

## **Guest Lecture Series of the Office of the Prosecutor**

**Birgitte Vestberg<sup>\*</sup>**

**“Prosecuting and Investigating International Crimes in Denmark”**

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<sup>\*</sup>Mrs Birgitte Vestberg is Director of Special International Crimes Office in Denmark which is a part of the Danish Prosecution Service. The Office is responsible for investigating and, if possible, prosecuting serious crimes such as war crimes, genocide, crimes against humanity, terrorism and torture committed abroad by persons now residing in Denmark. Apart from working for two years in private practice she has been employed by the Danish Prosecution Service, as Assistant Director of Public Prosecutions and as Regional Public Prosecutor. She graduated in Law from the University of Copenhagen in 1966.

## Prosecuting and Investigating International Crimes in Denmark

### International crimes?

There is no universally adopted definition of “international crimes” but jurists include the core of the Rome Statute setting up the International Criminal Court i.e. genocide, crimes against humanity, war crimes and the crime of aggression possibly to be included in the future. Genocide and crimes against humanity however are just umbrellas under which crimes such as murder, torture, deprivation of liberty, rape etc. are committed with a specific intent. War crimes are specified as “grave breaches of the Geneva Conventions”, other serious violations of the law and customs applicable in international armed conflict, serious violations of Article 3 common to the Geneva conventions in armed conflict not of an international character and other serious violation of the laws and customs applicable in armed conflicts not of an international character.

Denmark – contrary to some European countries – has passed no “Law on International Crimes” and has currently no plan to do so, but our Penal Code has so far sufficed to meet the needs of the Special International Crimes Office ([www.sico.ankl.dk](http://www.sico.ankl.dk)). This implies that an investigation and prosecution has to focus on acts criminalized in the Danish Civil Penal Code. Happily they include murder, manslaughter, assault, rape, abduction etc. Terror was included in 2002.

Denmark has however passed a “Law on Genocide” in 1955 to follow up on the Genocide Convention. In 1951 at the ratification of the Genocide Convention Parliament was informed that only genocide committed on Danish soil was included which is in accordance with the text of the convention (before the courts of the State on the territory of which genocide has occurred or before an international penal tribunal). In 1955 no mention was made of jurisdiction and Danish jurisprudence has that special laws are limited to the territory. At the implementation in 2001 of the ICC Statute the government told Parliament that the Law on Genocide allowed proceedings in Denmark of genocide committed abroad.

### SICO established on 1 June 2002

The Special International Crimes Office (SICO) office was created by Ministerial Order of the Minister of Justice as part of the Prosecution Service headed by the Director of Public Prosecutions.

The minister stressed in the press release announcing the decision that the attitude of the government was clear:

war criminals and the like shall not find a safe haven in Denmark but  
must be investigated and prosecuted if conditions so allow.

In the view of the minister the international dimension and the need to gather considerable knowledge of international affairs required the establishment of a special unit. Concurrently the European Union by

Council Decision required each member state to appoint contact points in respect of persons responsible for genocide, crimes against humanity and war crimes (2002/494/RIA) which was followed by 2003/335/RIA concerned with cooperation between national authorities.

The official job description (M.O. 1346/2002) is not a model of simplicity:

...international criminal cases, including cases of genocide, crimes against humanity, war crimes, acts of terror and other serious crimes committed abroad where investigation and prosecution as a result of the complexity and international aspects of the case imply special knowledge and understanding of conditions abroad and imply cooperation to be established with foreign authorities, international institutions, organisations etc.

This description makes it clear that no crimes related to Danish soil are included and that serious crimes other than those described in the Rome Statute are included. Quite early SICO in consultation with the Immigration Service took the decision only to consider crimes with a possible sentence of 6 years in prison or more as “serious crimes”.

