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Active Complementarity: Legal Information Transfer

Morten Bergsmo (editor)

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Dedicated to the memory of Tor Bergsmo

PUBLICATION SERIES PREFACE

The Torkel Opsahl Academic EPublisher is pleased to publish this first book on the central challenges in the construction of national ability to investigate, prosecute and adjudicate core international crimes. The volume brings together contributions by several leading experts on what is frequently referred to as 'positive complementarity', that is, the combined efforts of State and non-State actors to contribute to the strengthening of national criminal justice systems in the area of war crimes, crimes against humanity, genocide and aggression. Involving authors with experience both from academia and from practice, the book aspires to bring the emerging discourse on 'positive complementarity' to a new, more concrete level.

We would like to thank Assistant Professor CHEAH Wui Ling, Adi Atlas, Melanie Habwe Dickson, Aleksandra Sidorenko and Audrey WONG for invaluable contributions to the preparation of the book. We also thank Kiki A. Japutra for preparing the Index, and gratefully acknowledge the support of Georgetown University and the Center for Transnational Legal Studies in London during the final editing of this book.

Morten Bergsmo
Publication Series Co-Editor

Alf Butenschøn Skre
Senior Editorial Assistant

PREFACE

This anthology addresses the coming together of criminal justice for international crimes and information technology. It is the first substantial work on legal informatics and international criminal law. Its publication is significant for several reasons. First, the efforts to enable national criminal justice actors to genuinely investigate, prosecute and adjudicate core international crimes is an important contribution to the rule of law concerning the entire international community. States, non-governmental organizations and academia all have a role to play.

Secondly, to yield lasting results, such knowledge-transfer and capacity building efforts must be sustainable and widely available to the professionals concerned. The efforts can not be limited to the traditional secondment of experts from Western States to countries that are less resourceful. The Internet and information technology can play a very important role in devising practical solutions that open the access to legal information and by that serve those who need assistance on an ongoing basis.

The Legal Tools Project of the International Criminal Court has been building IT-services such as the online Legal Tools Database and the Case Matrix application since 2003. I have followed this work with great interest since 2005, in my capacity as a member of the Legal Tools Expert Advisory Group. The Project has shown its practical usefulness to those who prosecute or adjudicate war crimes cases, having been developed pursuant to careful analysis of user needs in international and national jurisdictions.

Furthermore, at the centre of the Project are conceptual-terminological resources such as (a) the Legal Requirements document, detailing the legal requirements of all crimes and modes of liability in the Statute of the International Criminal Court; (b) the metadata scheme developed by lawyers serving at the Court; and (c) the comprehensive keywords list also developed at the Court. The Project has also developed a terminological framework for structured analyses of the way courts and tribunals deal with facts, means of proof and evidence. The Means of Proof Digest and the way it is implement in the Case Matrix application is innovative. It opens a new area of research on facts and evidence in international

criminal law that may enhance our understanding of the relationships between facts, evidence, means of proof and factual findings, submissions, propositions, arguments and stories.

The book contains informative chapters on these structured knowledge resources, but also on the practical application of the Legal Tools, on how they give concrete content to capacity building programmes, on the emerging case law of the International Criminal Court regarding the use of in-depth evidence analysis charts, and on how information technology can revitalise the use of older legal sources such as World War II cases on war crimes.

I think this is an important book. It makes the discussion on positive complementarity and justice sector capacity-building more concrete and it centres this discussion on how all relevant criminal justice officials can be given an equal opportunity to perform, through democratic access to the legal sources needed to write legal submissions and decisions on international crimes. The book also shows how the Legal Tools Project has developed multiple networks of technical and content developers, as well as of users around the world, and editors and supervisors, paving the way for further academic research on the basis of this platform.

Professor Giovanni Sartor
European University Institute

FOREWORD

Just as the term 'impunity gap' was coined in the creative environment of the start-up team of the International Criminal Court (ICC) in late 2002, so was the notion of 'positive complementarity' conceived in the ICC Office of the Prosecutor in 2003. Seven years later, the ICC Assembly of States Parties adopted a resolution on positive complementarity during the first Review Conference on the ICC Statute in 2010.[1] It signalled a paradigm shift, the significance and consequence of which is already evident. The resolution has broadened civil society's interest in positive complementarity, also among the largest NGOs. Donors, such as the European Union, are gradually compelling NGOs to shift their attention away from international institution building to national capacity building. Brussels has showed leadership in this process.

This shift of attention from the institutions and activities in The Hague and New York to national criminal justice agencies in capitals around the world will be challenging. For one, many civil society actors will find it less attractive to undertake projects in the remote capitals of materially less resourceful countries, far removed from the glamour of Manhattan and the bricked streets of The Hague. More importantly, it is a matter of fact that foreign States, international organizations and human rights NGOs enjoy limited trust *vis-à-vis* national criminal justice agencies. Due to sovereignty issues, fear of exposure and concerns for confidentiality, national investigators, prosecutors and judges with an international crimes mandate are understandably reluctant to openly discuss their capacity weaknesses and needs with such foreign actors, however well-meaning the latter may be.

Capacity building and legal empowerment at the domestic level is therefore central to this paradigm shift. While it remains uncertain which capacity building platforms will prove most effective in the upcoming years, there has been a general increase in activities seeking to raise awareness about positive complementarity since the 2010 ICC Review Conference. But we have not yet seen many practical and innovative examples of effective capacity building. There is much talk and less action.

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[1] See Resolution RC/Res. 1 Complementarity, adopted by consensus on 8 June 2010.

This book brings together contributions by persons with expertise in the practice of capacity building, the development and maintenance of tools that can be used to make knowledge-transfer more effective and sustainable, and international criminal law. The tools and practices highlighted in this book embody and further our evolution in approach towards positive complementarity. These tools are not only innovative or cutting-edge in their own right, they also reflect and advance the Kampala Review Conference's progressive development of positive complementarity. We hope that the anthology will help to make the existing capacity building discourse more practical, focused and real.

This book's chapters make clear that access to legal information should lie at the heart of capacity building and knowledge-transfer in the area of criminal justice for core international crimes. If investigators, prosecutors, counsel, and judges do not have proper access to available legal sources and expert knowledge on international criminal law, they cannot write proper submissions and decisions. Legal sources are the bread and butter of lawyers. Without them, even the most talented lawyers are unable to work professionally.

Access to legal sources and knowledge should be provided in line with this new paradigm shift towards positive complementarity that focuses on strengthening domestic capacity and empowering national actors. Democratization of access to legal information is therefore of fundamental importance. Levelling the playing field for war crimes lawyers in all jurisdictions should be a common goal for all concerned with increasing national ability to investigate and prosecute core international crimes. This is a neutral form of knowledge-transfer. It does not require that, for example, Western experts teach or supervise professionals from materially less resourceful countries. Didactic training and secondments can create unhealthy dependencies and sometimes disincentives. Instead, one should aim to reduce existing conditions of inequality faced by lawyers and investigators operating in different jurisdictions around the world. One way of doing so is to facilitate the direct access of national actors to legal sources and knowledge. It can empower legal professionals, rather than reshaping or replacing them. Legal empowerment should not be a term reserved for the socio-economic development discourse. It should be a prioritized objective for those who seek to play a role in positive complementarity. It is more important to make legal professionals who are in need of assistance self-sufficient than investing grants in the implementing of elaborate training programmes for them, the latter often on the terms of the external capacity builder. This should guide and shape

how positive complementarity is understood and how it should be implemented.

The Legal Tools Project of the ICC is a technical platform that can be used by those who intend to strengthen capacity. It has been developed since 2003 with the objective of helping national criminal justice actors to get free, effective and equal access to all relevant legal sources on the international crimes. This book describes the Legal Tools in some detail: their development, basic taxonomies, technical development, and use in select jurisdictions. It describes how the Legal Tools Database[2] has captured the online market for legal information on core international crimes – it is located in the public commons and has become a public good. It also explains how the Case Matrix application – used by national criminal justice actors around the world – generates trust and openness among national actors, which are prerequisites for any respectful, constructive and needs-based dialogue on how to strengthen capacity at the national level.

The Legal Tools are based on detailed legal requirements for each of the crimes and modes of liability contained in the ICC Statute, as well as a system of metadata and keywords developed by lawyers at the ICC. These constituent instruments are described in chapters 6 and 7 below. Significant legal analysis has been invested in the making of these instruments. They are of high quality and designed to flexibly meet the needs of different actors, although they do not necessarily reflect the view of the ICC, any of its Organs, or participants in proceedings before the Court.

One of the key functions of the Case Matrix application is the ability to correlate legal requirements of crimes and modes of liability with the (potential) evidence in a case. It is this function on which the name of the Case Matrix application is based. And it is the innovative manner in which this function has been implemented that resulted in the Case Matrix developers being awarded the 2008 Dieter Meurer Prize for Legal Informatics. Furthermore, ICC Chambers have in several decisions implemented a key methodology of the Case Matrix in the so-called in-depth evidence analysis charts. Such innovative and practical methods can have far-reaching implications for the way core international crimes cases will be organized, presented and disclosed, not only at the ICC but, gradually, in national jurisdictions. Chapter 15 discusses this substantial development.

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[2] See http://www.legal-tools.org.

Another Legal Tool that has had an impact on practice is the National Implementing Legislation Database. This advanced database is being used in the preparation of national implementing legislation and the import of core international crimes into national criminal law. It is also the leading tool for comparative research analysis on national legislation in connection with the formulation or assessment of arguments on customary international criminal law or general principles of international criminal law. Chapter 8 presents this resource in some detail.

Chapter 10 analyzes the fundamental logic of the 6,400 page resource known as the Means of Proof Digest. This tool provides a detailed guide to the types or categories of fact that can be used to prove core international crimes and modes of liability. It is a unique guide to proof. The resource is available through the Case Matrix application. By bringing together facts and legal requirements and clarifying their evidential relationship in a concise and practice-focused manner, this tool has given terms such as 'means of proof' and 'components of elements of crimes' a new meaning in international criminal law. The Digest invites further academic research on the precise nature of statements on facts in judgements, submissions and pleadings before international criminal jurisdictions. New academic initiatives to this effect are underway and will further increase this tool's relevance and importance to criminal justice actors working on the ground.

'Positive complementarity' has become a trendy term since the Kampala Review Conference. Ironically, little thought went into its definition or suitability when it was first coined in informal discussions at the ICC in 2003. Fairly examined, the term is neither clear nor particularly logical. 'Complementarity' in the ICC Statute is an admissibility threshold below which the Court will not investigate or prosecute. As such, it serves as a passive filter. The process to construct national ability to investigate and prosecute, on the other hand, will entail the tireless efforts by numerous international and national actors for many years to come. Some of this activity will be self-serving and not very effective. But gradually a broad range of effective, targeted activities should emerge and stand out. All such initiatives require systematic, professional activity to add value in a sustainable manner. Hence the title of this book, 'Active Complementarity: Legal Information Transfer'. I hope that the book will help take this common effort forward.

Morten Bergsmo
Editor

TABLE OF CONTENTS

PART I:
CONSTRUCTING NATIONAL ABILITY TO INVESTIGATE, PROSECUTE AND ADJUDICATE CORE INTERNATIONAL CRIMES

1

Complementarity after Kampala: Capacity Building and the ICC's Legal Tools[♣]

Morten Bergsmo,[*] Olympia Bekou[**] and Annika Jones[***]

Twelve years after the creation of the first permanent International Criminal Court and eight years since the entry into force of its Statute,[1] the first ever Review Conference took place in Kampala, Uganda. Besides successfully introducing aggression as one of the crimes under the Court's jurisdiction and expanding the coverage for war crimes,[2] the Review Conference provided a timely opportunity to reflect on some of the key aspects of the Court's regime.

An integral part of the Review Conference was the "stocktaking exercise". The exercise provided a platform for the participants at the Review Conference to reflect on the successes and the failings of the ICC following the first few years of its operation and to consider measures that could be taken to enhance and strengthen the Court's functions in the years to come. The stocktaking exercise focused on four themes: complementarity, co-operation, victims and affected communities, and

♣ This chapter was published in *Goettingen Journal of International Law*, 2010, vol. 2, no. 2, pp. 791–811. It is republished here with the kind permission of the Journal, with minor editorial changes.

* **Morten Bergsmo** is Senior Researcher at the University of Oslo, Faculty of Law, Visiting Fellow at Stanford University, Visiting Professor, Georgetown University and Co-ordinator of the ICC Legal Tools Project; he formerly served as Senior Legal Adviser and Chief of the Legal Advisory Section of the ICC Office of the Prosecutor.

** **Olympia Bekou** is Associate Professor in Law and Head of the International Criminal Justice Unit, Human Rights Law Centre ("HRLC"), University of Nottingham.

*** **Annika Jones** is a Ph. D. Candidate at the University of Nottingham and Senior Research Fellow of the Legal Tools Outsourcing Partners' Network.

1 See 1998 Rome Statute of the International Criminal Court, A/Conf.138/9, 1998. The Court was formally established on 1 July 2002 (hereinafter ICC or the Court).

2 Resolution RC/Res.6, "The Crime of Aggression", adopted at the 13th plenary meeting, on 11 June 2010, by consensus; Resolution RC/Res.5, "Amendments to Article 8 of the Rome Statute", adopted at the 12th plenary meeting, on 10 June 2010, by consensus.

peace and justice.[3] These themes represent major aspects of the ICC's operation which will continue to warrant consideration as the Court matures as an institution. The theme of complementarity is of particular importance because of its uniqueness to the ICC. The ICC's complementarity regime places a primary obligation on States to investigate and prosecute international crimes.[4] It does so by limiting the jurisdiction of the ICC to situations where States are shown to be unwilling or unable genuinely to investigate and prosecute, in respect of cases of sufficient gravity to justify action by the Court.[5] The principle of complementarity was an innovation, specifically tailored for the ICC. The Review Conference therefore provided an important opportunity to reflect on the effectiveness of the principle and steps that could be taken to strengthen it.

This piece will consider the tenor of the debate concerning complementarity during the Review Conference and the emphasis that was placed on strengthening national capacity for the investigation and prosecution of core international crimes. In particular, it will highlight a significant shift in the use of the term "positive complementarity". The term, which had originally been used to refer to the ICC's role in the construction of national capacity, was used throughout the Review Conference to refer to the involvement of States, international organisations and civil society in strengthening justice at the national level. It will also draw attention to the efforts that were made during the Conference to identify means to put positive complementarity into practice with the hope of overcoming some of the problems that States had faced in the investigation and prosecution of serious international crimes within their national systems. The article will go on to discuss the relevance of the ICC Legal Tools Project, a unique collection of legal databases, digests and applications designed to facilitate the application of international criminal law, to the discussions that took place in Kampala. It will be concluded that the ICC's Legal Tools provide an important means of supporting the principle of complementarity, positive or otherwise.

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3 See Resolution ICC-ASP/8/Res.6, "Review Conference", adopted at the 8th plenary meeting, on 26 November 2009, by consensus, para. 5.

4 J.T. Holmes, "The Principle of Complementarity", in R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer, 1999, p. 41.

5 Rome Statute, articles 1 and 17.

1.1. Background to the Principle of Complementarity

Before turning to the discussions that took place in Kampala with respect to complementarity, it is worth considering the original understanding of the principle incorporated into the Rome Statute. During its inception and the early years of the Court's operation, the principle of complementarity has been subjected to much academic scrutiny, both in terms of its constituting elements and the potential ramifications of its use.[6]

Complementarity strikes a delicate balance between the competing interests of State sovereignty and judicial independence.[7] The balance between these two interests was crucial to the materialisation of the Court.[8] In order to secure the agreement of States it was necessary to offer national institutions the primary responsibility over the investigation and prosecution of international crimes. At its inception, therefore, complementarity was envisaged primarily as a means of determining the forum that would assume jurisdiction over a particular case. The Statute recognises that whereas some States have well-functioning judiciaries, others

[6] See, *inter alia*, Holmes, 2002, p. 45, see *supra* note 4; M. Benzing, "The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight Against Impunity", in *Max Planck United Nations Yearbook*, 2003, vol. 7, p. 592, at p. 599; J.K. Kleffner and G. Kor, *Complementary Views on Complementarity*, TMC Asser Press, 2006; M.M. El Zeidy, "The Principle of Complementarity: A New Machinery to Implement International Criminal Law", in *Michigan Journal of.International Law*, 2002, vol. 23, p. 869; I. Tallgren, "Completing the International Criminal Order: The Rhetoric of International Repression and the Notion of Complementarity in the Draft Statute for an International Criminal Court", in *Nordic Jornal of International Law*, 1998, vol. 67, p. 107; B. Perrin, "Making Sense of Complementarity: The Relationship Between The International Criminal Court and National Jurisdictions", in *Sri Lanka Journal of International Law*, 2006, vol. 18, p. 301.

[7] See M. Bachrach, "The Rome Statute Explained", in *International Law Practicum*, 1999, vol. 12, p. 37, at p. 40; see also J. Pejic, "Creating a Permanent International Criminal Court: The Obstacles to Independence and Effectiveness", in *Columbia Human Rights Law Review*, 1998, vol. 29, p. 291, at p. 311. Arguably, the protection the ICC provides will compensate for the relinquishment of whatever sovereign rights. On this particular issue see R. Bhattacharyya, "Establishing a Rule-of-Law International Criminal Justice System", in *Texas International Law Journal*, 1996, vol. 31, p. 57, at p. 75; see also R.A. Brand, "External Sovereignty and International Law", in *Fordham International Law Journal*, 1995, vol. 18, p. 1685, at pp. 1696–1697.

