

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

First Phase Report – December 2008

Executive Summary

The Justice Branch

The role of the Prosecutor in the Open Confessions¹

1. The Attorney General's office faced a work overload due to the magnitude of the Process, which exceeded its capacity to respond. The office had to face up to operational and legal challenges of unprecedented nature in Colombia, and in some instances took on tasks beyond its exclusive responsibilities, without adequate resources. However, from an international perspective, there is special value to the fact that the Process generates novel international standards.

2. The fact that the internal armed conflict is still going on debilitated the Justice and Peace proceedings, though not necessarily directly. New scandals arising from the conflict undermined the participation of victims, and even the very credibility of the Process. Examples of this were the 'false positives,' that is, the killing of civilians by security forces and their misrepresentation as combatants in order to receive monetary compensation, and also the extradition by the government of paramilitary leaders involved in the Justice and Peace Process

3. The legal tactics employed by the *postulados*² in a highly politicized context undermined, in certain cases, the position and role of the prosecutors. Although ostensibly participating voluntarily in the Process, some of the demobilised used a 'break defence'. As in the famous case of Milosevic, this tactic involves contesting the very legitimacy of the tribunal. In these cases, the legal punishment is irrelevant because the objective of the accused is to turn his trial into a political stage in which he can proclaim his political ideals and denounce the institutions. This type of defence presented the prosecutor with 'an enemy of the game'. Other *postulados* adopted a collusive defence, that is, they agreed to participate in the proceedings but relied on judicial guarantees to ensure a favourable result in the final court decision. In this case, the prosecutor faced a 'fake player.'

4. There were major structural differences between the confessions of the paramilitary commanders and those of the guerrilla commanders. However, in the case of the so-called 'patrollers' or 'combatants', and of low-ranking members on both sides, the approach to the confessions was very similar.

5. The possibilities open to the Prosecutor and his public performance were also influenced by how the *postulados* portrayed themselves, how they perceived their

¹ Open confessions refer to the declarations of the crimes committed, made by former members of illegal armed groups within the framework of the Justice and Peace Process, also known as the *version libre*.

² *Postulados* refer to the demobilised members of former illegal armed groups prosecuted under the Justice and Peace law.

conduct in the conflict, and the mechanisms they employed to explain - be it by way of justification or excuse- their crimes. The next stages of the Process will be in large part affected by whether the *postulados* adopted a disruptive stance and was unwilling to submit to the Justice and Peace Law, or whether he demonstrated a commitment to it.

6. The arguments used by the *postulados* in their defence included the following: they denied responsibility by portraying themselves as victims rather than as active agents, they argued that their conduct was not illegal but widespread and supported by those in positions of authority, and they denied the victims' status by portraying them as enemies deserving of punishment.

7. Each prosecutor adopted a different approach towards the open confessions, some being more proactive and committed, while others remained passive. This affected the way the hearings developed. The more proactive prosecutors provide examples of what the ideal role of the prosecutor should be. The way they conducted the case included the following:

- effective direction and execution of the *postulados*' open confessions, ensuring their spontaneous and voluntary character;
- rigorous cross-examination of the defence, seeking clarifications without taking any information for granted;
- encouraging a forensic discussion conducive to the 'reconstruction of truth';
- challenging glaring inconsistencies in the *postulados*' confessions;
- investigating the structure of an organisation, its lines of command, its higher hierarchy, the motives behind actions and events, the names of the perpetrators and their victims;
- revealing how paramilitary groups exercised de facto judicial powers in geographic areas under their control
- distinguishing between actions that, based on international criminal law and Colombian law, constitute international crimes, from those which constitute ordinary crimes.

8. The language used by the *postulados* presented the prosecutors with a dilemma between allowing the *postulados* to express themselves freely and prohibiting the use of terms that discredit the victims or minimise and trivialise the nature of the crimes. Such terms include referring to the victims as drug traffickers, subversives, or guerrillas/former guerrillas. Respect for the victims should serve as the limiting criterion for the spontaneity of the confessions. Another consideration should be the need to provide spaces of reconciliation, given the lack of alternative forums.