Serious crimes committed outside Denmark had of course been dealt with by Danish Courts prior to 1 June 2002. A man was convicted in 1994 and sentenced to 8 years in prison for war crimes committed in 1993 in Former Yugoslavia in a camp for detained persons. At his arrival in a center for asylumseekers he was immediately recognised by some victims. By 2001 it dawned on the public via the media that Denmark for a number of years had given asylum to persons having committed serious crimes prior to their arrival in Denmark. Most had gladly informed the Immigration Service to make sure they were not returned to their country of origin for fear of persecution and this information rested peacefully in the archives of Immigration. The “straw that broke the camel’s back” was the knowledge that a former Iraqi general who had fallen out of Saddam Hussein’s favour lived quietly in a Danish provincial town in spite of his responsibility for war crimes committed against civilian Kurds during the Anfal campaign in 1988. A closer look by the Immigration Service at their files revealed 18 cases in all to be screened by investigators and to meet this special need SICO was set up as no existing unit was deemed fit to deal with this.

Becoming operational was quite a task but we managed that by 21 October (2002). Practical issues apart staffing the Office required an important decision. Would investigators and prosecutors do or should interpreters, historians, analysts etc. be employed? The experiences of Canadian and Dutch units pointed to employing wide expertise but funding pointed to concentrate on the core qualifications of investigating and prosecuting as other experts could be paid on an ad hoc basis. So at the end of the day the office was staffed and still is by nine investigators, six prosecutors and two clerks with a wide range

of skills. To meet special tasks we also employ police officers of the reserve p.t. nine persons who screen certain files.

### **Jurisdiction and criminal procedure**

An important condition to prosecuting in Denmark is the presence of the suspect. Presence – however migratory - is sufficient if Denmark is internationally obliged to initiate proceedings, such as war crimes under the Geneva Conventions, torture and terrorism to mention the best known. If Denmark is not internationally obliged to initiate proceedings, Danish citizenship or residence is required and so is dual criminality. This means that Denmark has no true universal jurisdiction and we have declined to investigate possible crimes committed by foreign dignitaries not present in Denmark.

Our criminal procedure is adversarial, we do not employ investigating judges and it is up to the prosecutor to decide whether there is sufficient evidence to prosecute. There is no need to seek confirmation by a court on the charges on which a prosecutor intends to seek trial. One of the guiding stars is the principle of objectivity obliging police and prosecution to ascertain that facts disculpating the suspect are brought forward as well as facts implying responsibility. The rules on disclosure are as wide as wide can be: All information provided by investigators must be disclosed to counsel for defence at once. Exclusions are possible but on a very limited scale. Investigations are discontinued “if there is no prospect of conviction”. The prosecutor has another margin of discretion as it is possible to discontinue investigations when costs, expected length of proceedings or amount of work are not proportional to the importance of the case or the punishment to be expected. These decisions may be appealed to superior authority but are not subject to court confirmation.

Prosecuting crimes in Denmark offer no differences depending on whether the scene of the crime is on Danish soil or on foreign soil. Formalities, the rights of the accused, balancing of evidence etc. are identical, so once you get down to the trial you are on “home ground”. Some niceties may be applied such as videoconferencing or using records from foreign courts as evidence but these are just practical adjustments to our general principles that supposedly live up to any known human right. Similarly arrest, custody, interruption of communications etc. are guided by the criminal procedural rules in Denmark as a request for an order from a Danish court for coercive measures abroad has to meet conditions set up in the Danish Administration of Justice Act.

### **Investigations**

- **Introduction**

As of 1 April 2006 SICO has started investigations in 122 cases of which 65 have been reported to the office by the Danish Immigration Service. Other feeding lines are foreign authorities, private reports and SICO’s investigative powers.

The foundation for the Immigration Service to report a case usually is information supplied by an asylum seeker to secure leave to stay in Denmark and not to be returned to his or her country of origin. This holds challenges different from those connected to a crime where you have a slain body and go looking for a suspect. SICO is offered a suspect and has to start looking up the crime. This is a major challenge to be faced.