[8] B.B. Ferencz, "International Criminal Court: The Legacy of Nuremberg", *Pace International Law Review*, 1998, vol. 10, p. 203, at p. 227.

do not.[9] article 17 of the Rome Statute allows the ICC to step in and exercise jurisdiction where States are unable or unwilling genuinely to investigate and prosecute without replacing judicial systems that function properly.[10]

When complementarity was first introduced into the Rome Statute, State Parties could not have foreseen its full practical implications or its potential to assist the Court in reaching its goal of ending impunity for core international crimes.[11] Since the principle of complementarity allows the Court jurisdiction only where national institutions are unable or unwilling to exercise jurisdiction, States may feel "forced" to investigate or prosecute cases involving core international crimes so as to avoid any intrusion by the ICC into situations involving their nationals or their territory. The real or perceived threat of ICC action, encapsulated in the application of complementarity, serves a useful purpose in practice and came to be recognised as complementarity's "catalytic effect".[12]

Effective national prosecutions have been an issue since the early function of the ICC. In 2003, the Court's Prosecutor, upon taking his position, suggested that the lack of cases prosecuted by his Office would be its major success, if this is to be a consequence of effective national prosecutions.[13] In its 2006 Policy Paper,[14] the Office of the Prosecutor[15]

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9 J.L. Dunoff and J.P. Trachtman, "The Law and Economics of Humanitarian Law Violations in Internal Conflict", in *American Journal of International Law*, 1999, vol. 93, p. 394, at p. 405.

10 J. Crawford, "The ILC Adopts a Statute for an International Criminal Court", in *American Journal of International Law*, 1995, vol. 89, p. 404, at p. 410; see also, "Establishing an International Criminal Court; Major Unresolved Issues in the Draft Statute", *International Criminal Court Briefing Paper Series*, 1998; Bassiouni puts it, "complementarity requires deferral to capable national systems", M.C. Bassiouni *et al.*, "Conference Convocation", in *American University International Law Review*, 1998, vol. 13, p. 1383, at p. 1396.

11 The goal of contributing to the fight against impunity for international crimes is recognised in the Preamble to the Rome Statute, para. 5.

12 See generally, J.K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, Oxford University Press, 2008, pp. 309–339.

13 Statement made by Luis Moreno-Ocampo, Chief Prosecutor, Ceremony for the solemn undertaking of the Chief Prosecutor of the International Criminal Court, 16 June 2003, The Hague.

14 ICC-Office of the Prosecutor, *Report on Prosecutorial Strategy*, September 2006.

15 Hereinafter OTP.

further elaborated on this issue by introducing what has since become known as "a positive approach to complementarity":[16]

> With regard to complementarity, the Office emphasizes that according to the Statute national states have the primary responsibility for preventing and punishing atrocities in their own territories. In this design, intervention by the Office must be exceptional – it will only step in when States fail to conduct investigations and prosecutions, or where they purport to do so but in reality are unwilling or unable to genuinely carry out proceedings. A Court based on the principle of complementarity ensures the international rule of law by creating an interdependent, mutually reinforcing international system of justice. With this in mind, the Office has adopted a positive approach to complementarity, meaning that it encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation.[17]

For positive complementarity to work, it is not enough to rely on the OTP to steer national processes towards more investigations and prosecutions. Although such encouragement is influential,[18] it runs the risk of becoming a paper exercise if there is no strong national framework in place enabling States to exercise criminal jurisdiction. It was clear even prior to shaping the agenda for the Review Conference that if positive complementarity was to succeed, a more systematic approach towards empowering national legal orders was needed.

1.2. Developments Relating to Complementarity during the Stocktaking Exercise

Throughout the lead up to the Review Conference and the stocktaking exercise, the importance of the principle of complementarity was re-

[16] For the general discussion on positive complementarity approach see: W.W. Burke-White, "Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice", in *Harvard International Law Journal*, 2008, vol. 49, no. 1, p. 53; W.W. Burke-White, "Implementing a Policy of Positive Complementarity in the Rome System of Justice", in *Criminal Law Forum*, 2008, vol. 19, p. 59.

[17] ICC-OTP, 2006, p. 5, see *supra* note 14.

[18] W.W. Burke-White, 2008, see *supra* note 16, at p. 71.

affirmed. However, the main emphasis was on the construction of national capacity. The difficulties that States had faced in fulfilling their role under the ICC's complementarity regime gave new impetus to the pursuit of positive complementarity. The next sections will highlight how the term "positive complementarity", which began as a prosecutorial policy, came to be recognised by State Parties as a vital means of strengthening the ICC's regime.

1.2.1. The Background to the Review Conference

The foundations for the Review Conference discussion on complementarity can be found in the 8th Session of the Assembly of States Parties to the Rome Statute (ASP) in November 2009.[19] The States Parties to the Rome Statute approved complementarity as one of the four themes for consideration as part of the stocktaking exercise.[20] In the following months, the Bureau of the ASP became actively involved in shaping the format and content of the negotiations that were due to take place in Kampala. A Resumed 8th Session of the ASP was held in New York in March 2010, during which the Bureau presented a report entitled *"Taking stock of the principle of complementarity: bridging the impunity gap"*, which was appended to the Resolution on the Review Conference.[21] The paper emphasised the integral nature of the principle of complementarity to the functioning of the ICC's system of justice and the long term efficacy of the Court.[22] However, the clear emphasis of the paper was positive complementarity.

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[19] See ICC-ASP/8/Res.3, Strengthening the International Criminal Court and the Assembly of States Parties, Adopted at the 8th plenary meeting, on 26 November 2009, by consensus. Paragraph 6 of the said resolution reads: "Encourages States Parties to further discuss issues related to the principle of complementarity and to explore proposals by States Parties introduced as "positive complementarity". Available at: http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-8-Res.3-ENG.pdf.
See also a discussion paper submitted by Denmark and South Africa at the 8th ASP, entitled: "Bridging the Impunity Gap through Positive Complementarity", 6 November 2009.

[20] *Ibid*.; see *supra* note 3, Annex IV, "Topics for stocktaking".

[21] Resolution ICC-ASP/8/Res.9, "Review Conference", adopted at the 10th plenary meeting, on 25 March 2010, by consensus, Appendix.

[22] *Ibid*., para. 4.

In the paper, "positive complementarity" was defined as "all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute, without involving the Court in capacity building, financial support and technical assistance, but instead leaving these actions and activities for States, to assist each other on a voluntary basis".[23] The paper discussed various issues relating to the notion. Firstly, it identified three categories of support, namely, legislative assistance, technical assistance, and capacity building.[24] Secondly, it discussed different "scenarios" in which assistance could be provided before, during and after situations arise, where the Court is investigating and prosecuting and where it is not.[25] Thirdly, and most significantly, the paper considered the actors involved in positive complementarity.[26] It highlighted the limited role that the ICC should play in positive complementarity as a result of its judicial mandate and limited budget, which should remain directed at the Court's primary function in investigating and prosecuting the crimes under its jurisdiction.[27] The paper clearly stated that the "Court is not a development agency".[28] Instead, the focus was shifted to States and civil society and the ways in which they could encourage and assist national institutions to fulfil their role under the Rome Statute. The report included as an aim for the stocktaking exercise the identification of ways in which State Parties, assisted by civil society, and in dialogue with the Court, may "even better, more targets and more efficiently assist one another in strengthening national jurisdictions in order that these may conduct national investigations and prosecutions".[29]

Denmark and South Africa, the two States which had been identified as focal points for the stocktaking on complementarity, also compiled a paper ahead of the Review Conference.[30] The paper, entitled *"Focal points' compilation of examples of projects aimed at*

[23] *Ibid*., para. 16.

[24] *Ibid*., para. 17.

[25] *Ibid*., paras. 19–26.

[26] *Ibid*., paras. 27–45.

[27] *Ibid*., para. 4.

[28] *Ibid*., para. 4.

[29] *Ibid*., para. 51.

[30] "Focal points' compilation of examples of projects aimed at strengthening domestic jurisdictions to deal with Rome Statute Crimes", 30 May 2010, RC/ST/CM/INF.2.

strengthening domestic jurisdictions to deal with Rome Statute Crimes", outlined a number of examples of projects which had already been established and developed to enhance the capacity and willingness of States to fulfil their role in the ICC's complementarity regime.

The report of the Bureau made positive complementarity a central aspect of the stocktaking exercise. Not only did the preparations for Kampala reflect a new emphasis on positive complementarity, they also seem to represent a change in the use of the term. Whereas the term "positive complementarity" had previously been used by the OTP to refer to the involvement of the Court in the construction of national capacity,[31] the focus of the report of the Bureau had shifted to the involvement of States and civil society in capacity building activities. Although the paper in itself had no legally binding effect, its structure and content influenced the debate that took place in Kampala and the resolution that was adopted with respect to complementarity at the end of the Review Conference.

1.2.2. Stocktaking in Kampala

The formal stocktaking exercise on complementarity took place on the fourth day of the Review Conference.[32] The exercise was organised by Denmark and South Africa, the focal points for complementarity, who had played an integral role in the preparations for the stocktaking exercise. In addition to the formal stocktaking exercise, several informal side events were organised throughout the Review Conference to allow States Parties, civil society, and other delegates to engage in further discussion both prior to and following the time allocated on the official agenda.[33]

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[31] *Supra*, section 1.1.

[32] The plenary took place on Thursday 3 June 2010. Held in a panel format with contributions from the floor, the plenary of the stocktaking on complementarity largely reflected the content of the discussion paper prepared by the Bureau.

[33] See for instance an informal event on complementarity organised by the Coalition for the International Criminal Court (hereinafter CICC) in advance of the plenary session, held on 1 June 2010. A further panel discussion on complementarity was hosted by South Africa and Denmark, the focal points for complementarity, on 2 June 2010. In addition, a side event was hosted by the Democratic Republic of the Congo, the United States, and Norway on "The DRC and Positive Complementarity", also on 2 June 2010.

The template that had been outlined by the Bureau of the ASP provided a framework for the formal stocktaking event. It listed, as a tentative programme of work the elaboration of the principle of complementarity; the practical application of complementarity and the Rome Statute system; positive complementarity, what it is and why it is necessary; and practical implementation of positive complementarity, or the enabling of national jurisdictions.[34] These themes were also discussed in the informal meetings that took place outside of the plenary.

At the plenary, States and panellists highlighted the centrality of the principle of complementarity to the ICC's regime and the importance of States fulfilling their role under the Rome Statute by investigating and prosecuting crimes committed on their territory or by their nationals.[35] Specific attention was drawn to the significance of the principle of complementarity in bringing justice closer to victims and affected communities. The visibility of justice has been thought to play a central role in increasing its legitimacy in the affected community and thus the restorative impact of the trial process.[36] The investigation and prosecution of serious international crimes by national courts may allow more victims and members of the local community to attend hearings and facilitate communication of the occurrence and significance of the proceedings to local populations. The ability to participate in proceedings, which is more likely when justice takes place closer to the affected population, has also been thought to increase the cathartic effect of criminal trials amongst the victim population.[37] Furthermore, the investigation and prosecution of international crimes in national institutions increases the likelihood that local personnel will play an integral role in the proceedings. The involvement of local personnel may result in more effective communication of the purpose and value of the trial process than that which could be achieved by staff who are unfamiliar with local languages and cultural practices.[38] The practical advantages of national justice were

[34] Resolution ICC-ASP/8/Res.9, see *supra* note 21.

[35] In accordance with article 12 of the Rome Statute.

[36] M. Drumbl, *Atrocity, Punishment and International Law*, Cambridge University Press, 2007, p. 148.

[37] C.L. Sriram, "Revolutions in Accountability: New Approaches to Past Abuses", in *American University International Law Review*, 2003, vol. 19, p. 301, at p. 383.

[38] Justice mechanisms located within post-conflict societies have been considered "better able to demonstrate the importance of accountability and fair justice to local popu-

also highlighted during the course of the discussions.[39] Like other international tribunals, the ICC is reliant on the co-operation of States to collect and transfer evidence as well as suspects and accused persons to the Court.[40] Even where States are co-operative, in line with their obligations under the Rome Statute,[41] the distance of the Court from the territories in which crimes may have occurred is likely to cause delays or obstacles to the pursuit of justice. Where justice is carried out at the national level, access to evidence, witnesses and perpetrators is likely to be easier, and thus facilitate the process of holding perpetrators to account for their crimes.

With regard to the practical application of positive complementarity, the discussions served to highlight the difficulties that States had faced in undertaking the investigation and prosecution of core international crimes.[42] Three main challenges facing the application of complementarity in practice were raised during the stocktaking exercise. The first is the lack or inadequacy of national implementing legislation.[43] Having legislation in place is the first step in putting an end to impunity for atrocities and constitutes a means of materialising the application of complementarity. Linked to this point was the discussion on whether it would be desirable to prosecute core international crimes as ordinary crimes. At a panel meeting on complementarity that was organised by CICC, it was felt that prosecuting core crimes such as murder or rape, rather than their international equivalents, is not desirable, since ordinary crimes do not represent the scope, scale, and gravity of the conduct.[44] A second problem concerns the lack of operational capacity. In particular, the problems faced by domestic institutions operating in the context of a weak economy, lack of infrastructure, lack of confidence in the judicial

lations", see J.E. Stromseth, "Pursuing Accountability for Atrocities After Conflict: What Impact on Binding the Rule of Law", in *Georgetown Journal of International Law*, 2007, vol. 38, p. 251, at p. 260.

39 Panel discussion on complementarity hosted by South Africa and Denmark, see *supra* note 33.

40 Rome Statute, article 86. States are obliged to provide for the various forms of co-operation outlined in Parts IX and X of the Rome Statute.

41 Rome Statute, article 86.

42 Plenary, *supra* note 32.

43 *Ibid*.

44 See *supra* note 33.

structure, and disputed authority were highlighted at the Danish-South African panel on complementarity.[45] Such operational capacity problems are likely to be exacerbated particularly where there may be a large backlog of cases, which is usually the case in the aftermath of mass atrocities where criminal justice institutions with restricted resources or expertise normally have limited capacity to process cases. Linked to this point is the lack of training, the third challenge identified by the plenary at the stocktaking exercise. Whilst the need for specific training was identified, the panellists at the South Africa-Denmark event reflected on the importance of the design of the training in empowering national judicial systems to oversee justice at the national level.[46]

The meaning of the term "positive complementarity" was discussed during the plenary. While repeated reference was made to the term, some States questioned its use, preferring the term "technical assistance".[47] It was highlighted that the term had no basis in the Rome Statute and served to confuse judicial capacity building with the principle of complementarity as laid down in article 17 of the Rome Statute.[48] Despite some hesitation of the use of the term "positive complementarity", there was general agreement during all meetings that the active involvement of States and civil society in building national capacity is desirable. Furthermore, doubts as to the use of the term "positive complementarity" may have been outweighed by the frequency with which the term was used.

A significant proportion of the discussion in all events on complementarity was focused on the ways in which national capacity could be increased so as to strengthen the ICC's overall system of justice. It was highlighted that the role of the Court in positive complementarity should be limited so as to ensure that the construction of national capacity would not interfere with the ICC's judicial function or divert funds from investigations and prosecutions being carried out by the Court.[49] There

[45] Panel discussion on complementarity hosted by South Africa and Denmark, *supra* note 33.

[46] *Ibid.*

[47] This issue was raised by the Spanish delegation during the plenary session, *supra* note 32.

[48] This point was made by the German delegation during the plenary session, *ibid.*

[49] This point was emphasised in the CICC side event on complementarity, *supra* note 33.

was general agreement that States, international organisations, and civil society should play a leading role in encouraging and assisting States to enact national implementing legislation and to investigate serious international crimes committed on their territory or by their nationals.[50] Efforts were made to identify tangible means of increasing national capacity. Several projects tailored to the construction of national capacity were highlighted during the plenary session.[51] In addition, the role of the United States in projects to strengthen judicial processes in the Democratic Republic of the Congo (DRC) was discussed in the US-Norway sponsored side event on positive complementarity and the DRC.[52]

The stocktaking exercise served to reaffirm the importance of the principle of complementarity but, at the same time, recognise the difficulties faced by States in carrying out investigations and prosecutions of the crimes under the Court's jurisdiction at the national level. Whilst there was some hesitation over the use of the term "positive complementarity", there was general agreement that States needed assistance in fulfilling their role as reflected in the Rome Statute and that States and civil society should take a leading role in building national capacity.

1.2.3. The Outcome of the Stocktaking Exercise

The outcome of the stocktaking exercise was a resolution that reflects the contribution of the Bureau of the ASP in its report on stocktaking as well as the content of the debates that took place in Kampala. The resolution stresses the primary responsibility of States to investigate and prosecute the crimes under the jurisdiction of the International Criminal Court.[53] It

[50] At the CICC side event, proposals were made for the Assembly of States Parties to play a role in overseeing and linking different activities aimed at the construction of national capacity so as to streamline activities and reduce duplication of tasks.

