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Preparation of Draft Indictments and Effective Indictment Review

Mark B. Harmon*

21.1. The Indictment

The single most important legal document prepared by the Office of the Prosecutor will be the indictment of the accused. If it is prepared thoughtfully and patiently, after careful consideration of the evidentiary basis supporting each of the charges contained in it and after sound legal analysis, both as to its form and to the charges contained in it, the rigours and consequences of the litigation that will flow from it will be manageable. Anything less will court failure.

21.2. Investigation

It is axiomatic that a sound indictment can only result from a careful investigation. Given that an indictment is the most critical document in the litigation, the investigation leading up to its creation should be directed, but not necessarily managed, by a prosecutor who is an experienced trial lawyer and one who will later participate in the prosecution of the case. I make this suggestion because the investigation must be focused on obtaining evidence that will be admissible in trial and will be sufficient to prove each of the required elements of the criminal charges contained in the indictment. Without such guidance, whatever limited investigative resources that are at disposal could be squandered pursuing matters that are

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irrelevant to the potential criminal charges being investigated. It is my firm opinion that the quality of the indictment and the soundness of the analysis of the evidence underlying the proposed counts will be qualitatively improved if the person directing the investigation has a role in the future trial of the case.

Before leaving the subject of the pre-indictment investigations, I would like to offer the following observation. The investigative team should be comprised of more than experienced police investigators. The team should be multidisciplinary and should, depending on the nature of the case include or have access to, *inter alia*, military experts, political experts, forensic experts and, when required, outside specialists including but not limited to experts in the fields of ballistics, pathology, questioned documents, anthropology and the like. The views of such experts should be incorporated into the pre-indictment decision-making process before the proposed indictment is drafted and submitted for review (see below section 21.5.).

21.3. Scope of the Indictment

Turning to the indictment itself, one of the common issues that will confront a prosecutor in every case is the issue of the scope of the indictment – should it include every possible charge revealed by the investigation or should it be a leaner instrument that focuses on fewer counts? I personally favour the latter and do so for pragmatic reasons. On one hand, the mandate of the Office of the Prosecutor is to investigate and prosecute persons responsible for the most serious crimes of concern to the international community, and on the other hand, the resources at the prosecutor’s disposal to do so will likely be limited. Between the imperative of accomplishing the lofty mandate and the likelihood of limited investigative resources being available, pragmatism must win out.

In some instances under the Statute of the International Criminal Tribunal for the former Yugoslavia (‘ICTY Statute’), similar criminal conduct can be prosecuted under different provisions of the Statute. For example, “extensive destruction of property not justified by military necessity and carried out unlawfully and wantonly” is a violation of Article 2(d) of the ICTY Statute (Grave breaches of the Geneva Conventions of 1949), and “wanton destruction of cities, towns, or villages or devastation not justified by military necessity” is a violation of Article 3(b) of the ICTY Statute (Violations of the laws or customs of war). Criminal con-

duct of this type can be prosecuted under either or both articles of the ICTY Statute. However, by charging a violation of Article 2 for the aforementioned conduct, the prosecutor is required to prove the additional element that the offence occurred within the context of an international armed conflict. Proving this additional element, in my experience, has been complex (a “trial within a trial”), burdensome and unnecessary in many cases, particularly since a conviction under Article 2(d) and Article 3(d) for the same conduct will not result in a greater sentence being imposed on the accused. Indeed, what may ensue from unnecessarily broad charging decisions are protracted trials, inefficient and wasteful use of limited prosecutorial and judicial resources, and delayed justice.

21.4. Evidentiary Standard for Indictment

Another critical consideration in the preparation of the indictment is the standard of the evidence supporting the indictment. Should the evidence supporting the charges in the indictment merely establish a *prima facie* case or should the evidence supporting the indictment be of a considerably higher standard (a trial ready standard or close thereto), meaning hypothetically that the case would be ready for trial or close thereto at the time of the initial appearance of the accused?

My view, from hard experience in the international criminal arena, ineluctably leads me to favour the latter concept. Again, this is for pragmatic reasons. Because the prosecutor will be based in The Hague and the locations where the crimes that he or she will be investigating are likely to be geographically distant, the investigations will take longer to complete than normal domestic investigations. Indeed, in terms of the differences of time it takes to complete an investigation, there is no comparison between the two. The reasons international criminal investigations take longer than domestic ones are manifold, and may include such formidable issues as the lack of access to or the inability to locate crime scenes, witnesses, and documents; limitations relating to language differences (interpretation issues such as interpreter availability and the time consuming translation of large volumes of documentary evidence); logistical issues (passports, air and ground travel, accommodation); and security issues (such as demining scenes of crimes and ensuring field security for staff).

In the context of international criminal justice and in the face of such investigative variables, it is imprudent to rely on an indictment that is merely supported by *prima facie* evidence. Should an accused person

be apprehended shortly after the indictment has been confirmed, such an indictment will require additional investigation in order for the charges (or some of them) to be provable at trial. Once an accused has been arrested, the prosecutor does not want to find himself or herself in a desperate race attempting to elevate the quality of *prima facie* evidence that supports the indictment to the standard of proof necessary to secure a conviction at trial (proof beyond a reasonable doubt), particularly when an accused has a right to be tried ‘without undue delay’. Under those circumstances, the prosecutor might actually lose the race and have to suffer the consequences.

21.5. Indictment Review Process

Having made these general observations, let me suggest a process designed to ensure the factual and legal soundness of the indictment itself. It is a process of testing the viability of the indictment before it is issued and it is a process that requires discipline and intellectual rigour. It requires two steps: the preparation of a draft indictment and supporting memorandum and a peer review process or indictment review.