9. The prosecutors hold an instructive role with regard to both the victims and the *postulados*, as is evident from the attitudes of some of the prosecutors. For the victims, this took the form of guiding them on the general purpose and the technical mechanisms of the Process, so as to ensure their participation and the possibility of establishing the time, manner, and place in which the crimes took place. As for the *postulados*, the objective was to ensure their correct account of the facts (for example, applying the term 'homicide of protected people'³ to describe the murder of civilians by illegal armed groups, rather

³ This term appears in the Colombian Criminal Code and refers to the assassination of unarmed civilians in the context of an armed struggle.

than the ‘killing of enemies’). Beyond a mere recounting of the facts, the prosecutors also sought to emphasize the gravity of the crimes under consideration.

10. It is imperative that prosecutors develop legal submissions in line with international criminal law, in particular with the Rome Statute of the International Criminal Court, and that they borrow from the language of international crimes and from the Colombian legal tradition of heinous crimes. They should consistently carry out prosecutions of acts that constitute international crimes such as recruiting of child soldiers, forced disappearances of persons, forced displacement, and sexual crimes committed in the context of the internal armed conflict. It should be noted that the Prosecution has issued a Memorandum on this matter, and that the prosecutors increasingly demonstrate a mastery of this type of legal submission and interpretation of conduct.

The victims in the open confessions

11. The Justice and Peace Unit at the Attorney General’s office has provided dignifying spaces for the victims, facilitating defused discussions and seeking to realize the victims’ right of access to the Process and participation in it. The Unit also developed a counselling function, encouraging reconciliation between *postulados* and victims. However, there is an urgent need for governmental branches to implement policies aimed at creating opportunities for reconciliation and programmes to protect the dignity of victims both within and without the judicial Process.

12. The ability of victims to ask questions during the open confessions is essential to guaranteeing their right to participation in the Process. It is through these questions that victims are able to inquire about the circumstances of the crimes committed against them. Thus, the mechanism enabling victims’ questioning is crucial: the use of Avantel communication equipment was unsatisfactory due to its unreliable sound quality, and the direct contact with the *postulado* generated tension that, in some cases, hindered the ability of the victim to properly form questions. The written format designed by the Justice and Peace Unit, on the other hand, is more effective in facilitating the identification of the victim’s claims and the definition of the crimes under scrutiny. To be effective, however, this mechanism requires technical and legal support of personnel from the Attorney General’s office.

13. The victims’ perception of the Process depends in large part on their interaction with the institutions and the actors involved in it. Lack of attention of some participants, leading to disorder and disruption in the victims’ auditing rooms, carries the risk of trivializing the entire Process. Representatives of the Public Defence (*Defensoria del Pueblo*), of non-governmental organisations, and victims’ lawyers, must respect the solemnity and formality of the proceedings at all times.

14. Security guidelines issued by the Attorney General’s office and the Justice and Peace Unit to protect all parties involved in the proceedings must be strictly observed. In particular, members of the National Penitentiary and Prison Institute (NPIC) must be kept out of the victims’ auditing rooms. Aside from being unregistered, unlike the rest of the attendees, their presence could frighten or cause distrust amongst victims. As for the confessions’ rooms, there is a need to explore mechanisms that satisfy NPIC’s obligation

to keep the *postulados* under custody while guaranteeing the confidentiality of the information relayed in the proceedings.

Practical Aspects

15. While the Attorney General's effort to provide auditing rooms for the victims has been significant, the use of improvised spaces, inappropriate layout and furnishings of the rooms, and the presence of inappropriate persons should be avoided in the future. It is also essential that the open confessions rooms are properly equipped with sounds and visual recording equipment, so that the proceedings can be viewed with reliable quality in the auditing rooms.