[51] Reference was made to the ICC Legal Tools Project as a means of contributing to national jurisdictions by the delegation of Norway during the plenary debate. During the plenary session, the Netherlands highlighted the Justice Rapid Response Initiative as well as the ICC's Legal Tools. Both projects had been included in the "Focal points' compilation of examples of projects aimed at strengthening domestic jurisdictions to deal with Rome Statute Crimes", see *supra* note 30.

[52] See *supra* note 33.

[53] Resolution RC/Res.1, adopted at the 9th plenary meeting, on 8 June 2010, by consensus, para. 1.

also notes the importance of States Parties "taking effective domestic measures to implement the Rome Statute".[54] In doing so, it serves to reaffirm the commitment of States to the principle of complementarity that forms the foundation for the ICC's system of justice. The resolution recognises the need for "additional measures at the national level as required and for the enhancement of international assistance to effectively prosecute perpetrators of the most serious crimes of concern to the international community" and encourages the Court, State Parties, and other stakeholders, including international organisations and civil society "to further explore ways in which to enhance the capacity of national jurisdictions".[55] Whilst the resolution does not make explicit reference to the term "positive complementarity", it acknowledges the activities referred to in terms of positive complementarity during the stocktaking exercise.

The resolution, adopted by consensus of the Assembly, does not introduce any new legal obligations. It does, however, serve to recognise and emphasise the importance of the principle of complementarity and engagement in initiatives to boost national capacity so as to ensure that States are able to apply international criminal law at the national level. In future, it is hoped that the resolution will translate into concrete initiatives that will serve to strengthen the Court's system of justice and help it work towards ending impunity for international crimes.

1.3. The ICC's Legal Tools

The Legal Tools Project was identified in the lead up to the Review Conference by the Focal Points for complementarity as an example of a project directed towards strengthening national jurisdictions and enabling them to address core international crimes.[56] Moreover, the importance of projects such as the ICC's Legal Tools Project were highlighted during

[54] *Ibid*., para. 4.

[55] *Ibid*., paras. 3 and 8.

[56] See the practical examples illustrating how several actors could assist States in enhancing national capacity with regard to the investigation and prosecution of serious international crimes, with a view to stimulating debate in Kampala, compiled by the Focal Points, *supra* note 30.

the general debate and the stocktaking exercise of the Review Conference.[57]

The ICC's Legal Tools offer a comprehensive online or electronic knowledge system and provide an expansive library of legal documents and range of research and reference tools. The Tools were developed with the aim of encouraging and facilitating the efficient and precise practice of criminal justice for core international crimes. Whilst the Tools were initially created and envisaged for use within the Court, realisation of their value as a means of increasing national capacity led to their development for use by a range of external actors. As the Project expanded, the further development of the Legal Tools was outsourced to a number of academic partners (the "Legal Tools Outsourcing Partners") with specific expertise in the field,[58] whose activities are overseen by practitioners and experts in the field, including the Legal Tools Advisory Committee of the ICC, with representation from the different Organs of the Court, as well as a Legal Tools Expert Advisory Group with some of the leading legal informatics experts serving as members.

The Legal Tools Project includes three main clusters of services, (i) the Legal Tools Database and Website,[59] (ii) digests on the law and evidence of international crimes and modes of liability, and (iii) the *Case Matrix* application for organising and structuring evidence in core international crimes cases.

The Legal Tools Database and Website provide a free, publicly accessible platform for the dissemination of legal information relating to the investigation, prosecution, defence, and adjudication of serious international crimes. The Database contains over 44,000 documents, which are fully searchable using a state of the art search engine, including decisions and indictments from all international and internationalised criminal tribunals, preparatory works of the ICC, jurisprudence and decisions from the ICC, treaties, information about national legal systems, and relevant decisions from national courts. The Legal Tools Database also contains a specific search engine that allows users to search specific aspects of national legislation implementing the Rome Statute.

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57 See *supra* note 50.

58 Legal Tools Project, see http://www.legal-tools.org/en/work-on-the-tools/.

59 Legal Tools Project, see http://www.legal-tools.org.

The Elements Digest provides raw data and notes on the elements of crimes as well as the modes of liability contained in the Rome Statute and Elements of Crimes document. The text is drawn from all sources of international law. Relevant sources will be hyperlinked in the Digest to allow users direct access to primary material. The Means of Proof Digest allows users to see the types or categories of evidence that have been used in national and international criminal jurisdictions to satisfy the elements of crimes and modes of liability contained in the Rome Statute. The two Digests can be accessed through the Case Matrix. They do not represent the views of the ICC, its Organs, or any participants in proceedings before the Court.

The Case Matrix is a law-driven case management and legal information application developed for the efficient and precise investigation, prosecution, defence, and adjudication of international crimes. The Case Matrix allows users to access documents selected from the Legal Tools Database (the "Legal texts" function) as well as access to the Elements and Means of Proof Digests. The application also serves as a database for the organisation of information and evidence relating to core international crimes, tailored to the specific crimes that have been committed and relevant modes of liability. It can also be adapted for use by different actors involved in the processing of core international crimes, such as human rights personnel, investigators, prosecutors, defence teams, victims' representatives, judges, and civil society.

1.4. The Legal Tools and Positive Complementarity

Access to legal information is the bread and butter of lawyers. Without adequate access to legal information, lawyers can not write proper legal motions, arguments and decisions. It is not enough to have talented and well-educated lawyers and investigators. Providing effective access to legal information on war crimes, crimes against humanity and genocide is therefore one of the first steps in all capacity building in criminal justice for such crimes. If the access is expensive, it can not be effective insofar as many potential users are excluded.

The Legal Tools seek to provide basic legal information with respect to core international crimes. The Tools are not a mere aspiration. Rather, they are in place, and they have been developed and are maintained in a sustainable manner. Additionally, the related *Case Matrix*

Network[60] provides capacity building activities that enhance positive complementarity in more than 20 countries, drawing, *inter alia*, on the technical platform of the Legal Tools. The *Network* seeks to reach all countries which have recently had or are currently engaging in core international crimes cases by mid-2012.[61]

The *Case Matrix Network* provides several layers of services including those presented in the following three sections.

1.4.1. Access to Legal Information Relating to Serious International Crimes

The Legal Tools provide free and easy access to legal information relevant to core international crimes. The wide range of resources contained in the Legal Tools Database, which can be easily accessed through the search or browse functions on the Legal Tools Website, is of potential value for any lawyer or institution operating in the field of international criminal law. Such resources may not be of existential value for legal actors who have access to a wealth of legal materials and expertise. Such actors constitute a small minority. The resources in countries that have suffered the commission of mass atrocities may be particularly limited. In the aftermath of international crimes, there may not be the budget to build up resources necessary to hold perpetrators to account for their crimes.

The availability of the Legal Tools serves to level the playing field in the investigation, prosecution, defence, and adjudication of core international crimes, allowing national judicial institutions to process international crimes involving their nationals or committed on their territory that may otherwise have lacked the means to do so. National institutions working on one or more core international crimes cases that do not have access to the Internet can access relevant information from the Legal Tools Database via the Case Matrix. In offering universal access to relevant information in the field of international criminal law, the Legal Tools can make a significant contribution to local empowerment, the importance of which was stressed throughout the stocktaking exercise in Kampala.

[60] Case Matrix Network, see http://www.casematrixnetwork.org.

[61] Case Matrix Network, see http://www.casematrixnetwork.org/users/.

The resources included in the Legal Tools Database and Website assist not only in the investigation, prosecution, defence and adjudication of core international crimes, but also in the drafting and amendment of implementing legislation. The specific search engine for national implementing legislation (NILD) allows States to compare approaches that have been taken in different jurisdictions and to model their legislation on that of States with similar characteristics, for example those sharing the same legal tradition. NILD also highlights the approaches that are likely to facilitate States in fulfilling their role under the ICC's complementarity regime and those that might be narrower than what is required, thus falling short of the Statute.

The resources found in the Legal Tools have value not only for the States that would normally exercise jurisdiction over crimes following territoriality or nationality. They can also be used by States wishing to investigate and prosecute serious international crimes through the exercise of universal jurisdiction. Furthermore, they can be used by States, international organisations, and civil society wishing to place political pressure on States to discharge their obligations under the Rome Statute. The Legal Tools can also be used by civil society working in the documentation of human rights violations that amount to core international crimes, and which may lead to the investigation and prosecution of international crimes.

In sum, the Legal Tools provide a complete library of materials relating to the practice of international criminal law. The materials provided by the Legal Tools are likely to have value for fully-functioning national judicial institutions. However, their significance is of particular importance within States that have access to fewer resources. Use of the information contained within the Legal Tools may allow States that would not have been able to engage in investigations and prosecutions to fulfil the role that has been attributed to them by the principle of complementarity under article 17 of the Rome Statute.

1.4.2. Facilitating Transfer of Legal Knowledge and Expertise

International criminal jurisdictions have not only produced a wealth of legal documents since the mid-1990s. They have also contributed to the development of detailed knowledge and expertise in international

criminal law. Making these resources available to national legal actors is essential.

The ICC's Legal Tools have been designed and developed by practitioners and experts with over 15 years of experience in the practice of criminal justice for atrocities. The Tools serve as a means of transferring this experience to national criminal justice institutions in a manner that is practical and user-friendly, respectful of local legal traditions and in accord with the logic of the law.

The Case Matrix application offers a low cost and instant means of increasing the capacity of national legal actors. It offers a comprehensive system that can be integrated within existing infrastructure and used by domestic personnel without the need for lengthy training or international oversight. Furthermore, following the installation of the Case Matrix, the application remains within the national judicial system, ensuring that the State in question will be ready to respond to possible future conduct that may form the basis of investigations and prosecutions. The fact that the Case Matrix can be incorporated into existing legal structures and operated by local personnel increases its value as a mechanism for local empowerment.

Once installed, national legal actors have ready access to the necessary resources and an effective methodology to conduct investigations, prosecutions, defence, and adjudication of international crimes. Users will have access to the Elements and Means of Proof Digests which incorporate knowledge and experience derived from theory and practice in a format that can be easily accessed and imparted into national judicial institutions. The Digests do not only provide valuable guidance for legal actors who are not familiar with the processing of international crimes; they can also encourage compliance with international standards and practices by providing a model for national jurisdictions.

The case management application contained within the Case Matrix provides a methodology for the oversight of serious international crimes cases. The application has been designed by practitioners with considerable experience in criminal justice for atrocities with the intention of increasing the efficiency and precision of the justice process. The application allows for the efficient organisation of evidence by reference to the elements of crimes and modes of liability being charged. In doing so, it facilitates effective case assessment by indicating which

charges are supported by sufficient evidence to allow for prosecution and potential conviction. It also allows for the development of more effective prosecutorial strategies and the focusing of time and resources on the weak points of strong cases. Furthermore, it reduces the potential for duplication of work by providing a platform for sharing and transferring information between teams and amongst different elements of the criminal justice system. The efficiency and precision of the criminal justice process, which is encouraged by the use of the Case Matrix, is particularly important for national institutions working on a limited budget, especially where there is a large backlog of serious crimes cases. The application can be customised to suit the needs of particular institutions. This allows national capacity to be constructed in a manner that is sensitive to cultural differences.

The ICC's Legal Tools amount to a technical platform that can be used as a means of transferring the expertise amassed at the international level and feeding it into national institutions, particularly those lacking resources and expertise in the field of international law. The provision of resources and a methodology for processing core international crimes cases may assist States in overcoming some of the challenges they face in such activities in a manner that is fast, cost-efficient, respectful of local traditions, and capable of being sustained in future years.

1.4.3. Provision of Legal Skills in the Field of Criminal Justice for Atrocities

Alongside the expansion and development of the ICC's Legal Tools, a network of experts and practitioners in the field of criminal justice for atrocities has been established to assist with installation of the Case Matrix and training in the use of the Legal Tools, in addition to a range of other capacity building services. The *Case Matrix Network* was created with the specific purpose of strengthening national ability to investigate, prosecute and adjudicate core international crimes, and to increase the cost-efficiency and quality of justice delivered by national institutions[62] by transferring skills linked to key work processes in criminal justice for atrocities. The *Case Matrix Network* offers two categories of services.[63] The first category of services relates to the installation and use of the

[62] Case Matrix Network, see http://www.casematrixnetwork.org/purpose/.

[63] Case Matrix Network, see http://www.casematrixnetwork.org/services/.

Case Matrix and the training and use of the Legal Tools Database. Some members of the *Network* assist the Co-ordinator of the Legal Tools Project with the implementation of such services. The second category draws on the combined expertise of a team of Network Advisers and the Director of the *Case Matrix Network* with regard to the investigation, prosecution, defence, and adjudication of core international crimes. The Network Advisers have amassed considerable expertise in the processing of serious international crimes as well as in the legislative and administrative aspects of the process.

The Network Advisers can provide a wide range of services upon a request by national criminal justice institutions. The range of services includes advice on the establishment and organisation of units for the investigation and prosecution of serious international crimes; advice on or organisation of work processes relating to the documentation, investigation, prosecution, adjudication, or defence of core international crimes cases; and advice on the drafting and review of legislation and other legal documents relating to serious international crimes. The services can be offered remotely or *in situ*, on an *ad hoc* basis or through secondment, and can be provided confidentially.

Through the provision of such services, the *Case Matrix Network* allows expertise developed in international criminal jurisdictions to be quickly and easily utilised by national legal actors. In doing so, it can contribute to national empowerment by ensuring that national institutions have the capacity to carry out their vital role in the fight against impunity.

1.4.4. Conclusion

The ICC's Legal Tools, together with the *Case Matrix Network*, provide an effective means of overcoming several of the problems faced by States in the pursuit of justice that were raised throughout the stocktaking exercise. The resources contained in the Legal Tools Database can be used to assist States in accessing legal information, including the drafting of legislation implementing the crimes under the jurisdiction of the Court into national law. Use of the Legal Tools can strengthen national institutions and increase their capacity to investigate and prosecute core international crimes. The resources available through the Case Matrix can facilitate the documentation, investigation, prosecution, defence, and adjudication of serious international crimes. The logic and methodology

provided by the Case Matrix allow knowledge and experience accumulated through the practice of international criminal jurisdictions to be transferred to national institutions in a fast and cost-effective manner that empowers and respects local traditions. The separate services offered by the *Case Matrix Network* provide a further source of assistance for legal actors engaged in the application of international criminal law.

To conclude, the ICC's Legal Tools and the *Case Matrix Network* offer an effective way of building the capacity of legal actors to investigate, prosecute, and adjudicate international crimes. In doing so, they contribute to strengthening the ICC's complementarity system in the manner envisaged by the stocktaking exercise at the ICC Review Conference. The debates in Kampala suggest a growing tendency to refer to this kind of assistance as "positive complementarity". Regardless of the terminology that was used during the Review Conference, the stocktaking exercise served to highlight the importance of projects such as the ICC's Legal Tools Project in contributing to the ICC's complementarity regime.

2

New Technologies in Criminal Justice for Core International Crimes: The ICC Legal Tools Project♣

Morten Bergsmo,[*] Olympia Bekou[**] and Annika Jones[***]

2.1. Introduction

The International Criminal Court's (hereinafter ICC or Court) Legal Tools are new technologies which facilitate the administration of criminal justice for atrocities by improving effectiveness and enhancing the capacity of criminal justice institutions to investigate, prosecute and adjudicate core international crimes. This piece will introduce the ICC's Legal Tools before drawing attention to two recent endorsements of the Tools. It will focus on the adoption of the logic underlying the Case Matrix, one of the Legal Tools, in several decisions of the Pre-Trial and Trial Chambers of the ICC, demonstrating the potential utility of the Legal Tools within the Court. It will go on to highlight the use of those Legal Tools beyond the ICC and the support of the Legal Tools Project at the Court's first Review Conference, held in Kampala in June 2010.

♣ This chapter was published in *Human Rights Law Review* 2010, vol. 10, no. 4, pp. 715–729. It is republished here with the kind permission of the publisher, with minor editorial changes. Parts of sections 2.2. and 2.4.2. in this chapter overlaps with chapter 1 above, but the sections are retained here in order to respect the integrity of the original publication.

[*] **Morten Bergsmo** is Senior Researcher at the University of Oslo, Faculty of Law, Visiting Fellow at Stanford University, Visiting Professor, Georgetown University and Co-ordinator of the ICC Legal Tools Project; he formerly served as Senior Legal Adviser and Chief of the Legal Advisory Section of the ICC Office of the Prosecutor.

[**] **Olympia Bekou** is Associate Professor in Law and Head of the International Criminal Justice Unit, Human Rights Law Centre ("HRLC"), University of Nottingham.

[***] **Annika Jones** is a Ph. D. Candidate at the University of Nottingham and Senior Research Fellow of the Legal Tools Outsourcing Partners' Network.

2.2. The Legal Tools and New Technology

The ICC's Legal Tools Project utilises the advantages of new technologies in order to tackle issues of access to legal material, and difficulties raised by the complexity of cases involving core international crimes. The ICC's Legal Tools offer a comprehensive online or electronic knowledge system and provide an expansive library of legal documents and a range of research and reference tools. The Tools were developed with the aim of encouraging and facilitating the efficient and precise practice of criminal justice for core international crimes. Whilst the Tools were initially created and envisaged for use within the Court,[1] realisation of their value as a means of increasing national capacity led to their development[2] for use by a range of external actors.

