



Bundeskriminalamt

Global Crime Hotspots - Impact on Germany

BKA-Autumn Conference, 25 - 26 November 2009

Conducting Investigations in Crisis Zones

Summary of the Presentation

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Introduction

Recent years have witnessed dramatic developments in the field of international criminal law. This presentation will review the work of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and other institutions of international justice, and focus on the difficulties faced by those investigating crimes at the international level. Particular attention will be paid to analysing investigations which take place in conflict zones, and in countries in transition from violent conflict.

ICTY

The ICTY was established by the UN Security Council in 1993, in response to global outrage at the mass atrocities then taking place in Croatia and Bosnia and Herzegovina. At that time, thousands of civilians in the region were being killed, injured, tortured in detention camps and expelled from their homes. The Security Council mandated the ICTY to investigate and prosecute those most responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia from 1991 onwards.

Over the past 16 years, the ICTY has indicted 161 persons. Those indicted include heads of state, prime ministers, army chiefs of general staff, interior ministers and many other high- and mid-level leaders from various parties to the Yugoslav conflicts. Today there are nine cases before the Tribunal,¹ with another six on appeal.² Radovan Karadžić, the former leader of the Bosnian Serbs, was arrested and transferred to The Hague in July 2008, and his trial began on 27 October 2009. One of the main priorities of the Office of the Prosecutor (“OTP”) at this time is to capture and try the two remaining fugitives, Ratko Mladić and Goran Hadžić.

In 2003 the Security Council determined that the ICTY should finalise its activities pursuant to a completion strategy first devised by the Tribunal’s Judges. Security Council Resolution 1503 (adopted 28 August 2003) directed the ICTY to complete its trial work by 2008, and appeals by 2010.³ The Security Council further instructed the Tribunal to concentrate on the prosecution and trial of the most senior leaders suspected of being most responsible for crimes within the ICTY’s jurisdiction, to transfer cases involving those who may not bear this level of responsibility to competent national jurisdictions (as appropriate), and to strengthen the capacity of such jurisdictions.

According to current estimates, the Tribunal will conclude most of its appellate work in 2012, with a few cases running into the first half of 2013. The OTP is also engaging in

¹ Đorđević, Gotovina et al., Karadžić, Perišić, Popović et al., Prlić et al., Šešelj, Stanišić and Simatović and Stanišić and Župljanin.

² Bošković and Tarčulovski, Delić, Dragomir Milošević, Haradinaj et al., Lukić and Lukić and Šainović et al.

³ Although the Security Council imposed specific deadlines on the ICTY for finalising its investigative and trial activities, these deadlines have been extended several times. A major reason for such extensions has been the late arrest of various accused (including Karadžić).

a number of capacity building initiatives in the states of the former Yugoslavia. Importantly, the OTP assists regional prosecutors with cases that the ICTY has transferred to them, and it also helps domestic prosecutors run their own cases (for example, by giving them access to the Tribunal's extensive databases and investigative files).

The OTP has always been reliant upon the cooperation of States, and ongoing cooperation remains critical to the successful completion of all trials and appeals work. The support of the States of the former Yugoslavia, as well as the international community, is essential. The international community has played an important role in stimulating countries of the former Yugoslavia to cooperate with the OTP, by setting cooperation as a condition for financial aid and accession to the EU and/or NATO.

Other international criminal justice institutions

Since the creation of the ICTY, other institutions dedicated to the investigation and prosecution of international crimes have been created. These include the International Criminal Tribunal for Rwanda, the International Criminal Court, Special Tribunal for Lebanon and the hybrid courts for Sierra Leone and Cambodia. Whilst these institutions differ in terms of their mandates, characters and compositions, they all pursue the same objective - an end to impunity for those guilty of the most serious international crimes. International justice mechanisms assume even greater importance in circumstances where national authorities are unable to take action, or where they lack the political will to do so.

Investigations

Before any crime – be it domestic or international - can be tried before a tribunal or court, it must be investigated. The success or failure of any international investigation or prosecution ultimately depends upon international cooperation. This comprises the cooperation of the countries on whose territory one collects evidence, neighbouring countries, and the cooperation of the wider international community. Cooperation - or lack of it - underscores each of the problems that will be canvassed in this presentation.

Perhaps the most striking aspect of international investigations is the manner in which they contrast with criminal investigations at the domestic level. National-level investigations are characterised by direct access to crime scenes, witnesses and evidence, and investigators with technical expertise and resources (eg, forensic equipment and training). Investigators at the national level function within a clear legal framework - judicial and police institutions are well structured, with powers of enforcement, and they enjoy widespread public respect. Additionally, selection of cases at the domestic level is directed by clear laws and policies. In contrast, investigations at the interna-

tional level are hampered by restricted access to crime scenes, limited abilities to meet with victims and witnesses and ongoing security concerns.

