Use and Abuse of Sealed Indictment

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They're important tribunal tools - but the way they work remains shrouded in mystery.

When tribunal prosecutor Carla Del Ponte announced last week that her team had provided Belgrade a sealed indictment implicating Goran Hadzic in crimes against humanity and violations of the laws or customs of war just hours before Hadzic went into hiding, she highlighted how one of the tribunal's most important tools - sealed indictments - has come to be used and abused.

But while sealed indictments - those charge sheets temporarily kept confidential and out of public view - have become standard fare at the tribunal, much about how they actually work remains shrouded in mystery.

Under regular circumstances, indictments issued by the tribunal become public immediately after they are confirmed. But under certain circumstances, at the prosecutor's request, the tribunal's rules allow judges to seal indictments. Corresponding arrest warrants may be sealed as well.

Normally, a judge will order that an indictment and arrest warrant be kept under seal until the indictee is in custody, in order to facilitate what is expected to be an otherwise difficult detention process.

Once sealed, the indictment's existence may not be disclosed to the public. But the prosecutor still can - and, because the tribunal has no police force of its own, must - tell the relevant authorities that the indictment has been issued. It is then up to these people to ensure the indictee is arrested.

The prosecutor decides who to provide the sealed documents to depending on where her team believes the indictee will be found. She could give it to governmental authorities in Bosnia, Croatia, Serbia, or elsewhere, for example, or to the international forces of SFOR or KFOR.

It is then left to the national police forces or foreign troops to detain the accused. And as soon as the indictee is taken into custody, he is informed about the indictment.

Although sealed indictments were used by the tribunal's first prosecutor, Richard Goldstone, it was his successor, Louise Arbour, who made them the norm.

She insisted that any criticism of the strategy was overblown, writing, "It is a basic principle of domestic criminal justice, and yet it seems to be perceived in the region as though we had launched a Star Chamber operation of secret lists.

"I doubt that any domestic criminal justice system would feel that it is appropriate to issue a televised warning that an operation is imminent to arrest a suspect who has demonstrated an unwillingness to surrender."

Although sealed indictments were - and continue to be -misunderstood by some people both back in the region and around the world, they are widely used in domestic and international legal systems, from United States courts to the UN-sponsored Special Court for Sierra Leone, and beyond.

Whatever the concerns, Arbour's strategy proved effective. Tribunal indictees began to be arrested with increasing frequency, both in the former Yugoslavia and abroad.

In August 1999, for example, Bosnian Serb general Momir Talic was in Vienna, attending a conference sponsored by the Organisation for Security and Cooperation in Europe and the Vienna National Defence Academy when - to his surprise - he was detained by Austrian police.

Unbeknownst to Talic, the tribunal had issued a sealed indictment against him - and had provided the indictment, along with an arrest warrant, to the Viennese police. Talic was turned over to the tribunal that same day.

Back in the former Yugoslavia, the number of arrests began to increase dramatically.

This boost was due, in large part, to the fact that sealed indictments decrease the risk involved in capturing indictees - and thus increases the willingness of national police and international military troops to detain them.

But while the utility of sealed indictments is clear, what is less apparent is how, exactly, they work in practice.

What actually happens once a sealed indictment is issued? How are some indictees, such as Goran Hadzic, able to run away? Why are others dramatically arrested? And how are some advised that the time has come for them to voluntarily turn themselves in?

According to one tribunal insider, these issues are determined by the arresting authorities, who are left to decide how to get the indictees into custody - and these people act differently in different cases.

For a striking example of the profoundly divergent ways sealed indictments have been put to use, compare the cases of Momcilo Krajisnik and Biljana Plavsic, who were transferred to the tribunal within less than a year of each other.

Back in April 2000, Krajisnik, the former Bosnian Serb speaker of the parliament and the subject of a sealed indictment and corresponding arrest warrant, was arrested by NATO troops in a spectacular night raid.

Members of Krajisnik's family told the media that SFOR troops had used a bomb to blow open the front door of their house. The soldiers then reportedly dragged Krajisnik away while still in his pyjamas.

