Peace in Colombia and Transitional Justice

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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
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."
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

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- 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 reinforcement 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)
Trust and the theory of positive general prevention

- 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