

Reparations and Prosecutions after Serious Human Rights Violations: Two Pending Issues in Peru's Transitional Justice Agenda

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Peru's internal armed conflict lasted twenty years (1980-2000). The Truth and Reconciliation Commission (TRC)¹ found that 69,280 people were killed in hostilities between, on the one hand, the Maoist movement, the Shining Path, and the leftist *Túpac Amaru* Revolutionary Movement, and, on the other, the armed forces and self-defence committees. The rural population was the most severely affected as rural inhabitants accounted for 79% of the fatalities, of whom 75% spoke Quechua or another indigenous language, and 56% came from areas with economies oriented towards agriculture. The TRC attributed 55.5% of crimes to non-State actors, especially the Shining Path. The remaining 44.5% fell under actions conducted by State armed forces and self-defence committees.

This essay will provide an overview of the Peruvian process of reparations and prosecutions after serious human rights violations, focusing on aspects yet to be implemented. I argue that the current legislative framework, along with practical resource conditions, are either undermining or even blocking the potential of prosecutions and reparations – in the form of accountability and redress respectively – to consolidate transitional justice in Peru.

I have focused on reparations and prosecutions since they were extensively recommended and perceived by the TRC as being crucial to fulfil the transitional justice and reconciliation efforts that the TRC initiated. Additionally, many Peruvians consider the fight against impunity as crucial; indeed reparations and prosecutions are understood as intertwined in the struggle for transitional justice in Peru.

Reparations

The TRC, in the recommendations section of its Final Report (2003),² suggested the implementation of what was called a 'Full Plan of Reparations', designed to help to heal the injuries inflicted by the violence, prevent a repetition of the past and foster the necessary conditions for reconciliation.³ Even though an important share of the recommendations on reparations – modalities, beneficiaries, mechanisms, etc. - made by the TRC have been implemented by the Peruvian State, there have been some setbacks in this implementation that have greatly affected the transitional justice process in Peru. Moreover, as the TRC warned,⁴ the success of reparations policies depends on the existence of strong political will, especially from the government, which is precisely what has been lacking in recent years.

¹ The TRC's Final Report is available in Spanish at:

<http://www.cverdad.org.pe/ingles/ifinal/index.php>. Last visit, 1 August 2009

² TRC. *Informe Final*, Tome IX, Recommendations of the TRC towards reconciliation, Lima, 2003, pp. 146-209.

³ *Ibid.*, p. 146.

⁴ *Ibid.*, p. 147.

In order to follow up and implement the recommendations of the TRC, the Peruvian Council on Reparations was established in 2005 to register individual victims and collective beneficiaries on the Unique Victims Registry.⁵ While the registry is growing, there are nevertheless pending tasks including the strengthening of the reparations programs and allocation of resources towards it.⁶

Thus, the Registry has endured budgetary cuts, which have partially been compensated for by civil society.⁷ Subsequently, the process of determining beneficiaries who can be added to the registry of victims has slowed down. These factors and others have led to a growing distrust, particularly among victims and human rights organizations, in the government's commitment to paying compensations for human rights abuses.

The TRC also called for collective reparations. The government has interpreted these as initiatives related to the restoration of communities' basic services and productive communal infrastructure. These initiatives have been entirely oriented towards community development,⁸ and have been used to compensate for the lack of basic services. This distorts the nature of reparations as there is no direct link between the damages caused by armed violence and the projects undertaken as collective reparations, especially when one bears in mind that the communities have not had the chance to identify community needs nor to choose the most appropriate reparations projects.⁹

In terms of the legal framework that lays out Peru's reparations plan, the exclusion of members of subversive organizations such as the Shining Path from the possibility of receiving reparations¹⁰ is controversial.¹¹ Indeed, the Inter-American Court of Human Rights (IACHR) has obliged states to provide reparations to redress state wrongdoings regardless of victim's participation in subversive movements.¹² Peru's legislation has therefore unfairly distinguished victims who 'deserve' to see redress from others from those who do not. Some sectors within the Peruvian government consider it unthinkable

⁵ See, Act No. 28592, which established the Full Reparations Plan of 28 July 2005 available in Spanish at: <http://www.planintegraldereparaciones.gob.pe/pdf/ley28592.pdf>. (Accessed 15 October 2009).

As of 23 September 2009 there are 55 959 persons signed up in the registry. Statistics obtained from: Presidencia del Consejo de Ministros / Consejo de Reparaciones, *Información sobre el Registro Único de Víctimas*, Official Letter No. 832-2009-PCM-CR/ST, Lima, 14 October 2009. On file with the author.

