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From Colombia to the DRC exploring the untapped potential of restorative justice- A

Response to Annette Pearson

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Introduction:

This is a response to the notes from the field: “Is Restorative Justice a Piece in the Colombian Transitional Justice Puzzle?”. In these notes Annette Pearson looking at Colombia, asks a very valid question regarding the potential role that restorative justice can play in the Colombian transitional justice process. As an African specialist, when I was asked to write a response to Annette’s field notes, I was unsure about how my knowledge and experience of African conflicts and peace processes could be relevant to the Colombian context. Yet, reading the notes, made me reflect on my recent work on transitional justice in the east of the Democratic Republic of the Congo. The complexity, messiness, fragmentation and politicisation of the Columbian process are also all too familiar.

In this response, I will share some insights from the DRC context that draw on similar issues raised by Annette. In line with Annette’s notes I believe that restorative justice can similarly be a piece of the Congolese transitional justice puzzle.

The Congolese peace agreements

Similar to the Colombian case, the conflict in the DRC is complex. In 1996–1997 Laurent Kabila’s attempt to depose the dictator Mobutu Sese Seko led to the start of the Congo first war. The fighting flared up after the Hutus genocidaires fled Rwanda to eastern Congo and were chased by the Rwanda Patriotic Front (RPF). The spill-over from the conflict drew 14 different countries from around the Great Lakes region and led to the extended presence in eastern Congo by Rwandan and Ugandan armies (*Zongwe* 2013). The Global and Inclusive Agreement of 2002 in Sun City that ended the Congo global wars, failed to stop the conflict in the east of the country and fighting resumed shortly after between the government and the

Rwanda backed Congrès National pour la Défense du Peuple (CNDP)- later on transformed into the March 23 Mouvement, the Rwandan Forces Démocratiques de Libération du Rwanda (FDLR) and the Ugandan Allied Democratic Forces (ADF) and many other armed groups (Stearns 2012). After the Sun City process, the DRC has seen several peace negotiations processes including the Goma Conferences in 2008; the Ituri 2009 accords and the Kampala peace process in 2013. These processes have led to a revolving door approach to demobilisation and resulted in the fragmentation and factionalisation of armed groups (Verweijen and Wakenge 2015; Vlassenroot 2013; Stearns and Vogel 2015). Since 2009, various coordinated assaults have been undertaken by the Congolese government FARDC backed by the MONUSCO peacekeeping force resulting in the defeat of the M23 Mouvement and weakening the Rwandan Forces Démocratiques de Libération du Rwanda (FDLR) and the Ugandan Allied Democratic Forces (ADF). However, the military actions by the Government and MONUSCO have failed to translate into significant gains in security and stability in the east of the Democratic Republic of the Congo. The UN Security Council Committee 1533 noted in December 2016 that the overall security situation in the east of Democratic Republic of the Congo has not improved and various national and internally linked armed groups continue to operate there.¹ The absence of a vetting process for members of the army and the security forces has meant that these are often involved in crimes of various nature including rapes, exactions and pillage. In the east of the DRC, the lack of economic opportunities and absence of the rule of law have also meant increased criminal activities and lawlessness among civilians who are often involved in armed robberies, killings and rapes.

The Congolese peace process and the legacy of the conflict

The 2002 Global Peace Accord peace agreement included an amnesty provision that excluded war crimes, genocide and crimes against humanity which formed the basis of the amnesty law No. 5/023 promulgated in 2005.² The 2013 Nairobi peace agreement between the government and the M23 does not include any references to amnesty but also includes additional commitments to ensure that, “*prosecution for war crimes, genocide, crimes against humanity,*

¹ Sanction Committee 1533 report 28 December 2016. UN security Council Doc. S/2016/1102 available on Group of expert report http://www.un.org/ga/search/view_doc.asp?symbol=S/2016/1102

² République Démocratique du Congo: Loi No. 05/023 du 2005 portant amnistie pour faits de guerre, infractions politiques et d'opinion available at Refworld at <http://www.refworld.org/docid/47305d032.html>

sexual violence and recruitment of child soldiers are initiated against any presumed author thereof” and to exclude these crimes from amnesty.³

To deal with issues of accountability for human rights and humanitarian law violations, following pressures from the international community, in April 2004, the DRC government self-referred the country- then already a signatory to the ICC since 2002- to the International Criminal Court. While, the ICC temporal jurisdiction was limited to crimes committed after its creation in 1 July 2002 by which time the DRC major wars were almost already over, this referral in addition to the adoption of article 215 of the DRC Constitution (2005), which provides a superior status to international treaties duly ratified by the DRC⁴ have meant that the door remained open for the ICC to pursue those responsible for future human rights and humanitarian violations in the DRC. In addition to the ICC referral, prosecutions in national military courts and tribunals including mobile courts have been pursued by the government and supported by donors. In the DRC, perhaps due to international heavy presence and involvement, there is an increasing focus on the prosecution of conflict related crimes as the way to deliver justice for survivors and particularly those involving the use of rape as a weapon on war.