Investigations have been discontinued in 91 cases for a number of reasons. In 54 cases investigations led to the conclusion that either had the crime not been committed, had not been committed by the suspect or that the suspect was under age at the time of the crime. Some suspects had left the country prior to their files being transferred to SICO and statutes of limitation has led to discontinuation in 6 cases. Unhappily prosecution of torture is barred after 10 years. Lack of jurisdiction led to discontinuation in 10 cases. Two suspects have died untimely prior to justice catching up with them and another unfortunate event took place when the Iraqi general chose to depart camp. He is – however – being investigated by the Iraqi Special Tribunal and all things equal an inclusive investigation from a prosecutorial point of view is to be preferred to individual prosecutions for the same crime.

Roughly 10% of the crimes having been investigated so far are to be classified as war crimes or genocide/crimes against humanity. Out of 22 cases registered under assault most are classified as torture (officially sponsored assault).

Time is an important factor. The crimes referred to in the first batch of cases transferred to SICO were committed from 1981 to 2001. There is no need to dwell on the difficulties presented by disappeared files or files devoured by insects. Faded memories are not to be criticised under these circumstances. No visits have been paid to fresh crime scenes and there has so far been no need to investigate in the middle of or close to an ongoing conflict.

Three investigations have produced sufficient evidence to prosecute:

- a Ugandan rebel was convicted of robberies and abduction (and committed to mental care),
- the Iraqi general departed without permission,
- a Rwandan passed away (assault and deprivation of liberty).

Some may find these results meagre compared to the energy and resources spent. With good reason investigators prefer convictions to discontinuations and the most frequently asked questions are: How many are in custody? How many convictions? From the view of the bird's eye – however – we have obtained the overall aim of securing that Denmark is not a safe haven or thought to be a safe haven for persons who have committed serious crimes prior to taking up residence in Denmark.

- **Has a crime been committed?**

Finding the crime is a priority when all SICO has is a confession from a person who wants to avoid being returned to his country of origin for fear of not only prosecution but also of persecution. Our primary sources of information are “open sources” i.e. the internet, reports from NGO’s, US State Department and UN, books, articles just to mention a few as only fantasy limits our activities. These sources must be validated and not all information in print or in the air is to be trusted, so “open sources” are just the beginning. A newspaper article at the time of the crime on the abduction of a Ugandan cabinet minister does however indicate that the crime actually had been committed, and so does news that the Central Bank in Colombo, Sri Lanka, had been bombed and 86 persons killed and more than 1300 injured in the process.

Formal requests for legal assistance are of course the proper path to take to find out whether a crime has been committed but this process is – even if there is a will to cooperate - extremely slow. Assistance may be excluded for different reasons. It is not to be presumed that a country will respond to a request if the crime has been committed on behalf of the current regime, and even when a country is positive as to cooperation internal disturbances may have prevented proper record keeping or caused destruction of evidence. One country however quickly dismissed the assumption that there had been an attempt to bomb police headquarters on a specified location, date and time. Local cooperation is to be preferred although the case of the Iraqi general had to be and was investigated exclusively outside Iraq.

Interpol plays an important part. A database has been set up to hold information on crimes being investigated. The point is to make sure that information is shared if two or more countries investigate the same crime and to secure that victims and witnesses will be made known to an investigation in a country different from their country of residence.

NGOs are quick to request action when crimes have been uncovered. Some- however- are less than willing to give away information specific enough to initiate proceedings. There are good reasons for that: protecting their sources and saving victims from having the past relived. It does however make it very difficult to bring an end to impunity.