⁶ Office of the Ombudsman, *A cinco años de los procesos de reparación y justicia en el Perú*, Lima, 2009, p. 303.

⁷ For further information see: Coordinadora Nacional de Derechos Humanos, *Informe Anual*, Lima, 2008, pp. 209-212.

⁸ Sonia Paredes, Julie Guillerot and Cristian Correa, *Escuchando las voces de las comunidades. Un estudio sobre la implementación de las Reparaciones Colectivas en el Perú*, Lima: APRODEH / International Center for Transitional Justice, 2009, p. 30. For example, in polls conducted by the Peruvian NGO APRODEH in four departments –Apurímac, Ayacucho, Huánuco and Junín– during the second trimester of 2008, only 23% of those polled identified the aforementioned projects as reparations.

⁹ *Ibid.*, p. 29.

¹⁰ Act No. 28592 setting up the Full Reparations Plan, article 4.

Law complemented by Rules passed on 6 July 2006 (as modified by Supreme Decree No. 003-2008 passed on 2 February 2008), article 52.a.

¹¹ The TRC considered that the members of subversive organizations killed or injured as a direct consequence of the hostilities were outside the scope of reparations beneficiaries unless the damages were inflicted in violation of their human rights. TRC. *ob.cit.*, Tome IX, p. 161.

¹² The Inter-American Court of Human Rights has ordered reparations for victims convicted of participation in subversive or guerilla movements. See, *Neira Alegria et al. v. Peru* Case, Judgment of 19 September 1996, series C No. 29, para. 5.

to grant reparations to those victims involved in subversion and even propose Peru's withdrawal from the IACHR's jurisdiction.¹³

Reparations in the form of health and education began in 2009. Barriers to the effective implementation of these included victims' health insurance membership, minimum cover, medical personnel's lack of information on reparations, and a pending scholarship program. However, a mental health policy prioritising the victims of armed violence was adopted and university vacancies for terrorism victims were created.¹⁴ Furthermore, reparations legislation considers only rape victims and excludes the victims of other forms of sexual violence.¹⁵ This is inconsistent with the domestic implementation of the International Criminal Court Statute, which includes a range of sexual crimes. Given the nature of sexual violence,¹⁶ women additionally are reluctant to be included in the Unique Victims Registry because it explicitly identifies them as rape survivors.¹⁷ The Reparations Council has so far failed to address this issue.

The granting of reparations holds particular importance in Peru's transitional justice process insofar as they are perceived as the Peruvian state's answer to the sorrow of those who were most severely affected during the internal hostilities. Reparations constitute a means to include an important sector of the Peruvian population which has been politically excluded for centuries. That reparations are connected with prosecutions can be understood by reference to the principle whereby serious human rights violations, which qualify as international crimes, generate the obligation to provide monetary and non-monetary reparations to the victims.

Prosecution

In investigating the period of 1980-2000, the TRC identified structural problems as underlying causes of judicial inefficiency.¹⁸ This situation was worsened after the self-coup d'état by the former president Alberto Fujimori in 1992 whereby the executive branch of power intervened and took over control of the Judiciary and Parliament.¹⁹ Two self-amnesty laws exemplified the problematic of the Peruvian judiciary during this period.²⁰ The 2001 IACHR ruling on *Barrios Altos*²¹ concluded that provisions

¹³ This situation acquired relevance when the IACHR ordered the Peruvian State to pay compensation to the next of kin of convicted subversives killed in a military intervention at the *Castro Castro* Prison during Fujimori's regime. IACHR, *Miguel Castro-Castro Prison v. Peru*, Judgment of 25 November 2006, series C No. 160, paras. 450 and 470.14.

¹⁴ Office of the Ombudsman, *ob. cit.*, pp. 307-309.

¹⁵ Act No. 28592 setting up the Full Reparations Plan, article 6.b. See also the Rules, *supra* note 7, article 47.b.

¹⁶ The psychosocial impact of armed violence in women, in Peru's armed conflict, was addressed in: TRC, *ob. cit.*, *Annex I. Análisis cuantitativo y secuelas psicosociales*, p. 271. See also: Eduardo Espinoza, 'Reflexiones sobre la violencia sexual y su reparación', in: *Revista Democracia y Derechos Humanos*, Lima: COMISEDH, II Etapa, No. 38, 2002, pp. 30-32.

