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Quality Control in Preliminary Examination: Volume 1

Morten Bergsmo and Carsten Stahn (editors)

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Front cover: *Pasquale Trento, with other masons, mounting a sculpture in Florence. Masons have a proud tradition of self-regulation and quality control in Florence. The guild of master stonemasons and wood-carvers* – Arte dei Maestri di Pietra e Legname – *was already listed in 1236 as one of the Intermediate Guilds. Ensuring rigorous quality control through strict supervision of the workshops, the guild not only existed for more than 500 years (until 1770, when several of its functions were assigned to the Florentine chamber of commerce), but it has contributed to the outstanding quality of contemporary masonry in Florence. Photograph: © CILRAP 2017.*

Back cover: *Section of the original lower-floor of the Basilica of Saints Cosmas and Damian in Rome which honours the memory of two brothers and physicians for the poor in Roman Syria. Its mosaics and other stonework influenced the Florentine guild of masons referred to in the frontpage caption, as its craftsmen and sponsors created a culture of excellence through competition and exacting quality control. Photograph: © CILRAP 2018.*

FOREWORD BY JUDGE LIU DAQUN

Led by its Director, Morten Bergsmo, the Centre for International Law Research and Policy has successfully held many academic activities in more than 30 countries to disseminate knowledge of international criminal law and promote exchange of ideas on many thematic subjects. I have personally taken part in many symposia and conferences on subjects such as positive complementarity, objective and subjective elements, old evidence of core international crimes, and quality control in fact-finding. Director Bergsmo, one of the co-editors of these two volumes, has been Visiting Professor at one of China's most prestigious universities, Peking University, since 2012. He has helped Chinese students and professors gain access to the latest international law sources, take part in various international activities, and be exposed to international judicial systems. He has bridged the gap between Asian countries – such as China, India and Japan – and the European Union and its members, as well as promoted exchange among different legal systems and traditions. This two-volume anthology and the Peace Palace conference on which it is based are just two of his many contributions.

Effective quality control over the preliminary examination of the situations submitted to the Prosecutor of the International Criminal Court ('ICC') is a very hot and pertinent topic in international criminal law. The legal process at an international criminal tribunal is set in motion by its prosecutor. There is no investigative judge at the International Criminal Tribunal for the former Yugoslavia ('ICTY') and the ICC. It is the Prosecutor who decides when to initiate a preliminary examination, what to investigate, whom to prosecute and what the charges should be. Once the Prosecutor believes there are sufficient grounds to prosecute, an indictment is drafted. The Prosecutor is fully independent in making these decisions. These decisions are not just judicial ones, but also involve political, diplomatic and administrative considerations on the international arena. Because of the nature of criminal investigation and independence of the Prosecutor, it is difficult for the public, victims and governments to know what is going on. There is limited scope for the public to follow and monitor the process of preliminary examination. People may wonder how

the Prosecutor makes the decision to start preliminary examination of this situation but not that? Is there selectivity? Is there enough evidence for the Prosecutor to go to the next stage of full investigation?

Investigation and prosecution of a suspect, especially a sitting head of State, is a very sensitive matter both in judicial and political respects, and it may become a turning point in the life of an international criminal jurisdiction. I will take the indictment of Slobodan Milošević before the ICTY as an example. Milošević was the President of Serbia from 1997 to 2000 and he was indicted in May 1999, during the Kosovo war, for crimes against humanity in Kosovo. A year and a half later, charges were added for violating the laws or customs of war and grave breaches of the Geneva Conventions in Croatia and Bosnia-Herzegovina, as well as genocide in Bosnia-Herzegovina. The indictment of Milošević is now regarded as a turning point in the history of the ICTY, shifting the investigation policy from lower- and mid-ranking suspects to the most senior leaders who allegedly committed the most serious crimes. Since then, gradually more indictees had been arrested and brought to the seat of the Tribunal. The ICTY has indicted 161 persons. After the arrest of Mladić in May 2011, there was no one left on the fugitive list of the ICTY.

The indictment of Milošević came just at the right time, when he was losing power domestically and facing charges of corruption. Because of the Kosovo war, he was condemned by the European Union and North Atlantic Treaty Organization States. Since his policy was to have a pure Serbian State by persecuting Muslims and other ethnicities, he became an arch-enemy of the Muslim world and the Non-Aligned Movement. Let us not forget that resolution 827 of the United Nations Security Council establishing the ICTY was adopted by all the members unanimously, the first time after the Cold War. His indictment was generally welcomed and supported by the international community. Since then, many fugitives have surrendered to the ICTY or been arrested by local authorities. The ICTY became the most effective international criminal tribunal in terms of arrests of suspects.