The Legal Tools Project includes three main clusters of services, (i) the Legal Tools Database and Website,[3] (ii) Digests on the law and evidence of international crimes and modes of liability and means of proof and (iii) the *Case Matrix* application for organising and structuring evidence in core international crimes cases.[4]

The Legal Tools Database and Website provide a free, publicly accessible platform for dissemination of legal information relating to the investigation, prosecution, defence and adjudication of serious

1 International Criminal Court, "Legal Tools History", available at http://www.legal-tools.org/en/what-are-the-icc-legal-tools/2003-2005/, last accessed on 1 September 2010.

2 As the project expanded, further development of the Legal Tools was outsourced to a number of academic partners (the "Legal Tools Outsourcing Partners") with specific expertise in the field, whose activities are overseen by practitioners and experts in the field, including the Legal Tools Advisory Committee of the ICC, with representation from the different Organs of the Court, as well as a Legal Tools Expert Advisory Group with some of the leading legal informatics experts serving as members. International Criminal Court, "Work on the Tools", available at: http://www.legal-tools.org/en/work-on-the-tools/, last accessed on 1 September 2010 and Legal Tools Outsourcing Partners' Network, "Purpose", available at http://www.ltop-network.org/, last accessed on 1 September 2010.

3 Available at: http://www.legal-tools.org, last accessed on 1 September 2010.

4 International Criminal Court, "What are the Legal Tools?", available at http://www.legal-tools.org/en/what-are-the-icc-legal-tools/, last accessed on 1 September 2010, and Case Matrix Network, "Knowledge-transfer, legal empowerment and capacity building", available at http://www.casematrixnetwork.org/purpose/, last accessed on 1 September 2010.

international crimes. The Database contains over 44,000 documents, including decisions and indictments from all international and internationalised criminal tribunals, preparatory works of the ICC, jurisprudence and decisions from the ICC, treaties, information about national legal systems and relevant decisions from national courts, which are fully searchable using a state-of-the-art search engine. The Legal Tools Database also contains a specific search engine which allows users to search specific aspects of national legislation implementing the Rome Statute.

The Elements Digest provides raw data and notes on the elements of crimes as well as the modes of liability contained in the Rome Statute and Elements of Crimes document.[5] The text is drawn from all sources of international law. Relevant sources will be hyperlinked in the Digest to allow users direct access to primary material. The Means of Proof Digest allows users to see the types or categories of evidence that have been used in national and international criminal jurisdictions to satisfy the elements of crimes and modes of liability contained in the Rome Statute.[6] The two Digests can be accessed through the Case Matrix.

The Case Matrix is a law-driven case management and legal information application developed for the efficient and precise investigation, prosecution, defence and adjudication of international crimes. The Case Matrix allows users to access documents selected from the Legal Tools Database (the "Legal texts" function), as well as to access to the Elements and Means of Proof Digests. The application also serves as a database for the organisation of information and evidence relating to core international crimes, tailored to the specific crimes that have been committed, and relevant modes of liability. In addition, it provides a methodology for the investigation and prosecution of international crimes, offering "a user's guide to proving international crimes and modes of liability and [providing] a database service to organise and present the potential evidence in a case".[7] The Case Matrix can be

5 The two digests currently spread over 8,000 pages.

6 They do not represent the views of the ICC, its Organs, or any participants in proceedings before the Court.

7 M. Bergsmo and P. Webb, "Innovations at the International Criminal Court: Bringing New Technologies into the Investigation and Prosecution of Core International Crimes", in Radtke, Rössner, Schiller and Form (eds.), *Historische Dimensionen von Kriegsverbrehcerprozessen nach dem Zweiten Weltkrieg*, Nomos, 2007, p. 208.

adapted for use by different actors involved in the processing of core international crimes, such as human rights personnel, investigators, prosecutors, defence teams, victims' representatives, judges and civil society.

2.3. Adoption of the Case Matrix Logic by the ICC

In several of its early decisions, both Pre-Trial and Trial Chambers of the ICC have ordered the parties to communicate evidence in the form of an in-depth analysis chart, similar in structure to the framework provided by the evidence management application of the Case Matrix. The requirements issued by the Chambers, and the justifications underlying their orders, can be seen as an endorsement of the Case Matrix logic within the ICC.

2.3.1. Orders by ICC Chambers

The Case Matrix logic was first adopted by Pre-Trial Chamber III in respect of the case of *Prosecutor v Jean-Pierre Bemba Gombo*. In its decision of 31 July 2008, the Chamber held that evidence submitted to the Registry for disclosure between the parties should be accompanied by, *inter alia*, "[a]n analysis of each piece of evidence reflecting its relevance as described in part III of this decision".[8] In part III of its decision, the Chamber outlined that "evidence exchanged between the parties and communicated to the Chamber must be the subject of a sufficiently detailed legal analysis relating the alleged facts with the constituent elements corresponding to each crime charged".[9] The Chamber went on to lay down detailed requirements for the manner in which the evidence should be presented:

> Each piece of evidence must be analysed – page by page or, where required, paragraph by paragraph – by relating each piece of information contained in that page or paragraph with one or more of the constituent elements or one or more of the crimes with which the person is charged, including the contextual elements of those crimes, as well as the

[8] ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-55, "Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties", 31 July 2008.

[9] *Ibid.*, at para. 66.

> constituent elements of the mode of participation in the offence with which the person is charged. [...][10]

The Chamber did not mention the evidence management functionality provided by the Case Matrix. However, its requirements adopt the Case Matrix logic. The evidence management feature of the Case Matrix breaks each crime down into its constituent elements, including the contextual elements of the crime and the modes of participation. It provides a structure in which evidence, potential evidence or information can be uploaded against each element of the crime or mode of liability in accordance with the Chamber's request.

Following the failure of the Prosecution and the Defence to comply with the requirements laid out in its decision of 31 July 2008, Pre-Trial Chamber III issued two further decisions ordering the respective parties to re-submit evidence in the required format.[11]

The logic of the Case Matrix was subsequently endorsed by Trial Chamber II of the ICC in the case of *Prosecutor v. Germain Kantanga and Mathieu Ngudjolo Chui*. On 13 March 2009,[12] the Trial Chamber issued a decision recalling its request to the Prosecution, during the first public status conference, to submit an "an ordered and systematic presentation of [its] evidence".[13] It also recalled its decision of 10 December 2008, directing the Prosecution to "submit a proposal for a table linking the charges confirmed by Pre-Trial Chamber I and the modes of responsibility with the alleged facts as well as the evidence on which it intends to rely at trial".[14]

The Chamber rejected a table that had been proposed by the Prosecution on the basis that it "would not enable the parties or the

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10 *Ibid.*, at para. 69.

11 ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-232, "Decision on the Submission of an Updated, Consolidated Version of the In-depth Analysis Chart of Incriminatory Evidence", 10 November 2008; ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-311, "Decision on the Disclosure of Evidence by the Defence", 5 December 2008.

12 ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-956, "Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol", 13 March 2009.

13 ICC-01/04-01/07-T-52-ENG ET WT 27-11-2008, p. 58, lines 9–10.

14 "Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol", see *supra* note 12, at para. 1.

Chamber to have an ordered, systematic and sufficiently detailed overview of the incriminating evidence".[15] In particular, the Chamber raised concerns that the table "[did] not show clear and particularized links between the charges, the elements of the crime, the alleged facts, and the relevant parts of the item of evidence" and "[did] not allow the evidence to be sorted out on the basis of its relevance to a particular factual statement".[16] The Chamber ordered the Prosecution to submit an "analytical table [...] based on the charges confirmed and follow[ing] the structure of the *Elements of crimes*".[17] Again, although the Trial Chamber did not refer to the Case Matrix explicitly, it laid down requirements which would be met by the submission of evidence in the format provided by the evidence management functionality.

The approach of Trial Chamber II was subsequently followed by Trial Chamber III in the case of *Prosecutor v. Jean-Pierre Bemba Gombo*.[18] Having referred extensively to the decision of Trial Chamber II of 13 March 2009,[19] Trial Chamber III ordered the prosecution to file an updated in-depth analysis chart in accordance with the same requirements.

2.3.2. Justification for the Adoption of the Case Matrix Logic

The approach of the Chambers to the submission of evidence in the decisions outlined above was supported by the dual rationale of increasing the efficiency and precision of the international criminal process, and ensuring respect for the rights of the accused.

2.3.2.1. Expediency of the Criminal Process

In its decision of 31 July 2008, Pre-Trial Chamber III stated the purpose of its request to be "to streamline the disclosure of evidence, to ensure that the defence be prepared under satisfactory conditions, to expedite

[15] *Ibid.*, at para. 9.

[16] *Ibid*.

[17] *Ibid.*, at para. 11.

[18] ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-682, 29 January 2010.

[19] *Ibid*., at paras. 21–25.

proceedings and to prepare properly for the confirmation hearing".[20] The approach of the Chamber was grounded in its conception of the role of Pre-Trial Chambers at the ICC: to act as a filtering system, preventing cases which fail to meet the threshold of article 61(7) of the Statute from proceeding to the trial stage,[21] and as a stage in the preparation for trial.[22] It considered the methodology adopted to allow this process to be conducted more efficiently,[23] ensuring that only relevant material would be introduced to the Chamber at the outset of the trial process.[24]

Trial Chamber II also justified its approach on the grounds of expediency.[25] The Chamber recognised the additional administrative burden that the methodology would impose on the prosecution.[26] However, at the same time it considered that "the supplementary investment of time and resources, required by the Prosecution for preparing the Table of Incriminating Evidence, will facilitate the subsequent work of the accused and the Chamber and thereby expedite the proceedings as a whole".[27] The approach of the Chamber was to consider the efficiency of the trial process as a whole, rather than the workload of individual organs of the Court at various stages of the trial process.

2.3.2.2. Protecting the Rights of the Accused

In addition to the emphasis on efficiency, Pre-Trial Chamber III acknowledged the value of a precise and structured approach to the handling of evidence for the rights of the accused. It acknowledged that "disclosure of a considerable volume of evidence for which it is difficult or impossible to comprehend the usefulness for the case merely puts the defence in a position where it cannot genuinely exercise its rights, and

[20] "Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties", see *supra* note 8, at para 72.

[21] *Ibid*., at para. 11.

[22] *Ibid*., at para. 25.

[23] *Ibid*., at para. 72.

[24] *Ibid*., at para. 64.

[25] "Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol", see *supra* note 12.

[26] *Ibid*., at para. 15.

[27] *Ibid.*

serves to hold back proceedings".[28] The Chamber considered that these issues could be remedied by handling evidence in a systematic and organised fashion, presenting it in the format it proposed.

In a similar manner, the Trial Chamber recognised the concerns of the defence regarding the amount of evidence in the case and its entitlement to be informed of the precise evidentiary basis of the Prosecution's case. The Trial Chamber also emphasised that the methodology would "ensure that the accused have adequate time and facilities for the preparation of their defence, to which they are entitled under article 67(1)(b) of the Statute, by providing them with a clear and comprehensive overview of all incriminating evidence and how each item of evidence relates to the charges against them".[29] The Chamber considered the approach that it had ordered with regard to the submission of evidence to "ensure that there is no ambiguity whatsoever in the alleged fact underpinning the charges confirmed by the Pre-Trial Chamber" and to provide for "a fair an effective presentation of the evidence on which the Prosecution intends to rely on at trial".[30] Similarly, Trial Chamber III justified the adoption of a similar approach on the grounds that it would provide for the "fair and effective presentation of the evidence which the prosecution intends to rely on at trial".[31]

2.3.3. Relevance of the ICC's Endorsement for Other Fora

The justifications supporting the adoption of the Case Matrix as a means of organising and communicating evidence are not ICC-specific. Fairness and expediency are issues pertinent not only to the ICC but also to other criminal justice systems which could benefit from the use of the technology provided by the Case Matrix. The need for expediency is particularly pertinent at the national level due to the role that national institutions are envisaged to play under the ICC's regime and the sheer number of cases that might arise for adjudication. National criminal justice systems are normally exposed to work pressures, expectations and

[28] "Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties", see *supra* note 8 at para 66.

[29] "Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol", see *supra* note 12 at para 6.

[30] *Ibid.*, at para. 5.

[31] *Prosecutor v. Jean-Pierre Bemba Gombo*, see *supra* note 18, at para. 21.

control mechanisms which when combined far exceed those of international criminal jurisdictions.

It is significant to note that the decisions referred to above relate to one of several means of using the Case Matrix. The decisions concern the use of a case analysis chart to facilitate the communication of evidence to the Chambers of the ICC and for disclosure between parties. The Case Matrix has a number of different uses beyond this. The evidence management function provided by the Case Matrix can be used not only to communicate material, but also within different parts of the criminal justice system to organise and oversee the documentation, investigation, prosecution, defence and adjudication of international crimes. Consequently, whilst the technology offered by the Legal Tools can assist in the communication and dissemination of evidence in the manner contemplated by the Chambers of the ICC, it also has much wider utility within the judicial process.

The next part will consider how the technology provided by the Legal Tools could be used beyond the ICC in a range of different institutions which form part of the wider system of criminal justice for international crimes surrounding the ICC.

2.4. Building Capacity Outside the ICC

2.4.1. The ICC's Complementarity Regime and the Importance of National Justice

The intention to confirm the place of states at the forefront in the fight against impunity is clear already from the Preamble to the Rome Statute, which affirms that the "effective prosecution [of the most serious crimes of concern to the international community] must be ensured by taking measures at the national level", recalling that "it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes". The essential role of national criminal justice institutions is elaborated further in articles 1 and 17 of the Rome Statute. Article 1 affirms that the ICC "shall be complementary to national criminal jurisdictions", emphasising the primary role granted to states under the ICC's institutional framework. Article 17 establishes the relationship between the ICC and national criminal justice institutions. It restricts the jurisdiction of the ICC in situations where states are willing

and able genuinely to investigate and prosecute,[32] thereby giving states priority over the investigation of international crimes and providing the ICC with the role of a "safety net"[33] or "court of last resort"[34] where national institutions fail to act.

The lack of capacity of States to fulfil their role under international law as reflected in the ICC's complementarity regime has led to the development of the notion of "positive complementarity". The term "positive complementarity"[35] was originally introduced by the Office of the Prosecutor in its 2006 Policy Paper[36] in order to describe the role the Court could play in the construction of national capacity.[37] However, the term has subsequently been used more widely to refer to the assistance that States and civil society can give in building capacity at the national level. During the first Review Conference of the ICC, held in Kampala in May-June 2010, efforts were made to identify ways in which a range of actors could contribute to the construction of national capacity in order to strengthen the ICC's regime.[38] The ICC's Legal Tools project was highlighted as one means of building national capacity.[39]

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[32] Rome Statute of the International Criminal Court, adopted 17 July 1998, entered into force 1 July 2002, UN Doc. A/CONF. 183/9, articles 1 and 17.

[33] M.C. Bassiouni, "Where is the ICC Heading?", in *Journal of International Criminal Justice*, 2006, vol. 4, p. 421, at p. 422.

[34] J.I. Turner, "Nationalizing International Criminal Law", in *Stanford Journal of International Law*, 2005, vol. 41, p. 1 at p. 3.

[35] For the general discussion on positive complementarity approach see: W.W. Burke-White, "Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice", in *Harvard International Law Journal*, 2008, vol. 49, p. 53; W.W. Burke-White, "Implementing a Policy of Positive Complementarity in the Rome System of Justice", in *Criminal Law Forum*, 2008, vol. 19, p. 59.

[36] ICC Office of the Prosecutor, *Report on Prosecutorial Strategy*, September 2006.

[37] *Ibid.*, at p. 5.

[38] M. Bergsmo, O. Bekou, A. Jones, "Complementarity after Kampala: Capacity Building and the ICC's Legal Tools", in *Goettingen Journal of International Law*, 2010, vol. 2, no. 2, p. 791–811. The article is republished as chapter 1 in the present volume, with minor editorial changes.

[39] Reference was made to the ICC Legal Tools Project as a means of contributing to national jurisdictions by the delegations of Norway and the Netherlands during the plenary session on complementarity during the stocktaking exercise. Moreover, the Legal Tools had been included in "Focal points' compilation of examples of projects

2.4.2. The Legal Tools and Positive Complementarity

2.4.2.1. Access to Legal Information Relating to Serious International Crimes

The ability to access legal information is the bread and butter of lawyers. Without adequate access to legal information, lawyers cannot write proper legal motions, arguments and decisions. It is not enough to have talented and well-educated lawyers and investigators. Providing effective access to legal information on war crimes, crimes against humanity and genocide is therefore one of the first steps in building capacity in criminal justice for such crimes. If access to legal information is expensive, it cannot be effective insofar as many potential users are excluded.

The Legal Tools provide free and easy access to legal information relevant to core international crimes. The wide range of resources contained in the Legal Tools Database, which can be easily accessed through the search or browse functions on the Legal Tools Website, is of potential value for any lawyer or institution operating in the field of international criminal law. Such resources may not be of existential value for legal actors who have access to a wealth of legal materials and expertise. Such actors, however, constitute a small minority. The resources available in countries that have suffered the commission of mass atrocities may be particularly limited. In the aftermath of international crimes, there may not be the budget to build up the necessary resources to hold perpetrators to account for their crimes.