¹⁷ As of 23 September 2009, there are only 248 rape victims registered on the Unique Victims Registry. Statistics obtained from: Presidencia del Consejo de Ministros / Consejo de Reparaciones, *ob. cit.* On file with the author.

¹⁸ TRC, *ob. cit.*, Tome VIII, General conclusions, conclusion 124.

¹⁹ *Ibid.*, conclusion 125.

²⁰ The criminal processes to punish those responsible were precluded because of the enactment of two Peruvian self-amnesty laws. The first law –the Act No. 26479 of 14 June 1995– granted a general amnesty to military, police and civilian personnel facing any stage of a criminal process either for common crimes or for military offences. Moreover, due to the fact that a judge had decided not to apply

designed to eliminate responsibility - i.e. the amnesty laws are not admissible - since they would prevent the punishment of perpetrators of grave human rights violations such as torture, extrajudicial execution and enforced disappearance.²² The IACHR declared that the amnesty lacked legal effect²³ and, due to the scope of this finding,²⁴ the victims of the Barrios Altos massacre were finally able to access the judiciary.

Eight years later, one can identify a double outcome of the overturning of the amnesty law in Peru. While Peruvian judicial actors have condemned State and non-State leaders for international crimes, there are still an overwhelming number of pending cases.

Abimael Guzmán and other Shining Path leaders were condemned for acts of terrorism²⁵ in 2006. The judicial bench, upholding the TRC's findings, found them responsible for serious violations of international humanitarian law since they breached minimum standards in the conduct of hostilities.²⁶

Former President Alberto Fujimori's trial, beginning in December of 2007, raised international attention as evinced by several *amicus curiae*.²⁷ Fujimori was found guilty as an indirect perpetrator, using the state apparatus for the *Barrios Altos* and *La Cantuta*²⁸ massacres whose direct perpetrators were members of the paramilitary group *Colina*. The Supreme Court qualified those massacres as crimes against humanity because of their systematic nature.²⁹ Arguably, the success of the Fujimori case

those rules, the Peruvian Congress passed a new interpreting Act –No. 26492– according to which, judges were forced to apply the first Act based on the argument that the Congress had an exclusive power to grant amnesty.

²¹ On 3 November 3 1991, six heavily-armed individuals -members of the paramilitary group *Colina*- burst into a building located in the neighborhood known as Barrios Altos in Lima. The individuals covered their faces with balaclavas and ordered the victims to lie on the floor. Then, the assailants fired at them indiscriminately killing 15 people and seriously injuring other four, one of the latter is now permanently disabled.

²² IACHR, *Barrios Altos v. Peru*. Judgment of March 14, 2001. Series C No. 75, para. 41.

²³ *Ibid.*, operative paragraph 4.

²⁴ IACHR, *Barrios Altos v. Peru*, Interpretation of the Judgment on the Merits, Judgment of September 3, 2001. Series C No. 83, operative paragraph 2.

²⁵ Including bomb attacks, selective murders and the *Lucanamarca* massacre. In this emblematic case, Shinning Path members murdered farmers inhabitants of *Lucanamarca*, a village located in the Peruvian southern Andes.

²⁶ *Guzmán Reynoso et al. (National Criminal Chamber)*, Accumulated File No. 560-03, Judgment, 13 October 2006.

The Transitory Second Criminal Chamber of the Supreme Court on judgment of 14 December 2007 upheld the Chamber's condemnatory judgment by which Abimael Guzmán and others Shining Path leaders were condemned to life imprisonment and other long-term imprisonment sentences.

²⁷ Among others, the International Center for Transitional Justice and some United States universities.

²⁸ On July 18 1992, members of the group *Colina* burst into the homes of students and professors of the *Enrique Guzmán y Valle* National University, better known as *La Cantuta*. Nine students and one professor were detained, murdered, and secretly buried in mass graves.

²⁹ *Barrios Altos, La Cantuta and SIE Basement Case (Supreme Court of Peru, Special Criminal Chamber)*, File No. AV-19-2001, Judgment, 7 April 2009, paras. 710-717 and 823. Available in Spanish at:

http://www.pj.gob.pe/CorteSuprema/spe/documentos/P3C1_tipificacion.pdf. (Accessed 21 October 2009).