- **Legal assistance**

In specific areas of crime such as highjacking international instruments call for mutual legal assistance. The European Convention on Mutual Legal Assistance is – as modified over the years – a splendid general instrument. However moving east and south of the Mediterranean leads you to unmapped areas as to legal assistance. Therefore bilateral agreements – oral or in writing (including MOU’s) take the field. Each country – be it Lebanon, Afghanistan or Uganda has its own expectations and working through diplomatic channels is a sedate affair. SICO has been tempted to consider the border between legal assistance and using your eyes and ears (and brains) while abroad. Is a talk over a cup of coffee permissible with an “informer”/ possible witness? Is it permissible to call the police officer in charge of a thatched village in Africa by phone to find out whether the hut of a preacher was burned to the ground

with loss of life? Are investigating officers allowed to take photos in places where any tourist is allowed to photograph? We have not found the philosophers' stone and do of course respect other countries sovereignty. Modern communications such as mail(s) are permitted and applying flexibility of mind has taken us some of the road to investigations within a reasonable time.

A different aspect of legal assistance is how to request it. Current wisdom has that letters rogatory have to be forwarded through diplomatic channels. On top of that SICO has found that paying visits to the relevant authorities speed up the procedures and in one case only has applying for a meeting not paid off. Going to the country to discuss the issues has proved efficient and the general experience of SICO is that a visit must be paid to the country of the crime the sooner the better.

SICO has adopted close cooperation with NGO's in some countries of the crime and these have proved helpful in making preliminary inquiries and through their network establishing links to possible witnesses.

It should be appreciated that the point of evidence permissible in court is a different matter and happily courts in Denmark are reluctant to exclude evidence. Another matter is the evidential weight of unusually (but legally) supplied evidence and the noises made by counsel for defence.

How do international tribunals render assistance? Article 93 in the ICC statute obliges State Parties to comply with requests from the Court to provide assistance in specific areas. No hits though in seeking an article on the obligation of the Court to render assistance.

To conclude this it should be stressed that SICO has received excellent legal assistance from countries far away and has established close relations with agencies in other countries dealing with serious international crimes. Part of networking is to share information on the swiftest road to legal assistance.

- **Unreported crimes?**

When SICO had settled in and handled the cases forwarded by Immigration awareness arose of unreported crimes. Some refugees are received without a screening, some requests for extradition have been turned down without taking over the investigation and a number of nations have lists of wanted persons. As SICO's task is to ensure that Denmark is not a safe haven for persons who have committed serious crimes abroad efforts – and not unsuccessful – have been made to identify unreported crimes or crimes that prior to the establishment of SICO have not been investigated due to a feeling of powerlessness in relation to investigating abroad.

Several tracks have been followed. The most successful has been access to Immigration's files. This authority is unwilling to part with files unless a specific person is identified or a subpoena is issued. The method used is to ask the court for access to files concerning males born in a specified span of time

having entered Denmark in another specified time span. Following a top 10 list of conflict areas SICO is working its way through the archives.

Another method is to compare lists of wanted persons to information of persons resident in Denmark.

A so far less successful effort has been trying to establish relationships of trust to ethnic groups in Denmark not only to make SICO's existence known but also to gather information and invite victims and witnesses to report crimes. SICO has found that former armed struggles have given way to loyalties not known of in the country of origin. SICO does however go on trying to win the confidence of ethnic groups.

- **Cultural differences**

Anyone moving out of a well known environment notices differences. Negotiating and investigating abroad require tact and a close knowledge of the do's and don'ts of the local community be it in Asia or Africa. Danish embassies and particularly interpreters offer valuable information on how not to offend even before SICO have started its business. A broad knowledge of different cultures is advisable also to draw the essence of information and putting the right supplementary questions. There are no shortcuts to be made but showing respect instead of questioning traditions different from your own will take you part of the road.

- **Investigative methods**

Basically there are no differences between "best practise" investigating in Denmark and abroad. Conditions may differ but at the end of the day the standard of proof must be met. The backbone of a criminal case, substantiated facts cannot and should not be subject to deviation. Politicians and the media might not like discontinuation of investigations and to reason a decision such as to give no breeding ground for contestations is another challenge. What differs is the unfamiliar stage and part of the investigation is to supply sufficient information to make the prosecutor (and the judge and jury) feel quite comfortable at assessing facts that occurred under far away skies. This includes a knowledge of the country, its administration and political system, its history and geography etc. etc. As to identifying a person there is no need to despair in country with no national registration office as the "elder" of the village where a person was born will most likely be able to tell where the person is and what he has been up to. This venerable person is also likely to know what has happened in the area for several decades.

