



Interactions of the International Community, State Institutions, Civil Society, and Illegal Organizations and their Impacts upon Post- Conflict Capacity Building in the Justice System in Bosnia

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I. Purpose of Presentation

The purpose of this presentation is to discuss how the international community, state institutions, civil society and illegal organizations have had an affect upon capacity building in the justice system in Bosnia and perhaps more broadly, the Balkans.

This presentation will begin by discussing the roles and goals of the aforementioned players. After noting examples of successes and failures of the “good guys” to act cohesively, focus is then placed on how the failures have impacted capacity building efforts in the justice system of Bosnia, actually creating an environment in which transnational terrorist and criminal organizations have flourished. Discussion then turns to some of the causes of these failures.

Finally, this presentation will offer some proposed solutions that are designed to better coordinate efforts among the international community, state institutions, and civil society in order to more effectively fight terrorist and organized crime organizations, and build capacity in justice system institutions in Bosnia, and perhaps in the Balkans and beyond.

A. Roles and Goals of the Actors

In order to understand why the mentioned actors have acted or omitted to act, and how these things have affected capacity building in Bosnia, we have to first identify their respective roles and goals.

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1. The Good Guys

For brevity's sake we cannot discuss each of the applicable instruments defining the roles and goals of the international community, state institutions, and civil society. We can, however, say that the so-called "good guys", have, for want of a better expression, the following basic roles and goals in common: human rights standards creators, law enforcers, and promoters of democracy and the rule of law. They do many things to achieve these things - creating legislation, making and signing instruments of cooperation or mutual legal assistance, taking investigative actions to implement legislation, giving technical advice, providing funding to civil society watch dog organizations, reporting on wrongdoing, and so on.

We can say that the good guys' approach is that of "technocrat firefighter": where there is a real or prospective problem, the technocrat firefighter attempts to investigate, legislate, enforce, rule on, and prevent the fire from breaking out.

We can also say that a fair amount of debate, expertise, and drafting and redrafting goes into any of the aforementioned legislation; that investigation and enforcement are often laden with the requirement of getting permission to act; that judicial determination is often saddled with traditional interpretation; and that prevention often addresses identified, concrete problems, not necessarily all situations.

Contrast this with....

2. The Bad Guys

While all this legislating, enforcement, jurisprudence, and prevention are going on, there is another side of the coin: the so-called "dark side", which is what these terrorist and organized crime organizations are all about.

What can be expected from illegal organizations and their members?

Their common roles and goals, for want of better language, generally fall into the categories of: wanting money, wanting power, and/or in some cases wanting disruption of the common order so that they can achieve either the getting of money or power, or both.

Such organizations have common enough goals, and means to accomplish those goals, that "the good guys" should perhaps take notice and notes.

It is clearly true that there are rivalries, as and between some organized groups in Bosnia (and elsewhere), but generally speaking, these are few and far between; most of the time, these groups will work with one another to either make sure they share in the ill-gotten booty or that territories are carved up so that there is no conflict. They are smart enough to realize these things, because conflict does not normally help them work more smoothly or achieve money and power more quickly. This is, for lack of a better expression, the "corporate



approach to crime (or to complete the analogy, arson).” To them, it’s all about getting the money and power.

I think we can safely also say that the bad guys are not interested in the good guys building capacity and more effectively fighting organized crime and terrorist organizations.

B. The Record: Successes and Failures

SUCCESSSES: it’s not all doom and gloom!

- Providing information (criminal records, background checks, personal identification numbers, locations of suspects and persons of interest, residences, entry and exit information);

- Making arrests, extraditions (dumping defendants over country lines; Mandic case is a classic example; BiH, Serbia, and Croatia have worked together to fight smuggling of persons on occasion);

- Putting on pressure (e.g., a trafficking suspect in Croatia was sought by BiH authorities; BiH authorities sent info to Croatian authorities’ so that they could prosecute the bad guy - since BiH authorities could not extradite due to Croatia’s Constitutional limitations on extraditing its own citizens - the suspect sent his attorney to negotiate a surrender because of the pressure!).

Why are these successes happening? Because of real acknowledgement of obligations towards members of the international community? Possibly, but more likely, because of individuals’ efforts to act in cooperation, and to realize the greater good that needs to be obtained (ignoring selfish accreditation goals).

So what’s the problem in all of this? Good guys do their thing and bad guys do their thing...

Well, the problem is that while the good guys aren’t doing too badly, they aren’t exactly winning as much as they could. And, to be blunt, it’s sort of like some members of the team aren’t playing well together.