In addition to criminal prosecution, the Sun City Agreement established a National Truth and Reconciliation Commission empowered to hear crimes and large-scale violations of human rights.⁵ The Truth and Reconciliation Commission which was established in 2004 failed to investigate a single case of human rights violations before the end of its mandate in 2006 (Aroussi 2011; Davis and Hayner 2009). This Truth Commission included representatives of those armed groups known to have committed egregious human rights violations which was a clear impediment for establishing credibility and pursuing the accountability agenda. The 2013 Nairobi agreement included a provision for establishing a new National Reconciliation and Justice Commission. This commission has not yet been established but doubts exist as to its independence and potential for delivering justice since it would be under the direct authority

³ Declaration of the Government of the Democratic Republic of the Congo at the end of the Kampala Talks Articles 1(1) and 8(4).

⁴ Article 215 of the DRC 2005 Constitution provides “Lawfully concluded treaties and agreements have, when published, an authority superior to that of the law, subject for each treaty and agreement to the application by the other party”.

⁵ The Global and Inclusive Agreement Sun City 16 December 2016, section V <http://reliefweb.int/report/democratic-republic-congo/global-and-inclusive-agreement-transition-dr-congo-inter-congolese>

of the president and prime minister. The Congolese peace agreements do not include any measures for the reparation of survivors.

Failure of the current approach

In the last few years, thanks to the organisation of mobile courts hearing and the support from donors in strengthening the capacity of the Congolese criminal justice system, we have seen a number of prosecution for crimes of international nature and particularly those involving sexual violence. For instance, in 2014, the DRC military tribunals convicted 135 individuals, including 76 members of the armed forces, 41 members of the national police and 18 members of armed groups, of war crimes.⁶ At the level of the ICC, Thomas Lubanga Dyilo and Germain Katanga were convicted of war crimes and crimes against humanity and the case of Mr Ntaganda is still on-going. Despite this, progress, in delivering justice for survivors of conflict related atrocities remains far from achieved. Most crimes in the east of the DRC remain never prosecuted or punished for lack of infrastructure, judicial and criminal justice capacity. The number of prosecutions in comparison to those of victims remain negligible.

In the east of the DRC, justice is remotely located and too expensive to be accessible for victims in rural communities. The Congolese justice system requires those seeking justice to pay fees for every step of the procedure from issuing the arrest warrant to getting a judgment. So far, prosecution rarely targeted the high ranking FARDC officers who continue to enjoy impunity (Aroussi 2016). Those convicted often escape from prison –if arrested at all- due to dilapidated prison conditions, poor security and corruption in prisons across the country (Aroussi 2016). While compensation orders have been awarded by the court, they have never been paid to the victims for reason of destitution of the perpetrator, lack of States' reparation fund and the complexity and cost of the procedure (Aroussi 2016).

The prosecution efforts in the east of the DRC due to pressure from the international community has been so far focused on addressing crimes against international law committed by armed groups and particularly rape as a weapon of war. Yet, as mentioned earlier many of the crimes in the east of the DRC are committed by civilians and criminal gangs. Responding

⁶ UN Secretary General Report on Conflict Related Sexual Violence 23 March 2015
http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2015/203

to atrocities that occurred during two decades of conflicts necessarily requires a broader framework that gives equal access to justice for those who have experienced violations that do not amount to crimes of international nature and crimes that do not involve sexual violence such as summary execution, damages to properties and the looting of assets. Delivering justice to these victims is complex, in terms of legal framework, mechanisms and priorities.

Restorative justice potential contribution to the Congolese process

Similar to Colombia, in the DRC, the restorative justice potential for dealing with the legacy of the conflict has not been fully utilised. So far, the prosecution efforts have failed to deliver justice to the large number of victims. In the east, impunity remains the norm rather than the exception. The failure of the demobilisation and security sector reform processes has meant that many of the perpetrators are now members of the army and security forces and continue to enjoy impunity and prey on the local population. The non-execution of sentences has also meant that those who are convicted continue to roam free in total impunity. Reparation orders against perpetrators are almost never executed even when the government is condemned in *Solidum*. The lack of commitments from the Congolese government to execute judgments and pay for the reparation orders to survivors has meant that all the international communities' efforts in improving the capacity of the Congolese criminal justice system to prosecute did not have any positive impact on survivors on the ground.

In eastern DRC, criminal prosecutions have little cultural resonance among the rural communities who continue to use the traditional justice system and particularly friendly agreements arranged at the level of the customary chief. Most of the population in the rural areas are unable and unwilling to access the criminal justice system due to issues of remoteness, complexity of the procedure and unaffordability (Aroussi 2016). In the east, the practice of delivering justice necessarily involves reparative and restorative measures that are at the heart of victims' perceptions of what justice is. As such in the east of the DRC, restorative justice can arguably play an important role in delivering a form of justice that is both meaningful and accessible to the victims. Since the Congolese peace agreements allowed for the establishment of truth commissions, it would be of utmost importance that a restorative process for eastern Congo is set up.

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