16. A considerable number of open confession sessions began with a delay (ranging from 30 minutes to 2 hours). The costs, for both the public prosecution and other institutions involved, as well as for the victims, are considerable. Delays obstruct the timetable, the possibility of the victims to formulate questions and the ability of the *postulados* to describe the events. In extreme cases in which the proceedings were suspended, victims failed to attend sessions on the date the proceedings had adjourned.

17. Compliance with Attorney General's directions on verification and inspection of information relayed in the proceedings before releasing it to the media has been lacking and in some cases inexistent. This represents both a security threat and a violation of the right to privacy and the reputation of victims and third parties mentioned in the confessions. Media access to the proceedings should be allowed only to the extent that it does not jeopardize the victims' rights to privacy and anonymity and their safety.

The Branch of Demobilisation, Disarmament and Reintegration (DDR)

Analysis of the Caribbean Coast region shows that the Process of reintegration in the region has improved significantly, not only with regard to the demobilised themselves but also to the host community. The improvements followed the restructuring of the national strategy and the change of personnel in municipalities and departmental administrations as a result of the 2007 elections. The High Council for Reintegration (HCR) has used this opportunity to stimulate the participation of new local authorities in the development and implementation of local and regional projects, and the inclusion of reintegration in their development plans.

However, implementation of the Process of reintegration at the local level still faces many challenges:

1. In some municipalities, projects targeting the demobilised have been integrated into the same area as programs for vulnerable populations. However, it is essential to distinguish between policies directed at the demobilised, displaced, host community, victims and other vulnerable groups in order to meet each and every group's needs.
2. Actions to support local administrations in the planning and execution of development plans, as well as the allocation of financial resources, need to be

strengthened. Even though Law 550, passed in 1999, instructed a financial reform at regional level, the consolidation of the Process of reintegration still depends in large part on the implementation of efficient, adequate and sustainable actions by local governments that would allow for progress to continue.

3. Integration of the demobilised in the labour market represents one of the main bottlenecks in the Process of reintegration. This was mostly due to lack of available employment opportunities and lack of appropriate training in those areas where employment was available. In the Caribbean coastal region, the vast majority of the demobilised who obtained formal employment did so through institutional programs of the National Police or the road safety program (*Fondo de Prevención Vial*), with a statistically insignificant number working in the private sector. As a result, informal forms of employment increased among the demobilised, especially that of the *mototaxismo* (unauthorized motorcycle taxis). The national government should therefore increase its efforts to incorporate the demobilised in the private sector as part of a sustainable, viable and inclusive income generating strategy.
4. There is a clear need to involve other social and economic organisms, considering the poor response of the business sector, the lack of acceptance in the communities (which is gradually changing) and the dissatisfying results of projects aimed at generating income.

The Public Policy Branch

1. The Justice and Peace Process has been progressing in the midst of grave controversy and active international involvement. The Process, initially a government initiative, has evoked fierce opinions regarding the limits of a Process for peace. This involved a debate on how much justice should be sacrificed for the sake of peace or how much peace should be offered to ensure that justice maintains its status as the highest public good.
2. The Process has strained the resources of Colombian institutions to an unprecedented degree. The challenge was not only the drafting and sanctioning of the Justice and Peace Law (Law number 975, passed in 2005), but also the careful devising of operational procedures to keep the Process in line with international standards.
3. The Process has, paradoxically, both contributed to the re-institutionalization of justice in Colombia and exposed institutional deficiencies. While re-establishing judicial channels in the country, the Process has also revealed the weakness of the government in crafting well-defined strategies and keeping implementation in line with these strategies.
4. Regarding the Process of Demobilisation, Disarmament and Reintegration, the Justice and Peace Process has faced problems both because of structural rigidities in governmental management and in public policy, and because of controversial public decisions by senior government officials and civil servants, which often

reflect an unwillingness to contribute to the Process's mission: 'facilitating Processes of peace and individual or collective reintegration into society of members of armed groups, and guaranteeing the right to truth, justice and reparation of the victims.'