The availability of the Legal Tools serves to level the playing field in the documentation, investigation, prosecution, defence and adjudication of core international crimes, allowing national judicial institutions to process international crimes involving their nationals or committed on their territory that may otherwise have lacked the means to do so. National institutions working on one or more core international crimes cases which do not have access to the Internet can find and use relevant information from the Legal Tools Database via the Case Matrix. By offering universal access to relevant information in the field of international criminal law, the Legal Tools can make a significant contribution to

aimed at strengthening domestic jurisdictions to deal with Rome Statute Crimes", 30 May 2010, RC/ST/CM/INF.2.

local empowerment, the importance of which was stressed throughout the stocktaking exercise in Kampala.

The resources included in the Legal Tools Database and Website assist not only in the documentation, investigation, prosecution, defence and adjudication of core international crimes, but also in the drafting and amendment of implementing legislation. The specific search engine for national implementing legislation (NILD) allows states to compare approaches that have been taken in different jurisdictions and to model their legislation on that of states with similar characteristics, for example those sharing the same legal tradition. NILD also highlights the approaches which are likely to facilitate states in fulfilling their role under the ICC's complementarity regime and those which might be narrower than what is required, thus falling short of the Statute.

Moreover, the resources found in the Legal Tools have value not only for the states that would normally exercise jurisdiction over crimes following territoriality or nationality.[40] They can also be used by states wishing to investigate and prosecute serious international crimes through the exercise of universal jurisdiction. Furthermore, they can be used by states, international organisations and civil society actors wishing to place political pressure on states to discharge their obligations under the Rome Statute. The Legal Tools can also be used by civil society actors working on the documentation of human rights violations amounting to core international crimes and which may lead to the investigation and prosecution of international crimes.[41]

In sum, the Legal Tools provide a complete library of materials relating to the practice of international criminal law. The materials provided by the Legal Tools are likely to have value for fully-functioning national judicial institutions. However, their significance is of particular importance within states that have fewer resources. Use of the

[40] In accordance with article 12 of the Rome Statute.

[41] The Tools are not a mere aspiration. Rather, they are fully realised, and they have been developed and are maintained in a sustainable manner. Additionally, the related Case Matrix Network (see http://www.casematrixnetwork.org) provides capacity building activities which enhance positive complementarity in more than 20 countries by mid-2010, drawing, *inter alia*, on the technical platform of the Legal Tools. The Network seeks to reach all countries which have recently had or are currently engaging in core international crimes cases by mid-2012, see http://www.casematrixnetwork.org/users.

information contained within the Legal Tools may allow states that would not have been able to engage in investigations and prosecutions to fulfil their role as reflected by the principle of complementarity set out in article 17 of the Rome Statute.

2.4.2.2. Facilitating Transfer of Legal Knowledge and Expertise

International criminal jurisdictions have not only produced a wealth of legal documents since the mid-1990s; they have also contributed to the development of detailed knowledge and expertise in international criminal law. Making these resources available to national legal actors is essential for these actors, their institutions, and for donors of international criminal justice causes.

The Case Matrix application offers a low cost and instant means of increasing the capacity of national legal actors. It offers a comprehensive system which can be integrated within existing infrastructure and used by domestic personnel without need for lengthy training or international oversight. Furthermore, following the installation of the Case Matrix, the application remains within the national judicial system, ensuring that the State in question will be ready to respond to possible future conduct that may form the basis of investigations and prosecutions. The fact that the Case Matrix can be incorporated into existing legal structures and operated by local personnel increases its value as a mechanism for local empowerment.

Once the Case Matrix application is installed, national legal actors have ready access to the necessary resources and an effective methodology to conduct investigations, prosecutions, defence and adjudication of international crimes. Users will have access to the Elements and Means of Proof Digests which incorporate knowledge and experience derived from theory and practice in a format that can be easily accessed and imparted into national judicial institutions. The Digests not only provide valuable guidance for legal actors who are not familiar with the processing of international crimes; they can also encourage compliance with international standards and practices by providing a model for national jurisdictions.

The evidence management function contained within the Case Matrix provides a methodology for the oversight of serious international crimes cases. The feature has been designed by practitioners with

considerable experience in criminal justice for atrocities with the intention of increasing the efficiency and precision of the justice process. The feature allows for the efficient organisation of evidence by reference to the elements of crimes and modes of liability being charged. In doing so, it contributes to more effective case assessment by indicating which charges are supported by sufficient evidence to allow for prosecution and potential conviction – and which do not. It also supports the development of better prosecutorial strategies and the focusing of time and resources on the weak points of strong cases. Furthermore, it reduces the potential for duplication of work by providing a platform for sharing and transferring information between teams and amongst different elements of the criminal justice system.[42] The efficiency and precision of the criminal justice process, which is encouraged by the use of the Case Matrix, is particularly important for national institutions working on a limited budget, especially where there is a large backlog of serious crimes cases. The application can be customised to suit the needs of particular institutions. This allows national capacity to be constructed in a manner which is sensitive to cultural differences.

2.5. Implications of the Use of the ICC's Legal Tools in the Practice of Criminal Justice for Core International Crimes: Some Concluding Remarks

Two positive implications of the use of the Case Matrix logic have been highlighted by the ICC. The ICC has endorsed the use of a structured analysis framework similar to that created by the evidence management function of the Case Matrix on the basis that it is conducive to the fairness and efficiency of proceedings at the Court. The same justifications could be put forward for use of the Case Matrix at the national level.

The resources incorporated into the Legal Tools may not only serve to increase efficiency and fairness at the national level; they may also allow national institutions to document, investigate, prosecute and adjudicate international crimes which they would otherwise have lacked the capacity to do. In this sense, the Legal Tools contribute to the democratisation of criminal justice and local empowerment for the pursuit of

[42] H.-P. Kaul, "Construction Site for More Justice: The International Criminal Court after Two Years", in *American Journal of International Law*, 2005, vol. 99, no. 2, p. 370, at p. 373.

justice by reducing the need for international tribunals such as the ICC to exercise jurisdiction on the basis that national institutions are unable to do so. Justice may be more effectively sought at the national level because of the problems faced by international institutions in gaining access to witnesses, evidence and perpetrators.[43] Proceedings at the national level are also more likely to hold significance for the local community due to both proximity and communication through national personnel.[44] The pursuit of justice at the national level is also essential due to the limited capacity of the ICC, which is caused by its open-ended jurisdiction. To date, the ICC has managed to open nine cases, with an annual budget of €103,623,300.[45] If the ICC is to achieve its stated goal of ending impunity for international crimes, national institutions will have to play the leading role in the investigation and prosecution of crimes under the Court's jurisdiction. The Legal Tools provide a fast and cost-effective means of increasing national capacity, on the existing legal and administrative terms of the national actors. Furthermore, since the technology will remain within the national system to be used by national personnel, the Legal Tools provide a long-term solution to incapacity which is not dependent on external resources or on the employment of international personnel. In doing so, this technology encourages empowerment of national systems of justice as well as long-term support of the criminal justice process.

The Legal Tools also provide a means of stimulating cross-referencing and cross-fertilisation in the field of international criminal law.[46] Access to a wide range of sources of law, available in the Legal Tools Database as well as in the Elements and Means of Proof Digests, allows legislators, judges and counsel to consider approaches taken in

[43] Bassiouni, see *supra* note 33 at p. 423.

[44] Justice mechanisms located within post-conflict societies have been considered "better able to demonstrate the importance of accountability and fair justice to local populations", see J. Stromseth, "Pursuing Accountability for Atrocities After Conflict: What Impact on Binding the Rule of Law", in *Georgetown Journal of International Law*, 2007, vol. 38, p. 251, at p. 260.

[45] Figure taken from the programme budget for 2010, Resolution ICC-ASP/8/Res.7, adopted at the 8th plenary meeting, on 26 November 2009.

[46] For discussion on judicial cross-fertilisation see generally L.R. Helfer and A.-M. Slaughter, "Toward a Theory of Effective Supranational Adjudication", in *Yale Law Journal*, 1997, vol. 107, p. 273; W.W. Burke-White, "International Legal Pluralism", in *Michigan Journal of International Law*, 2005, vol. 25, p. 963.

other domestic or international systems. Sources of law from other jurisdictions may also provide a point of reference for NGOs advocating for rules to be drafted, interpreted or amended in a particular way. Whilst differences in context may prevent approaches adopted in one legal system from being incorporated into others, the practice of cross-referencing can encourage discussion, add a wider range of considerations into the legislative or adjudicative process, and lead to higher quality, better-reasoned decisions. Furthermore, discussions between legal systems may lead to the emergence of internationally recognised standards of evidence or clearer definitions of crimes. Coherence and consistency have been thought to contribute to the strength and legitimacy of international law.[47] In the field of criminal justice for atrocities, coherence is of utmost importance because it helps to deter the commission of international crimes, and assists in restoration from the effects of such crimes. If the law is seen as *ad hoc* and unstable, it is less likely to have the deterrent[48] and restorative[49] effects that a strong, consistent body of rules might have.

Whilst there are compelling reasons for the use of new technologies such as the Legal Tools in the application of international criminal law, certain negative implications must be considered. The first is the impact on established work processes. The use of a structured framework to organise and communicate evidence to Chambers or disclose evidence to other parties involved in the proceedings may have implications on the way the parties work. The Office of the Prosecutor of the ICC has raised this issue in respect of the use of the case analysis chart for the

[47] See generally P. Rao, "Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or its Fragmentation?" in *Michigan Journal of International Law*, 2004, vol. 25, p. 929.

[48] The ICC is thought to have a "specific preventative effect on individual (potential) perpetrators". See G. Werle, *Principles of International Criminal Law*, T.M.C. Asser Press, The Hague, 2009, at p. 35.

[49] S. Bibas and W.W. Burke-White "International Idealism Meets Domestic-Criminal-Procedure Realism", in *Duke Law Journal*, 2010, vol. 59. See also E. Haslam, "Victims Participation at the International Criminal Court: A Triumph of Hope over Experience", in McGoldrik *et al*. (eds.), *The Permanent International Criminal Court: Legal and Policy Issues*, Hart, 2004; Alverez, "Rush to Closure: Lessons of the Tadić Judgment", in *Michigan Law Review*, 1998, vol. 96, at p. 2033.

communication of evidence to the Registrar at the ICC,[50] highlighting the implications of the use of the case analysis chart both in terms of time and resources and impact on the balance of duties, roles, responsibilities, prerogatives and burdens to the parties under the Rome Statute.[51] It is important to note that the objections of the Prosecution were not directed towards the use of a case analysis chart to organise its own internal work, but at the obligations imposed by the Chamber to communicate and disclose the evidence to the Chamber and to the Defence. It is understandable that prosecution services may not wish to add to their burden of work, which frequently exceeds available resources, even in those agencies where the work is organised well. It is particularly challenging to change the organisation and method of presentation of evidence in an ongoing case preparation process. If, however, a mature design for the organization and presentation is implemented from the start of an investigation, there may be considerable resource gains. This fact simply underlines the importance of investigation plans and the overall methodology for preparation of core international crimes cases. Moreover, the technology provided by the Legal Tools can be used in a variety of ways, depending on the needs of the particular institution. It does not impose strict work processes, but can be used to support those thought desirable and appropriate within different jurisdictions.

It is also important to consider the Legal Tools in terms of their content. Restrictions on the content of the Legal Tools would affect the range of information available to users. This could be problematic for an actor who relies on the Legal Tools to find evidence of international custom or general principles. There will inevitably be an operational delay in incorporating new documents into the Legal Tools Database. Documents must be provided by institutions, which must then be registered, approved and entered into the system. Obstacles may be

[50] ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-63, "Prosecution's Application for leave to Appeal Pre-Trial Chamber III's 31 July 2008 "Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties"", 6 August 2008; ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/05-01/08-982, 23 March 2009.

[51] "Prosecution's Application for leave to Appeal Pre-Trial Chamber III's 31 July 2008 "Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties"", see *supra* note 50, at paras. 26–28; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, see *supra* note 50, at paras. 32–3 and 36–7.

encountered in accessing certain materials, particularly from national jurisdictions. States contribute to the Legal Tools at their discretion and failure to communicate legislation or decisions can have an impact on the body of materials that are available in the Legal Tools Database. Whilst there are such inevitable operational limitations on materials in the Legal Tools, those provided exceed what would otherwise have been available to users. By mid-2010, the Legal Tools Database had provided access to over 44,000 documents from both international and domestic institutions.[52] Actors in even the most well-developed legal systems would struggle to gain access to such a vast range of material; this would have been almost impossible for actors in those systems which lack any sources of information on international criminal law whatsoever. Consequently, whilst efforts must be made to enhance the completeness and universality of the contents of the Legal Tools, their use is likely to contribute to the dissemination and exchange of information and materials in the field of international criminal law. It is important that states, civil society and individuals contribute documents to the Legal Tools so that the system becomes as complete as possible.

The use of new technologies in the field of justice for atrocities is as recent as the field itself. Whilst new technologies have been used by internationalised institutions, there is scope for expansion in their use, both within and outside the ICC. But this is a process that takes – and should take – time. By focussing on the ICC's Legal Tools, this piece has sought to explore the ways in which new technologies can support both national and international legal actors in documenting, investigating, prosecuting and adjudicating core international crimes. It has concluded that the ICC's Legal Tools provide both an effective means of building capacity but also invaluable assistance in strengthening existing resources and improving efficiency, whilst maintaining high standards of justice and respecting the rights of the accused. Whereas the impact such new technologies may have in shaping the future of criminal justice for atrocities is acknowledged, it has been argued that the distinct advantages offered by their use, are to be cherished.

[52] International Criminal Court, see *supra* note 3.

3

Preserving the Overview of Law and Facts: The Case Matrix♣

Morten Bergsmo,* Olympia Bekou and Annika Jones*****

Since the establishment of the *ad hoc* International Criminal Tribunals for the Former Yugoslavia and Rwanda,[1] other internationalised criminal jurisdictions,[2] and the International Criminal Court,[3] the investigation, prosecution and adjudication of core international crimes[4] is increasing at the international and national levels. Both international and national institutions and mechanisms currently apply the law on core international crimes in respect of a wide range of atrocities committed throughout the world.

♣ This chapter was published in Alette Smeulers (ed.), *Collective Violence and International Criminal Justice*, Intersentia, 2010, pp. 413–435. It is republished here with the kind permission of the publisher, with minor editorial changes. Parts of section 3.4. in this chapter overlaps with section 2.3. in chapter 2 above, but the text is retained here in order to respect the integrity of the original publication.

* **Morten Bergsmo** is Senior Researcher at the University of Oslo, Faculty of Law, Visiting Fellow at Stanford University, Visiting Professor, Georgetown University and Co-ordinator of the ICC Legal Tools Project; he formerly served as Senior Legal Adviser and Chief of the Legal Advisory Section of the ICC Office of the Prosecutor.

** **Olympia Bekou** is Associate Professor in Law and Head of the International Criminal Justice Unit, Human Rights Law Centre ("HRLC"), University of Nottingham.

*** **Annika Jones** is a Ph. D. Candidate at the University of Nottingham and Senior Research Fellow of the Legal Tools Outsourcing Partners' Network.

1 S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., article 8, U.N. doc. S/Res/827, 1993, and S.C. Res. 955, Annex, U.N. SCOR, 49th Sess., 3453d mtg., article 7, U.N. Doc. S/Res/955, 1994.

2 Including the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, the East Timor Tribunal, the Special Tribunal for Lebanon, and the Iraqi High Tribunal.

3 Rome Statute of the International Criminal Court, 1998, U.N. Doc. A/CONF.183/9 (hereinafter Rome Statute).

4 For the purposes of this paper, the term 'core international crimes' means war crimes, crimes against humanity, and genocide, or the equivalent.

The investigation, prosecution, and adjudication of core international crimes require the interpretation and application of specific legal provisions to factually rich and complex cases. Inability to properly comprehend the specialized legal requirements can impair the quality of justice rendered by criminal justice institutions, and failure to develop a precise and structured approach to the application of law to fact can have a negative impact on the efficiency and precision of the criminal justice for atrocities process. In turn, this can jeopardize the fight against impunity and the right of the accused to a fair trial. Conscious of these realities, the ICC has engaged in the development of a set of Legal Tools intended to serve as a free and public platform for the transfer of legal information and knowledge to those who work on one or more core international crimes cases, by that contributing to the quality of their work and their capacity building.[5] The ICC's Legal Tools seek to provide a comprehensive online or electronic legal information platform, comprising an expansive library of legal documents and series of research and reference tools. The Case Matrix, one of the Legal Tools, brings together several other elements of the Legal Tools to offer users the requisite resources and a precise methodology to document, investigate, prosecute, defend, and adjudicate core international crimes cases.

This chapter gives a tentative overview of some aspects of the Case Matrix as a dynamic tool with multiple services for actors in criminal justice for atrocities. At the time of writing,[6] the five main functions of the Case Matrix were: (1) a database structure for the organization of cases by country/situation, suspect, incident, and legal classification; (2) a "Legal texts" collection of the key documents in the ICC Legal Tools Database[7]; (3) an "Elements Digest" that provides structured access to subject-matter law in internationalised criminal jurisprudence (approximately 700 pages); (4) a "Means of Proof Digest" that provides structured access to discussions in internationalised criminal jurisprudence on types or categories of fact that may be resorted to in order to prove legal requirements of core international crimes and modes of liability

5 The Legal Tools are available through the International Criminal Court's website, see http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/, last accessed on 12 November 2011.

