



Max-Planck-Institut
für ausländisches und
internationales Strafrecht

Peace in Colombia and Transitional Justice

Hans-Joerg Albrecht

Max Planck Institute for Foreign and International Criminal Law
<http://www.mpicc.de>



A View from the High Commissioner of Human Rights



- Pansieri declares at the occasion of opening the visit to Columbia, April 21, 2015
 - The decision to include victims in the peace process is welcomed
 - Violations of human rights and humanitarian law must be prosecuted and punished (justice)
 - At the same time special mechanisms of transitional justice are important: truth, reparation, guarantee of non-repetition
 - Particularly affected victim groups: Indigenous, Afro-descendants, peasant communities, women
 - Land reform, restitution and dialogue
 - Exploitation of natural resources and the environment
 - Illicit economies
 - Transitional justice mechanisms must be implemented



A View From The Hague



- The Prosecutor (February 2015) reiterates her support to Colombia's ongoing efforts to bring an end to the decades-long armed conflict
 - In line with its obligations under the Rome Statute
 - The principles of the Rome Statute reflect the consensus of the international community in recognizing the integral role of justice in ensuring sustainable peace, stability and security
 - Peace and justice are indeed mutually reinforcing
 - Continue its constructive engagement with the Government of Colombia and to assess progress on national proceedings in relation to the areas of focus



A Continuing Focus On ...



- The Legal Framework for Peace and other relevant legislative developments, as well as jurisdictional aspects relating to the emergence of “new illegal armed groups”
- Proceedings relating to the promotion and expansion of paramilitary groups
- Proceedings relating to forced displacement
- Proceedings relating to sexual crimes
- Proceedings relating to false positive cases.



A Positive Approach to Complementarity



- Systematic information
- Monitoring (since 11 years)
- Dialogue
- Evaluation/Assessment (of whether peace agreements and legislation implementing the Legal Framework of Peace is compatible with the Rome Statute)



A Warning



- In this respect, the Office has informed the Colombian authorities that a sentence that is grossly or manifestly inadequate, in light of the gravity of the crimes and the form of participation of the accused, would vitiate the genuineness of a national proceeding, even if all previous stages of the proceeding had been deemed genuine



A View From the United Nations



- Report of the Secretary General on the rule of law and transitional justice in conflict and post-conflict societies, 2004
- Transitional Justice is
 - „the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both, judicial and non-judicial mechanisms, with differing levels of international involvement and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.“



International Dialogue on Peacebuilding and Statebuilding (New Deal)



- New Deal involves 5 Peacebuilding and Statebuilding Goals (PSGs), which are:
 - Legitimate Politics — Inclusive political settlements and conflict resolution
 - Security — Establishing and strengthening people's security
 - Justice — Addressing injustices and increasing people's access to justice
 - Economic Foundations — Generation of employment and improvement of livelihoods
 - Revenues and Services — effective management of revenue and building capacity for accountable and fair service delivery



Transitional Justice for Whom?



- „La justicia transicional es para el beneficio de la sociedad, no de los perpetradores“
- Semana, 6/3/ 2015

- Transitional justice is based on inclusion
- Society benefits from an inclusionary approach to all members of society (including perpetrators)
- German Federal Constitutional Court/ European Court of Human Rights jurisprudence on punishment and rehabilitation (a right to rehabilitation and reintegration)
- Based on the conviction that reintegration is the best way to protect society



Challenges of Transition and Justice



- Transition addresses past, presence and future
 - Different questions
- How to reconcile the ban of impunity and effective prevention of further violence?
- How to reconcile justice (repression/punishment) and prevention (security)
- How to build peace and state?
- How to avoid conflicts which are a product of transitional justice itself?



Achievements in Colombia



- Negotiations and peace process
- Dialogues including victims and victim groups
- Legislative approach to sexual crimes
- „False positives“ cases to be dealt by civil courts
 - Restrictions on armed forces and strengthening separation of powers and the judicial power
- Land reform



Security and a Bias in the Rome Statute



- A bias in the Rome Statute towards core human rights
 - Predesigned through human rights instruments
 - Genocide Convention, ICCPR
 - The focus is on life, liberty, torture ...