The underlying rationale for conducting an indictment review process is simple: it is better that the indictment is first tested vigorously by one’s peers, thus exposing its flaws and weaknesses, than tested for the first time in the courtroom. The review process creates an opportunity to identify and cure evidentiary and legal problems with the proposed indictment whereas proceeding to trial with an untested instrument may create stress and uncertainty and could lead to failure.

The process begins when the prosecutor who has directed the investigation believes the evidence is sufficiently developed to indict an accused for a crime or crimes within the ICC Statute. At that point, he or she should prepare a draft indictment and simultaneously prepare a prosecution memorandum in support of the proposed indictment.

The prosecution memorandum is a critical document in the indictment review process because it focuses the mind of the prosecutor proposing the indictment on the available evidence and on the legal issues relating to the proposed indictment. Second, it serves the persons reviewing the proposed indictment with an analytical tool by which to commence a proper assessment of the indictment and the evidence supporting it.

An effective prosecution memorandum should include the following parts:

1. *Summary of the case*: This section provides a brief descriptive overview of the case.
2. *Description of the evidence*: Included in this section is a complete description of the evidence that supports each of the counts of the proposed indictment (meaning summaries of the testimony of each proposed witness, description of the documentary evidence, summaries of the expert evidence).
3. *Legal analysis*: This section includes a thorough legal analysis of the indictment, both as to its form and as to the nature of the substantive charges contained in it.
4. *Anticipated defences*: This section identifies and discusses the possible defences to each of the counts. By addressing anticipated defences at this early stage of the process, the prosecutor will be better prepared to deal with them at trial.
5. *Special problems*: This section identifies any special problems associated with the evidence or the law. For example, this section may identify and discuss witness protection issues for selected witnesses or document authentication issues in respect of specific items of evidence. It may also address such concerns as drafting issues or potential legal issues relating to specific charges in the indictment. The purpose of this section is to alert the reviewers to any problems that may impinge on the quality or availability of evidence or the viability of the charges contained in the proposed indictment.
6. *Recommendation*: The memorandum concludes with the recommendation of the prosecutor submitting the indictment for review.

To maximise the effectiveness of the indictment review process, the prosecution memorandum and the draft indictment should be circulated to the reviewers a reasonable time in advance of the actual indictment review in order for the reviewers to absorb its contents and prepare thoroughly for the indictment review.

It is imperative that the indictment review panel is composed of experienced trial attorneys and international legal experts and that the review process is presided over by a disinterested party (one who has not participated in either the investigation or the preparation of the proposed

indictment). If possible the chief prosecutor should attend and participate in the review.

The indictment review process requires the vigorous and honest review of the evidence that supports each of the counts in the proposed indictment. The term ‘evidence’ in this context is synonymous with the definition of what is admissible at trial under prevailing ICC standards. Therefore, evidence should include summaries of the proposed testimonies of persons who have indicated a willingness to testify (as opposed to summarising the evidence of witnesses who will not testify) and descriptions of documents that are at hand and that are legally admissible before the ICC. Using any lesser standard will corrupt the indictment review process and ill serve the prosecutor at a later trial.

The second component of the review process should include a vigorous review of the law that relates to the form of the indictment and to the legal charges themselves. For example, indictments at the ICTY are frequently challenged on the basis that they are allegedly deficient because they fail to state the material facts necessary to provide the accused with sufficient notice of the charges he faces. If properly addressed at the indictment review, such challenges may be later minimised or eliminated altogether.

Once the indictment review process has been completed, the conclusions of the reviewers in respect of the factual and legal sufficiency of each count of the indictment should be prepared by the person who led the review in its deliberations. If the indictment is found to be factually and legally sufficient, either in whole or in part, and a decision is taken to submit it to the chief prosecutor, the conclusions of the review panel and a final draft indictment should be forwarded to the chief prosecutor for his or her consideration and approval.

Should additional investigation be required before an indictment is submitted to the chief prosecutor, it should be pursued. Once this investigation has been completed, the indictment review panel should be reconvened to consider the new evidence. Assuming the results of this review are positive, the indictment should be finalised and forwarded for approval to the chief prosecutor, along with the conclusions of the review panel.

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Historical Origins of International Criminal Law: Volume 5

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This volume is about the birth of the Office of the Prosecutor of the International Criminal Court. It concerns the strategy and activities of the preparatory team for the Office between 1 August 2002 and November 2003. The emphasis is on the thinking of the team and dozens of experts it consulted. Part 1 of the book contains 41 chapters by some of these experts, including Xabier Agirre, Richard J. Goldstone, Fabricio Guariglia, Mark B. Harmon, Daryl A. Mundis, Bernard O'Donnell, Mohamed C. Othman, John Ralston, Christopher Staker, William A. Schabas, James K. Stewart and Clint Williamson. Their reflections are relevant to builders of capacity to prosecute core international crimes also at the national level.

Part 2 has chapters on three expert-group reports that the preparatory team organised: on the length of proceedings, fact-finding and state co-operation, and complementarity in practice. Introductions by actors involved at the time explain the background, main issues, and impact of the reports. Parts 3 and 4 contain three chapters on governance documents prepared by the team with experts: the draft Regulations of the Office, the draft Code of Conduct, and budgetary documents.

In Chapter 1, Morten Bergsmo, the co-ordinator of the preparatory team, analyses its risk-assessment and strategy, as well as challenges that subsequently beset the ICC Office of the Prosecutor. He calls for accurate historical research on the institutions of international justice and, beyond that, for a sociology of international justice. He argues for renewed commitment to integrity as a binding legal standard.

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