6 That is, at the start of 2010.

7 For the Legal Tools Database, see http://www.legal-tools.org, last accessed on 12 November 2011.

(approximately 6,400 pages); and (5) an evidence database structure for the correlation of law and facts and the rational organization of facts and evidence. Illustration 1 to this chapter shows the additional Case Matrix functions that are under development, including databases for victims' participation and reparations, grounds for exclusion of criminal responsibility, sentencing, organization of open case files, and overall evidence management. This chapter only deals with existing function (5), the evidence database structure for cases, suspects, incidents and crimes.

The chapter discusses how the Case Matrix contributes to alleviating some of the challenges in the melding of fact and law in core international crimes cases. It begins by highlighting some legal specificities of core international crimes cases and the importance of a proper understanding of the legal requirements of a case and an informed, efficient, and precise approach to the application of the law to the facts. The Case Matrix will then be introduced and considered as a means of offering such an approach to the oversight and relation of law and facts in core international crimes cases. The chapter goes on to discuss the endorsement of the logic of the evidence database function of the Case Matrix in ICC jurisprudence. It concludes by suggesting that the Case Matrix can help to overcome some hurdles associated with the application of core international crimes, thereby increasing the efficiency and precision of the process and safeguarding the right of the accused to a fair trial.

3.1. Some Difficulties Faced in Relating Law to Facts in Core International Crimes Cases

The practice of criminal justice for core international crimes requires knowledge of the specific legal requirements of international crimes and modes of liability. The sheer volume of facts in core international crimes cases represents by far the main challenge in criminal justice for atrocities. Losing the overview of the facts and evidence in these cases is commonplace. That makes the application of the law to the facts – the "subsumption" as it is often referred to in Civil Law countries – more difficult. It is a further challenge to preserve the factual and evidentiary overview through the various stages of the criminal justice process. Case facts are in reality one coherent knowledge-base, but it is frequently fragmented as different actors work on the case from one stage to another. That easily leads to duplication of effort and increased costs.

3.1.1. Understanding the Legal Requirements for the Prosecution of Core International Crimes

The crimes of genocide, crimes against humanity, war crimes, and aggression have been recognised by the states drafting the Statute of the International Criminal Court as the "most serious crimes of concern to the international community as a whole",[8] and form the substantive jurisdiction of the ICC.[9] In order to fulfil their role under the ICC's complementarity regime and avoid exercise of the Court's jurisdiction, these crimes must also be interpreted and applied by national institutions.[10] The crimes in the ICC Statute have been broken down into their constituent elements in the Elements of Crimes document, adopted by States Parties with a view to assisting the Court in the interpretation and application of the offences under its jurisdiction.[11]

The crime of genocide, crimes against humanity, and war crimes each have numerous constituent elements or legal requirements. For example, for the crime of genocide, the Elements of Crime document prescribes that (i) the perpetrator committed one of the genocidal acts listed under article 6 of the Rome Statute; (ii) the victim(s) of the act belonged to a particular national, ethnical, racial or religious group; (iii) the perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such; and (iv) the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.[12] Evidence must be presented in relation to each element in order to convict any accused person of the offence. Unlike ordinary crimes found under domestic criminal law, core international crimes require proof of certain

[8] Rome Statute, article 5.

[9] The ICC will only be able to exercise jurisdiction over the crime of aggression following the adoption of a provision, in accordance with articles 121 and 123, defining the crime and setting out the conditions under which the Court shall exercise jurisdiction. Rome Statute, article 5(2).

[10] Rome Statute, article 17.

[11] Rome Statute, article 9.

[12] In order to convict an individual of genocide by imposing measures intended to prevent births under article 6(d) of the Rome Statute, it must also be shown that the measures imposed were intended to prevent births within that group.

contextual or circumstantial elements.[13] For example, war crimes must be shown to have been committed during a situation of armed conflict,[14] crimes against humanity must be shown to have been committed as part of a "widespread and systematic attack",[15] and genocide, as already mentioned, must be committed "in the context of a manifest pattern of similar conduct".[16] The need to satisfy these additional, socio-political elements adds a distinct level of complexity to the practice of international criminal law, when compared with ordinary domestic crimes. In order to convict an individual of an international crime, it goes without saying that it is necessary to have evidence sufficient to satisfy each constituent element of the crime, including the common contextual or circumstantial elements that must have been in place at the time that the offence was committed.

Furthermore, the prosecution of core international crimes requires the presentation of evidence capable of satisfying the legal requirements of one or more of the modes of liability found in the rules of international criminal law.[17] The crimes are defined in the Statute and the Elements of Crime document with the perpetrator in mind. But perpetration is only one of several ways or forms of participating in the realisation of the crime. Other forms or modes of liability include ordering, command responsibility, planning, and complicity. They are defined in articles 25 and 28 of the ICC Statute, but there is no "Elements of Mode of Liability document" detailing the legal requirements of each mode of liability. The specialised modes of liability in international criminal law reflect the context of conflict or widespread atrocities in which core international crimes are committed and the range of different ways in which individuals might have played a part in their commission. The modes of liability by which core international crimes can be perpetrated constitute a dynamic area of international criminal law over which some lack of

[13] M. Bergsmo and P. Webb, "Innovations at the International Criminal Court: bringing new technologies into the investigation and prosecution of core international crimes", in H. Radtke, D. Rössner, T. Schiller and W. Form (eds.), *Historische Dimensionen von Kriegsverbrecherprozessen nach dem Zweiten Weltkrieg*, Nomos, 2007, p. 205.

[14] Rome Statute, article 8(2).

[15] Rome Statute, article 7(1).

[16] Elements of Crimes document, article 6.

[17] Rome Statute, articles 25 and 38. See further M. Bergsmo and P. Webb, see *supra* note 13, p. 205.

clarity remains.[18] Indeed, the text of the Rome Statute suggests a departure from the approach of the *ad hoc* tribunals to individual criminal responsibility.[19] The degree of ambiguity that exists in this area increases the challenge in outlining the specific legal requirements that must be fulfilled in order to secure a conviction for an international crime.

As well as understanding the legal requirements that must be satisfied in order to convict an individual of an international crime, legal personnel must have an appreciation of the quantity and nature of evidence that will suffice to prove that each requirement has been satisfied to the requisite standard. Without such an appreciation, it will be impossible to assess whether or not there exists requisite evidence to satisfy the legal requirements for conviction.

The difficulties of applying the provisions of international criminal law have been demonstrated, *inter alia*, by the internationalised jurisdictions in Kosovo, Sierra Leone and East-Timor, which have, on occasion, been seen to incorrectly apply different elements of the core international crimes under their jurisdiction.[20] In part, their inability has been attributed to inadequate staffing, funding, and support.[21] Difficulties have also been experienced in domestic jurisdictions. For example, the war crimes mechanism in Bosnia and Herzegovina has been reported at times to have struggled with the application of the substantial and complex body of international criminal law due to limited experience of the law and lack of training and resources.[22] Whilst the detailed nature of international

[18] E. Greppi, "The Evolution of Individual Criminal Responsibility under International Law", in *International Review of the Red Cross*, 1999, no. 835, p. 531; A.M. Danner and J.S. Martinez, "Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law" in *California Law Review*, 2005, vol. 93, no. 1, p. 75; C. Meloni, "Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?" in *Journal of International Criminal Justice*, 2007, vol. 5, no. 3; E. Van Sliedregt, "Article 28 of the ICC Statute: Mode of Liability and/or Separate Offence?" in *New Criminal Law Review*, 2009, vol. 12, no. 3, p. 420.

[19] G. Werle, "Individual Criminal Responsibility in Article 25 ICC Statute" in *Journal of International Criminal Justice*, 2007, vol. 5, no. 4, p. 953.

[20] W.N. Ferdinandusse, *Direct Application of International Criminal Law in National Courts*, TMC Asser Press, 2006, p. 106.

[21] *Ibid*.

[22] See Report of the OSCE Mission to Bosnia and Herzegovina, "War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina", 2005, at p. 30.

criminal law may raise greater challenges for some national tribunals that work with fewer resources and less specialised expertise, international courts and tribunals, including the ICC, are also likely to be challenged when applying particular provisions, especially when this is done for the first time.[23] The challenge is aggravated if the international jurisdiction is unable to attract or retain high quality staff.

The proper application of substantive international criminal law thus requires adequate understanding of the detailed and, in part, not fully defined provisions on crimes and modes of liability, as well as a sound overview of the evidence that must satisfy every requirement in the legal classification of the case. Lack of such understanding and overview could delay justice, undermine its precision and quality, and contribute to eroding its credibility.

3.1.2. Applying the Legal Requirements to Large Quantities of Evidence

The criminal justice for atrocities process requires investigators, prosecutors and adjudicators to be able to handle vast quantities of data efficiently and accurately, in particular to relate it to the specific legal requirements of the case at hand. Regardless what the intellectual aspirations and pretentions of criminal justice lawyers might be, the main challenges in criminal cases are rarely purely legal. Rather, it is the facts and evidence that pose the greatest challenges to analysis and work processes in larger criminal cases, including core international crimes cases. Such cases tend to draw on a broad basis of thousands of documents and witness statements. They are what we can call fact-rich cases. Case teams need to analyse and organize the materials, and assess their relevancy and weight in light of the legal parameters of the case. The ability to organise evidence effectively is critical to the success of the handling of the case. It impacts on different aspects of the processing of the case, from case selection and prioritisation, to the quality of the case, to fairness and judicial economy.

In order to select strong cases, prosecutors must understand the legal requirements and the extent to which they can be satisfied by the

[23] See, for example, a description of the difficulties faced by the ICTY in preparing a case for prosecution. M.J. Keegan, "The Preparation of Cases for the ICTY", in *Transnational Law and Contemporary Problems*, 1997, vol. 7, p. 120, at p. 125–127.

available evidence. The ability to maintain a well-organized overview of the case is also necessary in order to allow counsel to develop a clear strategy for the prosecution or defence of the accused and to ensure that different personnel working on the same case have an appreciation of the overall context in which they are working. This is particularly important where members of large teams are focused on discrete areas of the same case.

The difficulties presented by the large quantities of facts and evidence which may be adduced in serious crimes cases can be faced by any tribunal seeking justice in respect of an international crime, whether it is a domestic, an international, or an internationalised institution. However, the ability to overcome such problems is likely to be more problematic in jurisdictions where resources and experience in handling such fact-rich cases is lacking, which is often the case in some national legal systems.[24]

The problem of handling large quantities of facts and evidence is by no means unique to core international crimes. It has also been an issue in the fields of serious fraud and organized crime. As a matter of fact, violent crime in most national legal systems – such as murder – is normally not factually complex criminality compared with patterns of mass atrocity in armed conflicts. In this way, working with crimes against humanity and genocide cases can have more in common with serious fraud cases than regular violent crime. Parallels can be drawn between the difficulties faced in the prosecution of core international crimes and serious fraud cases in respect of the need to relate large quantities of factual information to specific legal requirements.[25] International criminal institutions can benefit from the experience of serious fraud agencies. Indeed, the work processes created in response to these difficulties in

[24] For example, Burke-White describes the limited resources available at the national level in the Democratic Republic of the Congo. See W.W. Burke-White, "Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo" in *Leiden Journal of International Law*, 2005, vol. 18, p. 557, at 579.

[25] J.A. Blum, "Enterprise Crime: Financial fraud in international interspace" in *Trends in Organized Crime*, 1998, vol. 3, no. 3, p. 22, at 39. See also report of the Fraud Advisory Panel, "Bringing to Book: Tackling the crisis in the investigation and prosecution of serious fraud", 2005, available at http://www.fraudadvisorypanel.org, last accessed on 12 November 2011.

serious fraud offices have fed into the development of the Case Matrix, which will be discussed in the sections below.[26]

3.2. The Significance of an Informed, Efficient and Precise Approach to the Application of Law to Facts in Core International Crimes Cases

Some of the main difficulties encountered in the application of core international crimes were outlined in the previous section. The ability of criminal justice for atrocities institutions to overcome these problems through the adoption of an informed, efficient and precise approach to the application of law to fact is important for several reasons.

3.2.1. The Ability to Pursue Justice and the Quality of the Process

Access to relevant legal documents and the practice of other tribunals may be essential for the pursuit of justice within criminal justice institutions that lack resources and relevant expertise in the practice of international criminal law. Resources, experience, and relevant expertise are likely to be particularly limited at the national level, especially where national infrastructure has been affected by the commission of atrocities. Access to legal documents that set out the requirements of each crime and provide guidance as to how they can be satisfied may be pivotal to whether or not national institutions have the ability to investigate and prosecute core international crimes. The ability of such institutions to pursue justice is significant in light of the ICC's complementarity regime, which anticipates that States have primary responsibility for the burden of cases following the commission of core international crimes.[27]

Lack of resources may not only impact the ability of criminal justice institutions to pursue justice in any particular case; it may also

[26] See the brochure on the Case Matrix available at http://www.legal-tools.org/en/what-are-the-icc-legal-tools/, last accessed on 12 November 2011.

[27] Rome Statute, article 17. See further C. Stahn, "Complementarity: A Tale of Two Notions", in *Criminal Law Forum*, 2008, vol. 19, p. 87; A. Segall, "Punishment of War Crimes at the National Level: Obligations under International Humanitarian Law and the Complementarity Principle Established by the International Criminal Court", in M. Neuner (ed.), *National Legislation Incorporating International Crimes: Approaches of Civil and Common Law Countries*, Berliner Wissenschafts-Verlag, 2003.

affect the quality of justice that the institution ultimately renders.[28] The establishment of international courts and tribunals have had an impact on standard setting in the field of international criminal law, both in terms of substantive law and procedure.[29] This impact may not be positive in all respects, but it is fair to say that international tribunals provide a guide as to standards relevant to the application of international criminal law. It has been suggested that the system of complementarity established under the provisions of the Rome Statute could have an impact on the establishment of standards in the practice of criminal justice for atrocities,[30] since failure to comply with international standards could be interpreted as inability or unwillingness to investigate and prosecute, allowing the ICC jurisdiction to intervene.[31] However, in order for international tribunals and the ICC to have a standard setting effect, domestic criminal justice institutions must be aware of the standards that those institutions uphold. This requires access to both the core texts of the institutions and judicial decisions that interpret the applicable provisions.

Access to jurisprudence from other tribunals may not only increase the quality of justice amongst national criminal justice institutions; it may also have a role to play in increasing the standards of justice. The process of judicial cross-referencing between different tribunals has been thought to play a part in increasing the quality of decisions produced by judicial institutions. The jurisprudence of established institutions may provide valuable guidance to newly created national and international mechanisms, which may be applying certain provisions for the first time. Furthermore, it can serve to broaden the scope of ideas and approaches

[28] W.W. Burke-White, "A Community of Courts: Toward a System of International Criminal Law Enforcement", in *Michigan Journal of International Law*, 2003, vol. 24, no. 1, p. 1, at p. 16.

[29] N. Matz-Lück, "Promoting the Unity of International Law: Standard-Setting by International Tribunals" in D. König, P.-T. Stoll, V. Röben and N. Matz-Lück, *International Law Today: New Challenges and the Need for Reform?*, Springer, 2008, pp. 99–212.

[30] M.S. Ellis, "The International Criminal Court and its Implication for Domestic Law and National Capacity Building", in *Florida Journal of International Law*, 2002–2003, vol. 15, p. 215; W.W. Burke-White and S. Kaplan, "Shaping the Contours of Domestic Justice: The International Criminal Court and an Admissibility Challenge in the Uganda Situation", in *Journal of International Criminal Justice*, 2009, vol. 7, no. 2, p. 257.

[31] Rome Statute, article 17.

introduced by counsel and contemplated by the judiciary, and by that add to the depth of reasoning provided by the judicial body.[32]

An informed approach to the application of international criminal law is therefore necessary to ensure not only that criminal justice institutions have the ability to investigate and prosecute core international crimes, but also that they do so to the highest possible standards.

3.2.2. The Efficiency of the Criminal Justice Process and the Fight against Impunity

Criminal justice for atrocities institutions must deal with the practical challenges associated with the application of law to fact in core international crimes cases. The way this is dealt with influences the ability of such institutions to pursue justice efficiently and effectively, thereby contributing to the fight against impunity for the commission of core international crimes.

In the aftermath of mass atrocities, there may be large number of perpetrators to be brought to account, perhaps making up a not insignificant section of the population.[33] The costly and resource intensive nature of the criminal justice for atrocities process will inevitably restrict the number of perpetrators who can be held to account, even where the process is carried out in an efficient manner. International criminal justice mechanisms with access to resources and expertise have driven large amounts of money into the processing of a relatively small number of

[32] See J.K. Cogan, "Competition and Control in International Adjudication", in *Virginia Journal of International Law*, 2008, vol. 48, p. 411; L.R. Helfer, A.-M. Slaughter, "Toward a Theory of Effective Supranational Adjudication", in *Yale Law Journal*, 1997–1998, vol. 107, p. 273; C.H. Koch, "Judicial Dialogue for Legal Multiculturalism", in *Michigan Journal of International Law*, 2003-2004, vol. 25, p. 879; V.F. Perju, "The Puzzling Parameters of the Foreign Law Debate", in *Utah Law Review*, 2007, p. 167; M.C. Rahdert, "Comparative Constitutional Advocacy", in *American University Law Review*, 2007, p. 56; A.-M. Slaughter, *A New World Order*, Princeton University Press, 2004.