- A bias in transitional justice towards
 - Dealing with atrocities in the past

- The economic basis of human life (social security) is protected indirectly (at best)
- Economic crimes (and economic security) are not considered



Conflict Resources



- Land and land reform (restitution)

- Natural resources and the environment

- Natural resources and distribution

- Illicit resources and political economy
 - War economies



Answer to Challenges



- Legitimacy (of power)
- Trust
- Cooperation



Punishment Itself Can be a Challenge



- Punishment is violence/force and therefore carries a significant stigma
 - Risk of being interpreted as illegitimate force
 - Risk of violent retaliation
- Superior force may generate power through violent acts (or threats)
- Legitimate/sustainable power must be free from the stigma of force, despotism and arbitrary decision-making
- Transformation is dependent on substantive norms (which are perceived to be legitimate and accepted)
- In particular international criminal punishment requires a full normative basis
 - » Legitimacy



The Warning



- In this respect, the Office has informed the Colombian authorities that a sentence that is grossly or manifestly inadequate, in light of the gravity of the crimes and the form of participation of the accused, would vitiate the genuineness of a national proceeding, even if all previous stages of the proceeding had been deemed genuine
- A Reformulation
- „a sentence that is grossly illegitimate, in light of gravity, form of participation and possible consequences for society“



The Core of Legitimacy



- Legitimacy is a claim
- a claim to have the right
 - not to be
 - Obstructed in the course of duty (obstruction offence)
 - Resisted when enforcing the law (collective civil resistance, the right to resist)
 - to be
 - supported through cooperation



Complexity



- Legitimacy has empirical and normative components
- Legitimacy (from a comparative perspective) is characterized by idiosyncracies
- Legitimacy is a product of ongoing conversations, dialogues etc (process of legitimation)
 - Participation
- Legitimacy is generated locally, nationally and globally
- Legitimacy can be imported and exported (travelling legitimacy) immigrants
- Legitimacy can be an imaginary category (phantasies for those who did never have any encounters with the state)



Complexity continued



- Legitimacy is something which is produced
 - through appeals to established procedures
 - and/or through appeals to reasons of substance
 - through complying with the rules and through breaking the rules
- Perceptions of legitimacy may depend on ethnicity, social class and many other variables
- Legitimacy can be achieved by
 - enforcing the rules
 - Under-enforcing the rules
 - and not enforcing the rules



How to generate trust and the basis for cooperation?



- The most fundamental way to gain trust is to be trustworthy
- Without norms of trust, trust/confidence cannot be established
- Trustworthiness of institutions creates interpersonal trust, which in turn make the production of social capital in civil society possible
- Collective memories (or narratives) can serve as a link in the theory of social capital and the explanation of cooperation as trust/confidence seems to be strongly dependent on past experiences (with others and institutions)
- Placing persons in small groups where they talk to one another, is beneficial for creating trust and collaboration
- In modern societies this is not a feasible way to produce trust
- What is needed is a change of the collective memory or a new narrative



Punishment and trust are correlated



- 2005 European Crime Survey
- Punitivity (demand for punishment) is correlated with trust/confidence in public institutions (police, courts, prisons)
 - The lower trust, the higher demand for punishment
- High imprisonment rates are correlated also with trust/confidence
 - The lower the trust in public institutions, the higher are prisoner rates



Punishment, Mediation and Trust



- Punishment has spiralled out of control in some regions
 - High prisoner rates
 - High rates of recidivism (revolving door)
 - Large numbers of hardened ex-cons have to be accommodated in the community

- Punishment is the last resort
- Victims needs are not catered to
 - Finding out what happened and why that happened
 - Compensation
 - Restoring dignity
 - „Healing“
 - Reducing fear



Mediation and Punishment



- Punishment is
 - Backward and Forward Looking
 - Interested in the reenforcement of legal norms
 - No answer in situations where punishment is disputed or likely to intensify conflicts
 - Amnesty, decriminalization
- Mediation
 - Forward looking
 - Interested in the future of communities and relationships between individuals
 - No answer if there is no voluntary participation or inequality
 - Success dependent on the threat of punishment (in the shadow of criminal law)





- Criminal norms carry expectations (that the norm will not be broken and that trust can be placed in the norm and institutions)
- If an offender breaks the norm then the result is
 - Disappointment
- Disappointment can be responded to by way of
 - Giving up expectations (because it is said that the expectations were wrong)
 - Maintaining the expectations contra factually
- In order to demonstrate that the offender was wrong and to compensate the damage done to trust (Vertrauensschaden)
 - A message must be send out carrying a demonstration that the expectations are legitimate

Conclusions



- Peace Building (not only in Colombia) is dependent on trust and cooperation
- Legitimacy is the core category in a process of peace building
- Transitional justice has to consider prioritization of social/economic security and balancing of security and justice
- Positive complementarity seems a feasible way to link needs for
 - Balancing security and justice
 - A process of trying out various approaches