It’s a bit like you have a winning basketball team, who wins 80% of its games; nothing wrong with that, but suppose the team could win more games and work better together? Well, if the team won more games and worked like a team, more fans might be interested to cheer them on, which might mean more money and resources would be dedicated to promote the winning; it might also mean that the team might improve its skills - its capacity might improve.

Now let’s go back to the good guys...

Despite their aforementioned common roles and goals, and cooperative pieces of legislation and implementation efforts, there is a misconception to believe that “the good guys”, i.e., the



international community, state institutions in Bosnia, and civil society, “are all playing on the same team, at the same time, and with the same goals in mind”.

FAILURES TO ACT COHESIVELY, examples:

a) Countries S and B have a formal agreement to cooperate and provide mutual legal assistance: that means providing evidence, assistance in extraditions, obtaining suspect information, etc. The kicker: to obtain the assistance, each country must send a mutual legal assistance request through its own Ministry of Justice, and wait for a response from the other country’s Ministry of Justice to reply.

To get around this formal approach and further efficient processing of matters, prosecutors of countries S and B also have an agreement: each will provide the other with the same kind of assistance when asked.

Balkan country S asks for assistance in collecting evidence from country B regarding a cross-border trafficking operation, and also promises to country B that it will provide similar assistance. Both countries agree that neither country will move towards making an arrest without notifying the other - so that all can coordinate arrest efforts and all the bad guys will be caught at once.

Key evidence is gathered by authorities from both countries respecting the trafficking operation. Country B provides its key evidence to country S, which it uses to arrest and indict persons involved in the trafficking operation, unbeknownst to country B authorities. Country B lost its chance to arrest its suspects, because they heard about country S’ arrests.

Country S additionally fails to deliver legally admissible evidence to country B, after promising it would do so, and after country B has indicted persons based on supposed evidence to be provided by country S.

After more than 6 months of requests, country S still has not provided the information in a legally admissible form, even though it has it!

What lesson have country B authorities learned from this situation? What capacity has been built here in terms of getting along, offering assistance, cooperating to secure evidence? Country B authorities have learned that country S is not a true partner, that its word is no good, and that its people are just out to make themselves look good.

What kind of assistance do you think country B authorities are going to offer country S authorities the next time a transnational trafficking operation is discovered?

And what lesson is in this for the bad guys? Well, while they have not been privy to the good guys’ communications, they’ve learned over time that they can run their operations across country lines, because they know that cross-country cooperation is not fully functional. They know this because country S is out there making arrests and indicting, while country B, whose territory was also involved in this trafficking operation, was much slower in getting to court.

b) Prosecutorial and law enforcement authorities of several countries are members of SEEPAG (South East European Prosecutor’s Association Group); this group agrees to exchange information, provide one another intelligence, cooperate wherever and however they can. This group meets regularly to provide information, hard intelligence, evidence gathering strategies, suspect names, etc., with regard to organized crime activities, including trafficking.



Information is shared at a meeting about a cross-country operation and known participants - a beautiful power point presentation is made. All parties agree that the sharing of further information is an absolute must, as they had at a previous meeting. Contact digits are exchanged, business cards and handshakes are given to and fro...

Later, when authorities from SEEPAG from two of the countries are queried by authorities from another country belonging to SEEPAG as to basic information about persons and indictments, the two subject countries do not respond. These two countries do not respond for 8 months.

Ultimately, the requesting country authorities obtain the information from a third country, who was not a party to the SEEPAG agreement!

Again, what has lesson country B learned here? Don't rely upon those who promise assistance, and agreements are not worth the paper they are written on? No capacity is being built here.

Lesson for the bad guys? Keep working across country lines because it is obvious - that cross country law enforcement cooperation is not occurring.

c) International community reps want country B to enact certain pieces of legislation, and seek out and prosecute members of organized crime and terrorist organizations; country B's state institutions enact the legislation, because it is the right thing to do, and with the hopes that it will eventually gain accession to the EU.

Country B's state institutions enact the legislation, and attempts to investigate members of certain organized crime groups. Country B is unable to effectively implement major portions of the legislation or properly investigate, however, because it does not have the money, equipment, trained personnel, or sufficient number of personnel to investigate such matters.

Country B requests the money to hire personnel, to obtain the equipment and to train the personnel on the equipment. The international community offers no financial or training assistance; Country B's government claims it has no money for such things. Among other things that Country B cannot do: interception of mobile phone communications and triangulation of phone location, conducting undercover buys.