[33] S. Straus, "How many perpetrators were there in the Rwandan genocide? An estimate", in *Journal of Genocide Research*, 2004, vol. 6, no. 1, p. 85; M. Bergsmo, K. Helvig, I. Utmelidze and G. Žagovec, *The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina*, Second Edition, Torkel Opsahl Academic EPublisher, Oslo, 2010, FICHL Publication Series No. 3, available at http://www.fichl.org/publication-series/, last accessed on 12 November 2011.

cases.[34] National justice institutions that do not have the same level of resources and relevant expertise may face a greater struggle to meet the expectations of justice. In light of the relative cost-inefficiency of the *ad hoc* tribunals, attention has been directed to effectiveness and efficiency of criminal justice for atrocities institutions.[35] Inefficiency and imprecision in the criminal process, perhaps combined with limited access to resources, is likely to exacerbate the problem of meeting the demand for justice in the aftermath of mass atrocities. It may lead to cases being pursued that later fail for lack of evidence or weaknesses that were not apparent at an earlier stage of the process, and may encourage the handling of unnecessary evidence, making the process more burdensome for counsel and the judiciary.

Inability to organise evidence so as to maintain a running overview of the case at hand may have a significant impact on efficiency. It may lead to the pursuit of cases in relation to which there is weak or missing evidence, wasting time and resources on cases that are not supported by sufficient evidence. It may also hinder the development of a clear prosecutorial strategy, making counsel prepare for cases to progress in a number of different directions, or the presentation of evidence with inadequate relevancy to the charges. Failure to develop a precise and structured approach to the handling of evidence could also lead to the duplication of work, both within teams of investigators, prosecutors, defence lawyers, and judges, and between different teams or stages of the criminal justice process, limiting the efficiency of the criminal justice process as a whole and increasing its overall length and cost.

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[34] It has been anticipated that the cost of the two *ad hoc* tribunals will "probably top at least $2.4 billion", C.P.R. Romano, "The Price of International Justice", in *The Law and Practice of International Courts and Tribunals*, 2005, vol. 4, p. 281, 296. On the costs of the *ad hoc* tribunals, see also D. Wippman, "The Costs of International Justice", in *American Journal of International Law*, 2006, vol. 100, p. 861. At the date of writing, the ICC has managed to open just nine cases, with an annual budget of €103,623,300. Figure taken from the programme budget for 2010, Resolution ICC-ASP/8/Res.7, adopted at the 8th plenary meeting, on 26 November 2009, by consensus. See also T. Ingadottir, "The Financing of Internationalised Criminal Courts and Tribunals" in C. Romano, A. Nollkaemper and J. Kleffner (eds.), *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor and Cambodia*, Oxford University Press, 2004, p. 272.

[35] B.N. Schiff, *Building the International Criminal Court*, Cambridge University Press, 2008, p. 2.

3.2.3. Promotion of the Rights of the Accused

Inability of the prosecution to outline a clear strategy for the prosecution of cases may also interfere with the right of the accused to a fair trial. The right to fair trial is a fundamental human right, found in major human rights treaties.[36] The right to a fair trial has also been assured to individuals accused of core international crimes before the ICC by virtue of article 67 of the Rome Statute.

The right of the accused to be informed promptly and in detail of the nature, cause, and content of the charge, and the right to have adequate time and facilities for the preparation of his or her defence are two aspects of the right to fair trial.[37] Again, these rights have been assured to accused persons appearing before the ICC.[38] Whilst accused persons may have been assured these rights in theory, international criminal justice institutions may face difficulties in putting them into practice.[39] The ability of such institutions to uphold the right of the accused to a fair trial will depend on the manner in which the criminal justice process is carried out, in particular how evidence is organised and presented by the prosecution. In a number of recent decisions, which will be discussed below, the ICC has emphasised the significance of clear overview of the case, linking the evidence admitted with the various elements of the crime and modes of liability, for the rights of the accused. A precise approach to the handling of evidence and clarity as to how the evidence is intended to be linked to the legal requirements for conviction of the offence can contribute to the respect for the fundamental rights of the accused. Awareness of the strategy that the prosecution intends to follow will lessen the burden on defence counsel, allowing them to direct time and resources to specific charges and ensuring that the accused is aware from the outset of the detailed nature of the charges against him or her.

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[36] International Covenant on Civil and Political Rights (ICCPR), article 14; European Convention on Human Rights (ECHR), article 6; Inter-American Convention on Human Rights (IACHR), article 8, African Charter on Human Rights (ACHR), articles 7 and 25.

[37] ICCPR, articles 14(3)(a) and (b); ECHR, article 6(3)(a) and (b); IACHR, article 8(2)(b) and (c).

[38] Rome Statute, article 67(1)(a) and (b).

[39] J.K. Cogan, "International Criminal Courts and Fair Trials: Difficulties and Prospects", in *Yale Journal of International Law*, 2002, vol. 27, p. 111.

Increased precision and efficiency can also help tribunals to ensure that accused persons are tried without undue delay.[40] The right to trial without undue delay is another fundamental aspect of the right to fair trial. International tribunals have struggled to put this right into practice in the international criminal justice context. Pre-trial detention at the ICTY and other international criminal tribunals has frequently lasted for several years.[41] National tribunals that may be lacking in resources and relevant expertise, limiting their ability to ensure the efficient application of international criminal law, may also face difficulties in ensuring that trials are completed without undue delay.[42] An efficient, precise, and informed methodology can assist jurisdictions in overcoming these difficulties and put the rights assured to the accused into practice.

3.2.4. Summary

The ability of criminal justice for atrocities institutions, both at the national and the international levels, to seek justice in an efficient way that conforms with the rights of the accused and upholds the highest standards of justice, requires an informed and precise approach to the application of law to fact. The next section will consider the ability of the Case Matrix application to provide such an approach.

3.3. The Case Matrix and the Facilitation of the Application of Law to Fact

The previous sections have outlined the difficulties faced in applying law to fact in core international crimes cases and the implications of a failure to do so in an informed, efficient, and precise manner. This section will consider the Case Matrix, which offers the information and an effective methodology that can allow criminal justice institutions to overcome difficulties faced in investigating and prosecuting core international crimes, and its value in the promotion of an effective, fair and high quality system of justice.

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40 ICCPR, article 14(3)(c).

41 G. Boas, *The Milošević Trial: Lessons for the Conduct of Complex International Criminal Proceedings*, Cambridge University Press, 2007, p. 31.

42 See report of the OSCE, see *supra* note 22, p. 30.

3.3.1. The Case Matrix

The Legal Tools, of which the Case Matrix is an integral part, are a range of digital tools that seek to equip users with legal information, digests and applications to work more effectively with core international crimes cases.[43] The idea to create a set of legal tools to facilitate the practice of criminal justice for atrocities was originally devised within the Office of the Prosecutor of the ICC by its Legal Advisory Section in 2003–2005.[44] The Legal Tools Project was conceived and created by Morten Bergsmo, who co-ordinated the establishment of the ICC Office of the Prosecutor in 2002–2003 before becoming the first Chief of its Legal Advisory Section. He had made a study of needs and weak links in relevant work processes of several international criminal jurisdictions and comparable national criminal justice agencies. His vision was to create tools that would be useful to the ICC Office of the Prosecutor and others in the ICC, as well as a platform for free and effective transfer of legal information and knowledge to national criminal jurisdictions. He acted on the understanding that the foundational principle of complementarity requires legal empowerment of national criminal justice actors. The most basic form of empowerment is to create a free, public Internet platform that anyone can use as they like to access legal information generated by states and courts across the globe. This does not entail any advisory, policy, or capacity building activity. In this way, the Legal Tools Project has always fallen squarely within the mandate of the ICC.

As the range of Legal Tools has expanded and developed, the processes of document collection, uploading and metadata registration, and some other maintenance and development tasks have been outsourced to a number of mainly academic partners with related expertise.[45] Experience since the mid-1990s shows that these work processes are far too labour intensive for an operational international criminal court to execute them in a sustainable fashion over time. Spreading the work on more than ten self-financed outsourcing partners from around the world

[43] ICC, "What are the ICC Legal Tools?", available at http://www.legal-tools.org/en/what-are-the-icc-legal-tools/, last accessed on 12 November 2011.

[44] ICC, "Legal Tools 2003-2005", available at http://www.legal-tools.org/en/what-are-the-icc-legal-tools/2003-2005/, last accessed 12 November 2011.

[45] ICC, "Work on the Tools", available at http://www.legal-tools.org/en/work-on-the-tools/, last accessed on 12 November 2011.

shares the burden, reduces the risks, and increases a sense of ownership in the making of the Tools. This has proven to work remarkably well. The partners report to the Co-ordinator of the Legal Tools Project who is responsible to the ICC for the co-ordination of the Project outside the ICC.[46] There is a Legal Tools Advisory Committee with representation from the different Organs of the Court, as well as a Legal Tools Expert Advisory Group with some of the leading legal informatics experts serving as members. The development of the Legal Tools has been overseen throughout by a body of practitioners and experts in the field of international criminal law.[47]

The ICC's Legal Tools Database provides users with raw data in international criminal law, including treaties and legislation, preparatory works, judicial decisions of international(ised) and national tribunals, and academic publications. They also offer analysis of the raw data in the form of a series of digests. In addition, the Legal Tools include a case management application, the Case Matrix, which brings together several of the databases and digests that make up the Legal Tools into a tool for the investigation, prosecution, and adjudication of core international crimes.

The Case Matrix is the most innovative component of the Legal Tools. The application allows users to enter the crimes and modes of liability being charged or considered into a system, which is then able to break down the case in terms of the legal requirements that must be fulfilled in order to convict the accused of the offence. The framework can be used as a digital filing system in which evidence can be entered alongside the relevant legal requirements. If used in this way, the framework provides users with a constant overview, or "snapshot",[48] of the status of the case throughout the criminal process. The framework can be shared amongst large teams of practitioners working on different aspects of the case, allowing them to maintain an awareness of the contribution of their work to the case as a whole. Furthermore, it can be used to transfer information between different stages of the criminal

[46] This Co-ordinator is Morten Bergsmo, who created the Legal Tools Project as Chief of the Legal Advisory Section of the ICC Office of the Prosecutor 2002–2005.

[47] The ICC's Legal Tools have been developed under the oversight of the Legal Tools Advisory Committee (LTAC).

[48] M. Bergsmo and P. Webb, 2007, see *supra* note 13, p. 210.

justice process, to disclose evidence to other parties or communicate evidence to the judiciary. Each element of the crime and mode of liability is accompanied by a hyperlink, providing the user with access to the raw data and notes contained in the Elements Digest.[49] The application also provides access to legal information and notes contained in the Means of Proof Digest, highlighting the nature and quantity of evidence that has been used to satisfy the burden of proof in other jurisdictions. In doing so, the Case Matrix provides users with access to legal information in thousands of documents and approximately 7,500 pages of digest concerning core international crimes and modes of liability, relating it to specific aspects of the case being addressed.[50] The case management application therefore establishes an "implied methodology" for the efficient investigation, prosecution, and adjudication of core international crimes.[51]

The Case Matrix was originally created for use within the ICC. However, recognition of its value as a means of promoting the efficient practice of international criminal law has led to its adaptation for use beyond the Court. The application is currently available to a wide range of users on submission of a statement of need.[52] By early 2010, there were more than 85 users of the Case Matrix around the world, to a large extent national investigation and prosecution agencies in both States affected by core international crimes and non-territorial States, but also non-governmental organisations and counsel involved in core international crimes cases.[53] By 2012, all specialised national investigation and prosecution agencies will have been offered access to the Case Matrix. The application can be adapted to suit the needs of a wide range of personnel, including NGOs, who may use the Case Matrix to monitor and record data in relation to core international crimes, investigators and prosecutors; to organise evidence and create a prosecutorial strategy, by

[49] The Elements Digest is one of the Legal Tools that provides raw data and notes on the elements of crimes contained in the Rome Statute and Elements of Crimes document.

[50] See Case Matrix Network, http://www.casematrixnetwork.org/, last accessed on 12 November 2011.

[51] M. Bergsmo and P. Webb, 2007, see *supra* note 13, p. 210.

[52] ICC, "What are the ICC Legal Tools?", available at http://www.legal-tools.org/en/what-are-the-icc-legal-tools/, last accessed on 12 November 2011.

[53] See Case Matrix Network, "Network Users", available at http://www.casematrixnetwork.org/users/, last accessed on 12 November 2011.

defence council to assess the strength of the evidence submitted by the prosecution; and to develop the client's defence; and by judges to assess the whether or not the evidence submitted meets the burden of proof for transfer to the next stage of the criminal justice process, or for conviction. The elements of crimes and modes of liability contained in the application can be tailored to match those of the relevant legal system, increasing its utility for a wide range of actors.

The installation of the Case Matrix is accompanied by training and coaching in the use of the Legal Tools by a network of advisers with expertise in the practice of international criminal law.[54] In addition to installation of the Case Matrix and training in its use, the Case Matrix advisers also provide a range of additional services, including technical advice on prosecution strategy, organisation of work, development of investigation, and work plans and their implementation, developed through study of work processes in numerous international and national criminal justice institutions and non-governmental organisations.[55] In doing so, the network of advisers can increase the capacity of criminal justice institutions, particularly at the national level where resources and expertise may be more limited, in a fast and cost effective manner.

3.3.2. The Facilitation of the Application of Law to Fact through Use of the Case Matrix

The services incorporated into the Case Matrix provide users with resources required to understand and apply complex legal provisions, increasing the ability of criminal justice professionals to apply the crimes contained in the Rome Statute.[56] By providing users with access to the jurisprudence of other tribunals, the use of the Case Matrix can prompt consideration of a range of different approaches to satisfaction of the legal requirements, offering personnel a point of reference and

[54] Case Matrix Network, "Network Advisers", available at http://www.casematrixnetwork.org/network-advisers/, last accessed on 12 November.

[55] Case Matrix Network, "Purpose", available at http://www.casematrixnetwork.org/, last accessed on 12 November.

[56] Concannon suggests that problems caused by lack of resources could be alleviated by making the ICC's decisions available in developing countries "via an appropriate technology". B. Concannon, "Beyond Complementarity: The International Criminal Court and National Prosecutions, A View from Haiti", in *Columbia Human Rights Law Review*, 2000, vol. 32, p. 201, at p. 234.

encouraging the formation of adequate standards in the application of international criminal law.

The supply of a precise and structured methodology allows for the selection of cases that have a high chance of resulting in conviction. The establishment of a clear overview can help streamline evidence, ensuring that the process is not weighed down by the admission of evidence without clear relevance to the charges, saving time for counsel and judges and, ensuring that the rights of the accused are respected. The provision of a framework in which all relevant evidence is filed can also increase efficiency between different stages of the criminal justice process. The data contained in the application can easily be shared and transferred to different personnel in a coherent and organised manner, avoiding duplication of work within and between different teams involved in the process of criminal justice for atrocities.

By providing users with resources and a methodology for the practice of international criminal law, the Case Matrix can alleviate some difficulties associated with the application of complex legal requirements to fact-rich cases, leading to better judgments and a more precise and efficient system of justice.

3.4. The ICC and the Case Matrix

In a number of early decisions, both Pre-Trial and Trial Chambers of the ICC have made orders that implicitly endorse the logic of the Case Matrix, justifying their approach both in terms of the efficiency and effectiveness of the Court and in the right of the accused to a fair trial.

3.4.1. Adoption of the Case Matrix Logic

In a series of recent decisions, Chambers of the ICC have ordered counsel to submit evidence in a format correlating with that provided for by the Case Matrix application, adopting the Case Matrix logic and highlighting its value in respect of criminal trials carried out by the ICC.

The Case Matrix logic was first adopted by Pre-Trial Chamber III in the case of *Prosecutor v. Jean-Pierre Bemba Gombo*.[57] In its decision

[57] ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-55, "Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties", 31 July 2008.

of 31 July 2008, the Pre-Trial Chamber ordered the parties to provide an analysis of each piece of evidence submitted to the Registry,[58] "relating each piece of information contained in that page or paragraph with one or more of the constituent elements of one or more of the crimes with which the person is charged, including the contextual elements of those crimes, as well as the constituent elements of the mode of participation in the offence with which the person is charged".[59] Whilst the Chamber did not mention the Case Matrix explicitly, the requirements it outlined would be fulfilled by the use of application, which breaks down the crimes into their legal requirements, allowing evidence to be added alongside them, together with any relevant analysis.

Following the Prosecution's submission of an incriminating evidence chart that failed to adhere to the requirements outlined in its earlier decision, the Pre-Trial Chamber reaffirmed its approach in a subsequent decision on 10 November 2008,[60] requesting the Prosecutor to submit an updated and consolidated version of the chart following the structure of a model chart contained in a separate annex.[61] The model attached mimicked the structure and format of the Case Matrix.