## **Legal niceties**

The past decades have displayed an increased interest in international criminal law on the unhappy background of more or less internal armed conflicts. Among several more or less international



tribunals/courts the Statutes and Rules of Procedure of ICTY and ICTR have specified crimes, standardised criminal procedure and led to decisions on a wide range of issues including command responsibility. The ICC has yet to contribute to verdicts but doing so is just a matter of time. Hosts of books have been published on international crimes and courses are held to share the new wisdom. In the long term Danish standards will be influenced and there is no doubt that Danish legislators and the Supreme Court of Denmark will make sure that Denmark lives up to international standards. As it is SICO has observed no obvious flaws in the Danish legal foundation even though some jurists and NGOs may hold a different view.

Some interest is connected to amnesties and commissions of Truth and Reconciliation. Are these barring prosecution or is it a matter of the length of the sentence? The principle of “ne bis in idem” is universal but a close look at an amnesty is required to decide whether it is to be recognised or whether it is applicable to one part of the conflict only? The current view based on case law in South America is that amnesties are not applicable to international crimes.

Another matter is to apply the proper conceptions. Specific facts must be available to decide whether a conflict is armed, internal, international or just civil disturbances. It does make a difference under which circumstances an opponent has been killed. Is damage collateral or is it a war crime?

### **Working methods**

One of the guiding stars of the Danish Police and Prosecution Service is to decide whether to prosecute or not “as swiftly as circumstances allow”. This has led us to organise SICO’s activities in such a way that the decision is made as soon as investigations have finished. A major step in this direction is to have cases screened by the Police Commander and Deputy Director within a week of a report to SICO and once the decision to investigate is made, to let investigators and prosecutors work together from day one and to inform “the management” on a regular basis. A plan of investigation is set up for each case to focus the efforts and make sure all aspects are dealt with. There is no need to collect a lot of facts just to realise that prosecution is statute barred or Denmark is without jurisdiction. Initially SICO’s staff was divided into four geographic teams as to generate background material as well as facts about the crime. Recently the office was reorganised to make sure that already collected and new background information is properly analysed and to focus on identifying unreported crimes.

### **Networks**

SICO has not had to invent the wheel or the deep saucer. The equivalent Canadian and Dutch units have offered invaluable assistance not only in the daily work but also in guiding the first steps. SICO has been allowed to share whatever available background information and information on shortcuts to legal assistance. The need for reciprocity will of course be met on the conditions applicable. On top of that the European Contact Point has met on two occasions with a third meeting in the pipeline to share the

lessons learned. SICO has received delegations from Bhutan, China and Indonesia just to mention the most remote places and have in due course shared experiences with Norway and Sweden who are now taking similar proceedings. Voices have been vented to organise joint Scandinavian teams. The question of joint training will be raised at the coming meeting of the EU network and investigating international crimes truly will take place in the global village.

### **Summing up**

SICO has tried to focus on the possibilities not on the problems and have actually renamed problems “challenges”. SICO was established for 4 years and is eagerly awaiting word of the extension of the mandate. No voices have suggested folding SICO and there is plenty to do in the foreseeable future so SICO is expected still to be around on 1 June 2006. It is very satisfactory that Denmark is shouldering its part of ending impunity and the future will hopefully see energies still being used efficiently. In hindsight our Minister of Justice was right about the complexity of investigating crimes committed abroad and resources required.

Working in SICO seems to be quite different from working in the OTP of the ICC. The principle of subsidiarity, referrals, ongoing conflicts, hostile environments and conflicts of interests are not on the top of SICO’s agenda, but the common goal is identical: To bring an end to impunity.