The judgment and sentence were upheld on appeals. See *Barrios Altos, La Cantuta and SIE Basement Case (Supreme Court of Peru, First Transitory Criminal Chamber)*, File No. AV-19-2001, Judgment, 30 December 2009. Available in Spanish at:

corresponds to the heightened international attention, which lent momentum to the Peruvian prosecution. International interest stemmed from Fujimori's status as a former President, a mastermind of criminal state machinery, and therefore a perpetrator of crimes characterized by huge asymmetry between the victims and the State. This international interest is consistent with the relatively recent tendency to bring sitting or former heads of states to justice, accused of international crimes, across the world. What Fujimori's trial and condemn shall mean for other prosecutions in Peru is a clear message of zero tolerance for impunity. The logical conclusion is that if the highest element of a criminal organization is condemned, the lower echelons should experience the same fate.

Nevertheless, most of the cases investigated by the TRC and recommended for prosecution remain stalled in the judiciary. This is despite the TRC's suggested establishment of a criminal subsystem specializing in cases of human rights violation.³⁰ The Office of the Ombudsman has identified some underlying factors that have impeded lower level prosecutions: lack of consolidation of the aforementioned subsystem, which was established in 2004; the complexity of cases; excessive workload and; inadequate investigatory strategies.³¹ The lack of cooperation from the armed forces and the non-enforcement of arrest warrants are also obstacles.³² In 2008, bills on new amnesties and presidential pardons³³ and some judicial decisions have clouded the situation. For example, cases decided by the National Criminal Chamber – which handles cases of serious violations of human rights rather than the to date unconsolidated subsystem – in the last two years have ended in absolutory judgments, due to the exoneration of the responsibility of superiors, a very high and formalistic evidentiary threshold and rejection of the accuracy of the investigations conducted by the TRC.³⁴ A contextual factor that may partially explain this situation is the existence of some cases of serious human rights violations committed by State agents during the first term (1985-1990) of the current Peruvian President Alan García.³⁵

In order for prosecutions of human rights abuses associated with the 1980-2000 conflict in Peru to proceed, it is vital to strengthen the judicial subsystem specializing in human rights, to implement a system for the protection of witnesses and victims and their next of kin and to provide them with sufficient economic resources and training. To a great

<http://www.pj.gob.pe/CorteSuprema/SalasSupremas/SPT/documentos/R.N.%20N%C2%BA%2019-01-2009-A.V..pdf> (Accessed 15 January 2010).

³⁰ TRC, *ob. cit.*, Tome IX, Lima, 2003, p. 137.

³¹ Office of the Ombudsman, *ob. cit.*, pp. 310-313.

³² *Ibid.*, pp. 310-324.

³³ Bill No. 2848 / 2008-CR of 6 November 2008 and Bill No. 2844/2008-CR of 6 November 2008.

³⁴ Instituto de Defensa Legal, *Los retrocesos del proceso de judicialización de graves violaciones a los derechos humanos. Las sentencias de la Sala Penal nacional*, Lima, October 2009, pp. 2-4. In file with the autor.

³⁵ See for example the *Durand and Ugarte* case which reached the IACHR. IACHR, *Durand y Ugarte v. Peru*. Judgment of August 16, 2000. Series C No. 68.

On 18 and 19 June 1986, more than 200 inmates either accused or convicted of terrorism were killed during the riots set by them in the prisons of *Lurigancho*, *El Frontón* and *Santa Bárbara*. The State agents purportedly used excessive force against the inmates who, once already subdued, were extra-judicially executed. The national criminal investigations involving President García have led to no concrete result.

extent, these necessary steps have not been adopted due to a lack of political will by the current administration to implement a timely and effective judicial policy.

In order to more realistically handle the overwhelming backload of cases related to the 1980- 2000 conflict, a selective approach to justice should not be dismissed. If such an approach were taken, cases to be dealt with first could be selected according to criteria including the dimension of atrocities, the impact on the communities and elapsed time since the crime. This does not entail excluding victims from the processes of justice. Instead, it requires the creation of a feasible and progressive timetable for prosecution. The current alternative, the simultaneous handling of all the cases suggested by the TRC, could weaken the transitional justice process, particularly given the multitude of obstacles, including serious lack of political will, currently facing prosecution for human rights violations during Peru's conflict.

Conclusion

When it comes to reparations and prosecutions after serious human rights violations in Peru, inconsistencies in the legal framework and lack of resources have greatly complicated the transitional justice process since the TRC. This becomes more complex as new cases related to Peru's armed conflict have recently been uncovered. Accordingly, certain legislative changes grounded in international law along with the necessary state funding are cornerstones to get Peru's transitional justice back on track. These changes logically demand strong political will from the government, which has regrettably been lacking from the current administration.

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