the prosecution of past human rights violations in the selected countries with the goal of comparing and disseminating positive and successful experiences. Another objective of the study is to underscore the challenges, difficulties, and obstacles that criminal judicial systems have had in conducting investigations and trials of grave human rights violations and guaranteeing the judicial rights of the victims to justice, truth, and reparations. Based on the successes and pending objectives of the judicial transition processes examined in this study, recommendations on how to best comply with international standards, keeping in mind best practices and lessons learned, were also made.

5. A first conclusion reached in the comparative study is that the results obtained through investigations and criminal procedures are very precarious and far from meeting international standards. In fact, if we compare the number of sentences produced in Argentina and Chile, which are the countries with the highest number of convictions for crimes of the past (68 and 59, respectively), with the number of victims from these country's years of dictatorships (30,000 and 31,425), we can see that the results are deficient and that the great majority of victims have not found an adequate judicial response to their violated rights. In the case of Guatemala there are only three sentences that sustained the conviction of ten individuals in an armed conflict that left at least 160,000 dead and 40,000 disappeared. In Peru there are nine individuals 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 in cases related to the extensive and brutal armed conflicts in these countries³.

6. Another important conclusion is that, although it is the State's duty and international obligation to satisfy the victims' right to justice through investigation, prosecution, and sanction of grave human rights violations, in the vast majority of cases compliance does not occur by State initiative, as it should be. Compliance has been demanded of the State, and in most cases demanded —repeatedly— by the victims, making them the essential motor of the trials and of any advances. As stated by Carlos Rivera, a recognized human rights defender and legal counsel to a number of Peruvian victims during the trial against the former president Alberto Fujimori, "*the legitimacy that the victims have today was not given by the State, but is a recognition earned and owned by the victims themselves*".

7. Even though it might appear obvious, it is necessary to say that criminal trials for past human rights violations face various kinds of obstacles, including: normative, political, institutional, cultural, economic, and ideological. Again, the victims have been the motor that have kept the processes going and their constant efforts has permitted each of the obstacles to be faced and overcome, at least partially. But we also need to say that in the long path confronting and overcoming obstacles to criminal prosecutions, national and international actors have also played important roles. Each country has found its own formula combining local and external actors. In some countries, like Peru, the role of international actors —like the Inter-American System of Human Rights⁴— has had more impact in specific criminal cases than in any other country. In fact, in Peru, Inter-American Court sentences have directly influenced the course of concrete judicial procedures, and cases have been reopened and laws

³ More information can be found in the national chapters of the book referred to in footnote 2.

⁴ 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 80's in the Peruvian armed conflict. More information in: "Victims Unsilenced: the Inter-American Human Rights System and Transitional Justice in Latin America", Due Process of Law Foundation, Washington DC, 2007, <http://www.dplf.org/uploads/1190403828.pdf>

and judicial decisions have been discarded based on other decisions by this international forum. 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.

8. As for national actors, one must note the important role played by human rights and civil society organizations. They 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 to repeal, annul, or deem them inapplicable (depending on the country) are a prime example. Another example are the campaigns denouncing laws and legal reforms that were designed to establish inadequate differences among victims such as the Victim's Law in Colombia, or Peru's law granting public funds to cover legal defense costs for military personnel under trial for past human rights violations but nothing 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 the victims in both countries.

9. When questioning the political and judicial decisions of investigators and judges that have favored impunity through the inappropriate use of criminal law institutions such as statute of limitation or *res iudicata*, the untiring efforts of the victims and the organizations representing them has made it possible, in some cases, for these decisions to be overruled. This has allowed the continuation, reopening, or—in some cases—commencement of investigation, 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, even against the most powerful (former Presidents, or former high-ranking military officials). National organizations have also been persistent—even in the context of military dictatorships, deficient legislation, or closed judicial mind frames—in insisting on trialing criminal cases by filing charges, evidence, testimony, documents, factual and legal arguments, and by demanding from judicial authorities the maximum possible, in accordance with the context: for example if amnesty laws disallowed sanctions, the demand consisted in the right to truth, as was argued in Argentina.

10. Another example of the key influence human rights organizations have had at the national level is the role they played in promoting campaigns and trainings designed to breach a rigid judicial mind frame to make them more flexible and receptive to including international law and jurisprudence. Thanks to these efforts, today, in many Latin American countries the judicial stage is no longer exclusively for judicial officials and counsels for the defense, and the victim's perspective has become ever more essential and legitimate. Today, even though their rights are far from being satisfied, fewer question that victims have rights that should be exercised in criminal procedures, as was the rule some years ago in courts and tribunals.

11. Even though victim participation in criminal procedures is, in general terms, legally guaranteed—even though at varying levels depending on complexity and/or normative evolution in each country—the main challenge is in its actual realization. Once again the consistent and creative demands of the victims has allowed that even in adverse circumstances, 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 y criminal procedure.

12. As for criminal procedures as a means to reparation, the study addresses two aspects: concrete economic measures ordered by national judges, and the criminal procedure as a reparation measure itself. The Inter-American System has had little influence in convincing national judges to order different measures than monetary compensation. In Guatemala, the

National Program on Reparation has yet to design a national reparation policy and reparations ordered in criminal trials are scarce. On the other hand, exhumations ordered in specific cases have had a role in the process of reparation by giving victims official information on the fate of their relatives. In most of the countries studied, criminal investigation and trials have become a way to recognize and give dignity to the victims. Criminal prosecutions are a valid way to make known past truths. On the other hand, our study revealed that, in general, although criminal procedures have contributed to rebuilding the truth, they have basically confirmed or complemented facts already known. Criminal procedures have therefore more of a symbolic role, with a lot of positive and reparative effects, because a personal truth finally becomes a historic, official, truth.

13. The existence of a criminal investigation followed by a judicial decision recognizing some fact long alleged by an individual historically ignored by the judicial system because of his or her social or economic status is a big deal. The fact that these long ignored individuals were finally able to make this impenetrable institution move against and actually pin responsibility for atrocities on —up until now— powerful and immune state representative is a very significant development – historically and emotionally. These dismissed individuals managed to place in the seat of the investigated a person who under other circumstances was in a power position and untouchable. Thus, the criminal process goes beyond the punitive function of giving justice, to giving the victim a new position in society with social and historic recognition.

14. Therefore, though it is true that when looking at the numbers, the process is deficient, the transitional justice processes in Latin America should also be looked at from a different perspective, one that focuses and recognizes the legitimacy and dignity earned by the victims through the process, legitimacy and dignity that cannot be measured in numbers. Although far from complying with the spirit of the internationally protected right to justice, this long road has served to prove the practices of terror used during the armed conflicts, military dictatorships, and authoritarian regimes. The victims have, by their own right, gained legitimacy in the process of unveiling and denouncing these atrocities.

15. In sum, in spite of differing normative regulations, lack of political will in governments and judicial authorities, and in many cases the entrenched opposition of sectors benefiting from impunity, the force that has brought about advances on the road to justice has been the consistent, dedicated, and committed efforts of the victims who have not rested in denouncing, documenting, and insisting in finding those responsible, and in the creativity, imagination, and judicial rigor of the organizations and individuals that have accompanied them. Criminal trials have not only played their natural role of sanctioning and giving facts historical recognition, but have also given the victims —usually forgotten and ignored by official institutions— the opportunity to denounce face to face, at the same level, those usually more powerful than themselves who violated their rights.