But things were very different for Plavsic, the former Bosnian Serb president, who was somehow informed of the existence of a sealed indictment and arrest warrant against her - and was thus given a chance to peacefully turn herself in.

According to a statement made by the prosecutor in January 2001, Plavsic "surrendered voluntarily by arrangement" with the tribunal "having been advised of the existence of an indictment against her and an outstanding warrant for her arrest".

No one surrounded her house and blew open her door; no one took her away in her pyjamas. Instead, she was “advised” that she should submit herself to the authorities. Unlike Krajisnik, she was given a chance to offer herself up to the tribunal.

Later, Plavsic was granted provisional release pending the start of her trial; Krajisnik was not. And this brings up another important issue - namely, how the use of sealed indictments affects an accused’s chances to be provisionally released.

When considering whether to provisionally release an accused, the judges will consider, among other things, whether they believe the person will appear for trial. An accused who has voluntarily surrendered is often seen as more likely to turn himself back over to the tribunal’s custody later on.

This was made clear by the judges in the case of former Yugoslav navy admiral Miodrag Jokic when they noted, “It goes without saying that prior voluntary surrender of an accused is not without significance in the assessment of the risk that an accused may not appear for trial.”

When a sealed indictment is issued, however, and an indictee is not advised of its existence but rather simply picked up and handed over to the tribunal, he is denied any opportunity to voluntarily surrender, and thus to show his willingness to submit to the authority of the tribunal.

The chamber presiding in the case of former Bosnian Serb deputy prime minister Radoslav Brdjanin addressed this issue directly, making clear that when a person is arrested on a sealed indictment, and “there is no suggestion that he knew of its existence” and thus had “no opportunity to surrender voluntarily”, he is “denied the benefit which such a surrender would have provided to him in relation to this issue”.

They continued, “In such a case - absent specific evidence directed to that issue - the trial chamber cannot take the fact that the applicant did not voluntarily surrender into account.” In other words, the accused will not get credit for turning himself in, but also will not be penalised for trying to evade justice.

Because indictments are sealed to prevent the indictee from knowing his arrest is imminent, and to reduce the likelihood that he will flee or otherwise try to resist capture, when the accused learns of the indictment - as appeared to happen with Hadzic - the usefulness of the seal can be greatly diminished. This is also the case when a significant amount of time has lapsed and the relevant authority has shown it is not inclined to carry out the arrest.

In such cases, the prosecutor will typically move to have the indictment unsealed. But until a judge officially does this, the prosecutor cannot publicly announce that the indictment exists. This remains the case even if news of the indictment’s existence has already leaked out. And this is what appeared to happen in the case of Hadzic.

As Del Ponte told it, her team delivered Hadzic’s indictment to Belgrade’s ministry of foreign affairs and the Serbian embassy in The Hague on July 13. That same day, she said, before the arrest warrant was validated or the police told to arrest Hadzic, he left his home - and did not return.

Two days later, information about the indictment was leaked to the press and published in a Belgrade newspaper.

At this point, as Del Ponte explained, “it had become obvious that there was no more ground to keep it sealed in order to facilitate an arrest, since the accused was aware of its existence and had gone into

hiding”.

But because the indictment had not yet been unsealed by a judge, she could not immediately speak of it. Only later did the prosecutor’s office submit a motion to have it unsealed, which Judge Amin El Mahdi granted on July 16.

Despite the fact that sealed indictments do not always work as the prosecutor may wish, it seems that many people have come to see the practical benefits they offer.

Sead Numanovic, a reporter for a daily newspaper in Sarajevo, said, “Sealed indictments should definitely exist because that way the chances for the indicted person to be sent to The Hague - whether he is a Serb, a Muslim, or a Croat - are much better if his indictment remains sealed.”

And ironically, Numanovic thinks the Hadzic situation just confirms why sealed indictments are necessary.

“Look what happened with Hadzic,” he continued. “He ran away the moment he found out about his indictment.”

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