Access to crime scenes

Investigations at the international level are hindered by restricted access to crime scenes. Investigators acting on behalf of international bodies lack the power to enter and/or remain upon the territory of any state without the consent of that state's government, or an international mandate. The work of investigators is often curtailed by critical security issues, such as the prospect of attacks.

Collection of evidence

The sooner that physical, documentary and testimonial evidence can be identified, collected and preserved following a crime, the more likely it is that such information will be accurate and reliable. Unfortunately, however, the international community is not equipped to move quickly into conflict and post-conflict situations. The resultant delays inevitably mean that crucial evidence is lost.

In conflicts involving traditional military structures, written materials (such as military orders, confidential reports, etc) exist, but governments are often reluctant to allow investigators to review and/or take custody of them. In other cases, there is very little written evidence which can be used in support of the Prosecution's case. In some conflict zones, written orders are not issued at all.

The international community is frequently conflicted when it comes to sharing information garnered from domestic intelligence services. States are naturally reluctant to reveal the methods by which they acquire information, or to endanger their sources. States seek and collect information for the purpose of protecting their national security interests - not in order to gather evidence for judicial purposes. This is an old problem, which also exists at the national level.

Witnesses

At the national level, investigators have ready access to witnesses, who are generally willing to cooperate. In contrast, international investigators have no powers to interview victims, witnesses and/or suspects without the permission of an individual's national government, or an international mandate.

A further problem is that victims and witnesses have often fled by the time that international investigators are seized of a crime scene. Such movement of people makes it difficult to identify and interview crime-based witnesses.

It is even more difficult to access insider witnesses. The evidence of insider witnesses is crucial in order to clarify the chain of command, and thus to link crimes committed on the ground with high-level perpetrators. However, insider witnesses have often com-

mitted crimes themselves, and are fearful of the political, military and civilian elites to whom they were once close. A natural aversion to self-incrimination, combined with fears for their personal safety, make it incredibly difficult to meet with insiders and to get them to provide “the full story.” The relocation of insider witnesses is also extremely difficult.

It is important to be conscious of the difficulties surrounding witness protection in conflict zones. Inadequate financial, human and technical resources mean that witness protection programmes are never as comprehensive as one would wish. Further, it is very hard to keep investigations confidential and discreet when all one’s movements are accompanied by a security detail. It should also be emphasised that international tribunals do not have their own witness protection programmes, and must rely entirely upon States.

Limited resources

National level investigations benefit most often from appropriate resources and expertise. Depending upon the crime in question, dozens of investigators may be deployed, and deployed rapidly. These investigators are trained to collect evidence properly, and they often have technical expertise and specialised skills and equipment (eg, forensic equipment and training). In direct contrast, international investigations are notoriously under-resourced in terms of money, equipment and personnel.

In light of such resource limitations, international investigators must decide how to prioritise the resources available to them. This is a question of strategy, to be determined on a case by case basis.

Different legal bases / inconsistencies

Investigators at the national level function within a clear legal framework. Judicial and police institutions are strong, with clear powers of enforcement. These institutions are buttressed by strong public respect. In direct contrast, there is most often no clear legal framework which directs the manner in which international investigations are established and conducted.

There are now a variety of bodies which conduct international investigations and fact finding activities. These organisations have been established by different authorities (such as the UN Security Council, the Human Rights Council, and national governments acting in partnership with the UN). International investigation commissions and tribunals vary significantly in terms of their mandates, powers and resources. Hybrid tribunals may face special difficulties when international and national laws and/or procedures come into conflict.

Selection of cases

At the national level, prosecutions are based upon clear policies, plans and strategies. However, at the international level, crime scenes cover large geographical areas, and victims can number into the millions. In such cases, it is impossible to investigate and to try all perpetrators.

Securing arrests

The execution of arrest warrants which have been issued by international judges is frequently problematic. International institutions lack their own police forces, meaning that arrests must be carried out by way of military intervention. In this regard, international tribunals are completely reliant upon international support to effect arrests of individuals accused of international crimes.

Concluding remarks

Today's institutions of international justice are making a fundamental contribution to global peace and security, by helping to eradicate a culture of impunity which has long existed in states crushed by dictators, and torn apart by violence. Ending impunity is essential if a society recovering from conflict is to come to terms with past abuses committed against civilians, and to prevent such abuses in the future.

International tribunals face a wide variety of challenges, particularly at the investigation stage. Investigators face many practical difficulties, but by far the greatest impediment to international investigations and prosecutions is the capricious nature of political will. The success of investigators and prosecutors at the international level hinges upon the cooperation of states affected by conflict, and the international community as a whole.