In the case of the ICC, the investigation and preparation of charges against the sitting President of the Sudan, al-Bashir, also represents a turning point, but in the opposite direction. On 14 July 2008, the Prosecutor of the ICC alleged that al-Bashir bore individual criminal responsibility for genocide, crimes against humanity, and war crimes committed since 2003 in Darfur. The Court issued an arrest warrant for al-Bashir on 4 March 2009, and on 12 July 2010, a second warrant on five counts of war crimes,

crimes against humanity and genocide. From then on, the ICC has traversed a rough and bumpy road. First, because of the Sudan's friends in the United Nations Security Council, such as China and Russia, the ICC may no longer get the support of the Council, even though it referred the Sudan situation to the ICC. Second, the Court's decision has been strongly opposed by the African Union, the League of Arab States, and the Non-Aligned Movement, which together constitute almost one-third of the States Parties to the ICC Statute. Those States Parties have refused or circumvented the implementation of the arrest warrant, blaming the ICC for selective prosecution. Thirdly, the fugitive has defied the arrest warrant by travelling to almost 20 countries in the world after the indictment, including countries outside Africa such as Iran and China. The ICC has spent much time and energy on endless self-defence against criticism by African countries, even facing the threat of withdrawal of some African States Parties.

Article 42 of the ICC Statute defines the functions of the Office of the Prosecutor, that is, it must act independently as a separate organ of the Court. But that does not mean that the Prosecutor could do whatever he or she pleases. There must be some constraints and limits. During the negotiation of the ICC Statute, many delegations were already very concerned about the power of the Prosecutor. Article 57 requires the Prosecutor to submit a request to the Pre-Trial Chamber for the purpose of investigation, but the Pre-Trial Chamber's decision could only focus on whether there is a reasonable or sufficient basis to proceed to a full criminal investigation, not on the policy issue. The policy issues – like when, how and in respect of whom the Prosecutor should start a preliminary examination or investigation – are not only a matter that concerns the prosecution. Rather, it is closely related to the function and development of the Court as a whole.

In the case of the ICTY, there was a procedure that may be called 'policy review'. A group composed of the President, the Vice-President and the presiding judges of the Trial Chambers would determine whether the indictment concentrated on one or more of the most senior leaders and whether the crimes they were charged with fell within the jurisdiction of the Tribunal. If it met this standard, the Prosecutor could submit the indictment and supporting evidence to a pre-trial judge for review. If the judge agreed that there was sufficient evidence to bring the accused to trial, he or she would confirm the indictment and issue an arrest warrant. The ICC may wish to consider the adoption of similar procedures to ensure effective control over preliminary examination and investigation.

It is my view that the 2017 Peace Palace conference and this two-volume anthology are very pertinent to the issue of preliminary examinations so as to contribute to a better understanding of them, their normative frameworks, and aspects requiring improvement. Preliminary examinations have become one of the most important activities of the ICC. I believe this project could contribute to the strategic and long-term thinking on broader policy issues such as the context, rationale and role of preliminary examination, the suitability of the existing legal framework and methodologies, the impact of preliminary examination on and beyond the situations, and lessons learned from specific case studies.

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This is the first of two volumes entitled *Quality Control in Preliminary Examination*. They form part of a wider research project led by the Centre for International Law Research and Policy (CILRAP) on how we ensure the highest quality and cost-efficiency during the more fact-intensive phases of work on core international crimes. The 2013 volume *Quality Control in Fact-Finding* considers fact-finding outside the criminal justice system. An upcoming volume concerns quality control in criminal investigations. The present volume deals with 'preliminary examination', the phase when criminal justice seeks to determine whether there is a reasonable basis to proceed to full criminal investigation. The book does not specifically recommend that prosecutorial discretion in this phase should be further regulated, but that its exercise should be more vigilantly assessed. It promotes an awareness and culture of quality control, including freedom and motivation to challenge the quality of work.

Volumes 1 and 2 are organized in five parts. The present volume covers 'The Practice of Preliminary Examination: Realities and Constraints' and 'Case Studies or Situation Analysis', with chapters by the editors, Andrew T. Cayley, Runar Torgersen, Franklin D. Rosenblatt, Abraham Joseph, Matthias Neuner, Matilde E. Gawronski, Amitis Khojasteh, Marina Aksenova, Christian M. De Vos, Benson Chinedu Olugbuo, Iryna Marchuk, Thomas Obel Hansen, Rachel Kerr, Sharon Weill, Nino Tsereteli and Ali Emrah Bozbayindir, in that order, and with forewords by LIU Daqun and Martin Sørby.

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