What is the lesson learned here? Unfunded mandates are a mistake; the international community cannot expect poor or developing countries to invent manpower, technical equipment and training out of whole cloth. Nor can it expect that implementation of legislation will come without cost. And merely putting laws on the books will not build capacity, will it?!

Lesson for the bad guys? "Make all the laws you want" - they amount to paper tigers. The borders are porous, law enforcement lacks the ability to catch us, and we can keep doing what we need to do to accomplish our goals.

d) Civil society organisations. U and O, designed to observe and report on the functioning of judicial institutions and whether human rights laws are being observed and complied with, report that there are regular "human rights violations going on", that accused persons are not being properly advised about their rights before entering a plea.

The reporting is actually inaccurate and an overstatement. The organizations, while well-intentioned, have not correctly read and applied the applicable law.

No violation is reported to and/or sustained by the ECHR or other applicable domestic reviewing authority.

What lesson is the judiciary and the prosecutor supposed to learn here in this situation? Isn't there a chilling effect that's going to occur here because prosecutors, even behaving correctly, don't want to be reported on?

e) Country B investigative authorities conducted a raid on a supposed non-profit organization, seizing hundreds of boxes of documents, and some computer and electronic equipment, some of which appear to link the organization to terrorist financing.

A month ago country B investigative authorities requested assistance from the international community and other domestic authorities of country B, in order to compile, organize, and manage the materials for review; the investigative authorities requested scanners and computers with large capacities in order to achieve these ends.

The investigative authorities' request was "taken under advisement" by members of the international community and domestic authorities of country B, who actually have a good deal of the equipment necessary to achieve the aforementioned goals (most of that equipment is unused, by the way).

As fighting terrorism and terrorism financing are both primary goals of law enforcement's work, both the international community and the domestic authorities have the obligation to help the investigative authorities to accomplish the goals, and particularly without delay given what the situation might turn out to be.

Moreover, what sort of strange message is sent to law enforcement if such an important request is not immediately honored or at least given priority? This is a prime moment when capacity of indigenous personnel can be built to address an important issue, and the carryover affect of organizing such a large investigation could have lasting effects upon this and future investigations to come.

f) Civil society provides statistics about a lack of addressing a troubling area in criminal prosecutions; they further provide best practices and legislative examples of insofar as fighting this certain kind of crime; they offer trainings, hold roundtables, and conferences.

Justice system stakeholders, parliamentarians, members of the international community, and others affected by the suggested information cannot agree on very logical and easy solutions: providing money, training, and legislative fixes.

What lesson is learned here? Civil society did the right thing, and receives virtually nothing; the justice system stakeholders acquired no new crime-fighting tools; society as a whole receives virtually nothing.

And the bad guys? Well, their just gonna keep on doin' what they've been doing, right?!

C. Impacting Capacity Building

These mentioned situations have cost the international community credibility - who is going to believe that it's worth time to meet, sign agreements, and work together with the international community only to be double-crossed or disappointed later? And if the international community is doubted, doesn't that, in turn, make it more difficult to build capacity among international community partners, including, say Balkan partners?

These situations have also cost law enforcement and prosecutorial authorities time and effort - and produced frustrations and mistrust. Additionally, these situations have resulted in unfunded mandates - which poor and developing countries like BiH cannot afford to resolve.



Worse still, these situations have resulted in lost opportunities - where law enforcement and prosecutorial authorities could have learned and shared important information and techniques that could have been used on the particular cases and for other cases in the future.

And in the case of civil society, aren't they going to feel even more marginalized, less likely to be able to influence the system for the better?

And don't miss out on the unhappy by-product of the lack of coordination either: the bad guys are laughing all the way to the bank, and past the borders because the "good guys" can't seem to get their act together.

The bad guys are lovin' the fact that the good guys are fighting among themselves as to who will do what task, who is going to get the credit for the arrest, etc. They must marvel at the "technocrat firefighters", who have all the tools to act like an efficient, coordinated firefighting machine, but who refuse to.

D. Causation

It is hard to say precisely why failures to act or act cohesively occur; but we can say a few things as to the causation issue:

- generally speaking, the reason for a failure to act or act cohesively depends on the circumstances;
- politics and personalities play a major role;
- legal restrictions or perceived restrictions are a factor;
- the ability to understand the urgency and importance of the requests is often not understood;
- often there is institutional failure; because while the top and bottom might understand and acknowledge the general obligation to assist others, the message is not consistently handed down, and because there are seldom heard of punishments for those who don't make cooperation a priority; and because there are no published positives for assisting others (no promotions, no good notes that go into the personnel files, no carrots);
- civil society may not be part of the process (they have something valuable to contribute, and can and should hold officeholders to account, as well as school others about best practices, proper applications of the law, legislative options, etc.);
- civil society sometimes doesn't "get it" (they just make and publish reports, consequences and objectivity be damned);
- the international community sometimes doesn't "get it" (they create legislation for which there is no realistic hope of implementation, or promise things that they cannot realistically deliver);
- justice system players sometimes don't "get it" (they are too concerned with taking credit or not acting because a superior hasn't okayed the action).



D. Solutions

So the question becomes, what do we do about all this?

We seek to offer some solutions as to how to make the international community, state institutions, and civil society can function in a more coherent and efficient manner in order to build capacity within the justice system in Bosnia, and more generally, the Balkans. The solutions are not a “one size fits all situation”, but are designed to at least get the good guys to better coordinate and cooperate, and hopefully, build capacity when it comes to fighting organized crime and terrorist organizations.

1. Remember the sports coaches’ No. 1 rule: There is no “I” in team; everyone has a role to play, and that role has to be positive and coordinated with other members of the team! The notion of moving solo on an investigation, e.g., that involves multiple countries and citizens from different countries, should be deemed impermissible and unthinkable.

Coordination within and across country lines has to be thought about, planned, and executed with precision. That means there has to be planning and identification of common goals to be achieved, trust established, delivery of timely communication, and honest dealings.

In a broader crime fighting sense, it means that in crafting legislation or developing solutions of various sorts, everyone must be open to wider audience participation and we all have to find our COMMON GOALS, and figure out how we can achieve them together!

2. Know and follow the rules! (if you don’t follow the rules, you will get nowhere; that means that you need to know among other things what to include in a request for assistance - be it international or domestic - and who to send it to, and where). Once you have complied with the rules, POINT OUT YOUR COMPLIANCE to the other member of the team that is supposed to respond.

3. Be realistic in what is requested (requests have to be succinct, clear, and not wider than necessary: e.g., in a trafficking in humans case, we asked authorities for specific names-were they deported? Did they enter the respective country? Can phone calls to certain numbers be identified in terms of family names?) If you have been realistic, and followed the law, then you can POINT OUT YOUR REASONABLENESS and there will be no legitimate excuse not to assist you.

4. Send repeated requests, follow up with phone calls; be persistent; if you don’t get what you are after, you have to try harder - not give up!

5. Go to higher authorities, superiors if you don’t get responses (it works, though there can be repercussions); make sure you are right, but demand that agreements and offers of assistance are honored!

6. Hold others (team members) to account! Look, if financial and other assistance are made on the basis of agreements, then the agreements have to be honored; if the international community is demanding that a country complies with agreements in order receive assistance, or to gain accession to the EU, for example, then the international community has to uphold its end of the bargain and provide necessary assistance in order to make compliance possible!

When it comes to signing agreements, passing legislation, perhaps, Balkan countries should be demanding that as part of the agreement, signing members agree to fund certain mandates?

7. Figure up an alternative way to obtain sought after information; being creative is sometimes key! (e.g., if the Interpol or police agency or prosecutorial agency is not of assistance, if it is legally allowed, have your Ministry of Justice contact the other countries' Ministry of Justice, or perhaps have your Ministry of Foreign Affairs contact the other countries' Ministry of Foreign Affairs or go to the appropriate embassy in your country).



8. Lead by example - offer assistance, timely, and in full response; seek clarification if the request isn't clear; don't seize upon technicalities to not do the job of assistance (seek to assist, do not try to not do your job). SDOC by the way, has a policy: we answer as soon as practicable all requests, foreign or domestic, and we strongly scrutinize for urgency of the needed information.

9. Inclusion of civil society in applicable phases of the fight against organized crime and corruption and terrorism; have communication with them in order so that they fully understand and accurately report about the application of the law and proceedings; they should be given the opportunity to comment and offer solutions; they have to be corrected when their reports are incorrectly stated.

10. THANK assisting partners!! Send letters of commendation to their superiors; when people come to town, offer a little hospitality! SDOC typically follows up with phone calls, coffees, letters of commendation!

11. Carrots and sticks; there should be REWARDS (commendations, or something else, perhaps) for assisting others in fighting crime; why can't promotions, extra vacation days or some sort of commendation or compensation be doled out for those who are trying hardest to fight crime?

On the other side, penalizing a non-compliant partner who you requested assistance from should not be an objective - though pointing out non-compliance should not be impermissible either. Maybe there should be penalties established for not complying with an agreement (fines, suspensions, other sanctions)?

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