The Case Matrix logic later received endorsement within the Trial Chambers of the ICC. In its decision of 13 March 2009,[62] Trial Chamber II recalled its previous request to the Prosecution to submit "an ordered and systematic presentation of [its] evidence" during the first public status conference,[63] and its decision of 10 December 2008,[64] directing the Prosecution to "submit a proposal for a table linking the charges confirmed by Pre-Trial Chamber I and the modes of responsibility with

58 *Ibid.*, letter (e) of the operative part, p. 22.

59 *Ibid.*, para. 69.

60 ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-232, "Decision on the Submission of an Updated, Consolidated Version of the In-depth Analysis Chart of Incriminatory Evidence", 10 November 2008, para. 8.

61 *Ibid.*, para. 8.

62 ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-956, "Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol", 13 March 2009.

63 ICC-01/04-01/07-T-52-ENG ET WT 27-11-2008, p. 58, lines 9–10.

64 ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-788, "Ordonnance enjoignant aux participants et au Greffe de déposer des documents complémentaires", para. 7.

the alleged facts as well as the evidence on which it intends to rely at trial".[65] The Chamber rejected a table that had been proposed by the Prosecution on the basis that it "would not enable the parties or the Chamber to have an ordered, systematic and sufficiently detailed overview of the incriminating evidence".[66] In particular, the Chamber raised concerns that the table "[did] not show clear and particularized links between the charges, the elements of the crime, the alleged facts, and the relevant parts of the item of evidence" and "[did] not allow the evidence to be sorted out on the basis of its relevance to a particular factual statement".[67] It went on to order the Prosecution to submit an "analytical table [...] based on the charges confirmed and follow[ing] the structure of the *Elements of crimes*".[68] Again, although the Trial Chamber did not refer to the Case Matrix explicitly, it outlined requirements that would be satisfied by the use of the case management application. The approach of Trial Chamber II was subsequently followed by Trial Chamber III in the case of the *Prosecutor v. Jean-Pierre Bemba Gombo*.[69]

Whilst the Court has not made overt reference to the Case Matrix, both Pre-Trial and Trial Chambers have thus made orders that would be satisfied by use of the case management application. The approach of the ICC shows a clear endorsement of the methodology encouraged by the case management system, confirming its relevance in the criminal justice for atrocities context. The Chambers of the ICC have given detailed justification for their approach to the submission of evidence, reflecting several of the issues discussed in the preceding section.

3.4.2. Justifications for the Approach of the Chambers

The approach of the Chambers to the submission of evidence in the decisions outlined above has been supported by the dual rationale of increasing the efficiency and precision of the international criminal process, and ensuring respect for the rights of the accused.

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65 ICC-01/04-01/07-956, para.1.

66 *Ibid.*, para. 9.

67 *Ibid.*, para. 9.

68 *Ibid.*, para. 11.

69 ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-682, 29 January 2010.

3.4.2.1. Expediency of the Criminal Process

In its decision of 31 July 2008, Pre-Trial Chamber III stated the purpose of its request be "to streamline the disclosure of evidence, to ensure that the defence be prepared under satisfactory conditions, to expedite proceedings and to prepare properly for the confirmation hearing".[70] The approach of the Chamber was grounded in its conception of the role of pre-trial chambers at the ICC: to act as a filtering system, preventing cases that fail to meet the threshold of article 61(7) of the Statute from proceeding to the trial stage,[71] and as a stage in the preparation for trial.[72] It considered the methodology adopted to allow this process to be conducted more efficiently,[73] ensuring only relevant material would be introduced to the chamber at the outset of the trial process.[74]

Trial Chamber II also justified its approach on the grounds of expediency.[75] The Chamber recognised the additional administrative burden that the methodology would impose on the Prosecution.[76] However, at the same time, it considered that "the supplementary investment of time and resources, required by the Prosecution for preparing the Table of Incriminating Evidence, will facilitate the subsequent work of the accused and the Chamber and thereby expedite the proceedings as a whole".[77] The approach shows the focus of the Chambers of the ICC not only on the work of individual teams within the Court, but on the efficiency of the process as a whole.

3.4.2.2. Protection of the Rights of the Accused

In addition to the emphasis on efficiency, Pre-Trial Chamber III acknowledged the value of a precise and structured approach to the handling of evidence for the rights of the accused. It acknowledged that "disclosure of a considerable volume of evidence for which it is difficult

[70] ICC-01/05-01/08-55, para. 72.
[71] *Ibid.*, para. 11.
[72] *Ibid.*, para. 25.
[73] *Ibid.*, para. 72.
[74] *Ibid.*, para. 64.
[75] ICC-01/04-01/07-956.
[76] *Ibid.*, para. 15.
[77] *Ibid*.

or impossible to comprehend the usefulness for the case merely puts the defence in a position where it cannot genuinely exercise its rights, and serves to hold back proceedings".[78] The Chamber considered that these issues could be remedied by handling evidence in a systematic and organised manner, presenting it in the format it proposed.

In a similar manner, the Trial Chamber recognised the concerns of the defence regarding the amount of evidence in the case and entitlement to be informed of the precise evidentiary basis of the Prosecution's case and emphasised that the methodology would "ensure that the accused have adequate time and facilities for the preparation of their defence, to which they are entitled under article 67(1)(b) of the Statute, by providing them with a clear and comprehensive overview of all incriminating evidence and how each item of evidence relates to the charges against them".[79] The Chamber considered the approach that it had ordered with regard to the submission of evidence to "ensure that there is no ambiguity whatsoever in the alleged fact underpinning the charges confirmed by the Pre-Trial Chamber" and provide for "a fair an effective presentation of the evidence on which the Prosecution intends to rely on at trial".[80] Similarly, Trial Chamber III justified the adoption of a similar approach on the grounds that it would provide for the "fair and effective presentation of the evidence which the prosecution intends to rely on at trial".[81]

In the decisions outlined above, both Pre-Trial and Trial Chambers of the ICC have demonstrated their approval of the Case Matrix logic in respect of proceedings carried out at the ICC and have highlighted its significance in contributing to the efficiency and precision of the international criminal justice process, as well as its ability to uphold the rights that have been assured to the accused.

3.5. Conclusion

This chapter has sought to demonstrate challenges faced in the application of the law on core international crimes and modes of liability to fact-rich cases. It has highlighted difficulties presented by aspects of the definition

[78] ICC-01/05-01/08-55, para. 66.

[79] ICC-01/04-01/07-956, para. 6.

[80] *Ibid.*, para. 5.

[81] ICC-01/05-01/08-682, para. 21.

of the core international crimes and modes of liability and unfamiliarity with the provisions due to their rapid evolution and specificity to the field of international criminal law. The additional problems raised by the large quantities of facts and evidence that must be organised and related to the specific legal requirements have also been explored. It has been argued that the Case Matrix provides a means of addressing these difficulties, empowering users to carry out the criminal justice process efficiently, effectively, and in compliance with international standards, by providing users with both resources required to comprehend the legal requirements and a methodology to apply them to the facts of the case. The value of the Case Matrix has been attested to by the Chambers of the ICC in a number of decisions ordering counsel to present evidence in the format provided for by the case management application. Bearing in mind the additional pressures on national criminal justice institutions in terms of resources and relevant expertise, the Case Matrix application could prove to be of equal, if not greater, value within domestic legal systems. If utilised in this manner, the Case Matrix can assist both international and national institutions to maximise their resources in the fight against impunity, whilst at the same time upholding high standards of justice and ensuring full respect to the rights of the accused.

4

Establishing the Legal Basis for Capacity Building by the ICC

Emilie Hunter*

Since the International Criminal Court (hereinafter ICC or Court) became operational, the Presidency, the Office of the Prosecutor and the Assembly of States Parties have engaged in, or evaluated, capacity building activities for national legal services.[1] While there are no express statutory provisions that authorise the Court to conduct such activities, the legal basis for the provision of capacity building by the ICC to its members and other stakeholders can be identified through interpretation of a composite of statutory provisions, and is reinforced by the inherent powers of the Court as an international judicial organisation.

This chapter will briefly consider capacity building frameworks adopted by international organisations, before outlining the applicable sources of law available to the Court in determining the whether the ICC has capacity to engage in or provide capacity building activities to States and considering the subsequent practice of the Court in this regard.

* **Emilie Hunter** is a doctoral researcher at the European University Institute, Fellow of the International Criminal Justice Unit of the University of Nottingham Human Rights Law Centre, and Case Matrix Network Advisor. Between 2006 and 2009, she co-ordinated the design and completion of phases 1–3 of the National Implementing Legislation Database (NILD) which forms part of the ICC Legal Tools, while she co-ordinated the newly established Legal Tools Outsourcing Partners Network (LTOP) between May and November 2008.

1 In June 2011, the ICC President signed a co-operation agreement with the Commonwealth Secretariat to provide drafting assistance to Commonwealth members of the Court; the Office of the Prosecutor has adopted a policy of "positive complementarity" which encompasses certain capacity building endeavours, while the ASP has appointed a Legal Officer as a Focal Point on Complementarity as well as created an "extranet" to map capacity building donors and actors.

4.1. Capacity Building by International Organisations as Development and Compliance

International organisations frequently provide technical assistance or capacity building to their members and stakeholders, in order to develop or build their capacities to fulfil the objectives or obligations that the State may have towards the international organisation, or simply to strengthen the internal goals of its members.[2] International adjudicatory organisations, including international criminal tribunals, have not excluded themselves from this practice, although little attention has been given to identify the legitimacy or scope of their actions. Instead, the provision of capacity building between international organisations and States has predominantly been analysed through the lexicon of development literature, with a focus on sustainability, local ownership and suitability for the recipient. Capacity building has also been evaluated as a component of managerial compliance mechanisms adopted by international organisations.[3] While development theories stress the usefulness – or otherwise – of capacity building to the recipients needs and contexts, compliance theories take the perspective of the international organisation, with its efforts to ensure that States follow the legal norms or standards enshrined in its constitutive documents. Both can facilitate considerations of whether an international organisation, such as the ICC, has a legal basis to provide capacity building, by first providing a framework for the concept of capacity building, and then by establishing the common norms or standards that underpin its practice by other relevant international organisations.

[2] From the early technical assistance programmes of the UN General Assembly in the 1940's onwards, technical assistance or capacity building has become mainstreamed in the mandate of many international organisations, including those with overlapping thematic mandates to the International Criminal Court.

[3] See C. Montoya, "The European Union, Capacity Building, and Transnational Networks: Combating Violence Afainst Women Through the Daphne Program", in *International Organisation*, Spring 2008, vol. 62, pp. 359–372; J. Tallberg, "Paths to Compliance: Enforcement, Management and the European Union", in *International Organisation*, Summer 2002, vol. 56, pp. 609–643; and A. Chayes and A. Handler Chayes, "On Compliance", in *International Organisation*, Spring 1993, vol. 47, pp. 175–205.

4.1.1. Capacity Building as Development

Notwithstanding the distinction between the two approaches to capacity building, the concept can be defined as a recipient-orientated process, whereby "individuals, groups, organizations, institutions and countries develop, enhance and organize their systems, resources and knowledge, all reflected in their abilities, individually and collectively, to perform functions, solve problems and achieve objectives".[4] United Nations (UN) bodies with thematic mandates that overlap with the ICC's, including the UN Development Programme (UNDP), the UN Children's Fund (UNICEF) and the United Nations Educational, Scientific and Cultural Organisation (UNESCO), prioritise processes such as self-reliance, sustainability, ownership, choice and self-esteem of the recipients.[5] The peace-building work of UN Department of Peace-Keeping Operations (DPKO) adopts a more functionalist approach by targeting the institutional capacity of its partners to perform their functions, along with the administrative and managerial capacity to deploy their resources,[6] but does not orient its work by following international standards and norms. In considering the recipient's obligations, either nationally or internationally, the World Bank has long targeted "under-performing" national public sectors as recipients of capacity building activities. In so

[4] United Nations, "UN Term", available at http://unterm.un.org/dgaacs/unterm.nsf/WebView/47938DB728B61ED0852569FD0003655F?OpenDocument, last accessed on 14 November 2011

[5] UNDP Capacity Development Group Bureau for Development Policy, *Supporting Capacity Development: The UNDP Approach*, 2008; UNDP, *Capacity development resource book*, New York, 1997; UNDP, *Capacity assessments and development in a systems and strategic management context*, Technical advisory paper, New York, 1998, no. 3; UNESCO and International Institute for Educational Planning, *Guide-book for planning education in emergencies and reconstruction*, 2006; UNESCO, *Thesaurus on Capacity Building*, available at http://databases.unesco.org/thesaurus last accessed on 1 October 2011. See also V. Turk, "Capacity Building", and B. Pouligny, "Local Ownership", in V. Chetail (ed.), *Post-Conflict Peace-Building*, Oxford University Press, 2009.

[6] The United Nations Rule of Law Indicators, available at http://www.un.org/en/peacekeeping/publications/un_rule_of_law_indicators.pdf, last accessed on 14 November 2011, at page 3.

doing, the Bank drives programmes that focus on building the human, organisational and infrastructural capacities of State institutions.[7]

4.1.2. Capacity Building as Managerial Compliance

Another way of thinking about capacity building is as a mechanism of managerial compliance. In this way, capacity building is a necessary tool in the compliance toolkit of an international organisation. Compliance mechanisms are adopted by international organisations to ensure that States follow the legal norms or standards enshrined under international law, and may be defined in its constitutive documents, in subsequent agreements, or developed through practice. Many social scientists have drawn direct comparisons between the effectiveness of international organisations and the capacity of government members to implement their provisions.[8]

Unlike the coercive mechanisms of sanctions and monitoring, which involve the international organisation seeking to impose its authority, managerial mechanisms seek to encourage compliance with the law, norm or standard that is being ignored or overlooked through constructive measures such as capacity building, rule interpretation and transparency. In this way, the international organisation adapts its role from enforcer to expert.[9] Proponents of managerial compliance measures argue that they work when States are willing to enforce or apply the international standard, but are unable to do so due to resource or capacity deficiencies.[10] Therefore, such measures may be appropriate for many post-conflict States that may be willing, but unable, in the terms of the ICC Statute, to investigate and adjudicate international crimes, or to co-operate with ICC requests. Indeed, management mechanisms address the protracted incapacities of post conflict countries, where human, organisational and institutional capacity may be devastated or severely disrupted. They also address more discrete limitations in the State's legislative,

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7 World Bank, *World Development Report*: *The State in a Changing World,* 1997; World Bank, *Africa Report,* 2005, p. 5.

8 O. Young, "The Effectiveness of International Institutions: Hard Cases and Critical Variables", in J.N. Rosenau and E.-O. Czampiel (eds.), *Governance without Government: Order and Change in World Politics*, Cambridge University Press, 1992.

9 See Tallberg, see *supra* note 3, pp. 609–612.

10 Chayes and Chayes, see *supra* note 3.

administrative and co-ordinating abilities, which restrict compliance because of the need for constitutional or legal amendments, the political will or capacity to push through such amendments, or the ability to internally co-ordinate the required amendments and changes in practice.[11]

4.1.3. Common Aspects of Developmental and Compliance-Driven Capacity Building

While the development lexicon may prioritise the process of capacity building (local ownership and sustainability) or the performance approach of the World Bank (enabling performance according to function) and compliance-driven models prioritise international compliance, there are a number of common or overlapping aspects of capacity building. The first is commonality in the dimensions of capacity building, which include human capacity, organisational capacity and institutional/legal capacity. *Human capacity* can be defined as the information, skills and knowledge required by individuals to perform effectively in the fulfilment of the function of the organisation; *organisational capacity* can be defined as the internal and external structures, processes and procedures of the organisation that enable the organisation to fulfil its function, including the co-operation with external actors; and finally, *institutional/legal capacity* can be defined as the legal and regulatory framework that the organisation is required to follow.

The second common aspect of capacity building is the methods of delivery used by the different models: material support, technical assistance, skills transfer and training.[12] Capacity building activities are also usually conducted to address overlapping dimensions. For example,

[11] While there are clear limitations in the use of management measures, where States have chosen not to comply, or put another way, the cost of compliance outweighs the cost of non-compliance, Tallberg asserts that the most effective international organisations deploy or combine both coercive and managerial compliance mechanisms, ensuring greater compliance by more member States. While his analysis focuses primarily on the European Union, it also considers the positive effects of managerial compliance mechanisms on international adjudicatory bodies such as the WTO. Tallberg, see *supra* note 3, pp. 609, 609–611.

[12] Turk reviews a range of capacity programmes of UN agencies in post conflict settings. In addition, see ICTY and UNICRI, *ICTY Manual on Developed Practices*, UNICRI, 2009; ICTY, OSCE/ODHIR and UNICRI, *Supporting the Transition Process: Lessons Learned and Best Practices in Knowledge Transfer: Final Report*, OSCE Office for Democratic Institutions and Human Rights (ODIHR), 2009.

increasing the skills and knowledge of legal drafters on methods of incorporating interational obligations into national law can have a direct impact on the institutional and legal capacity of a State. This method of delivery would satisfy the developmental prioritiy of ensuring that capacity building was sustainable and locally owned, by providing State employees with the skills they needed to strengthen their legal framework, rather than simply employing international consultants to draft legislation for the State machinery.

Another common aspect of capacity building is the involvement of multiple actors: of various national recipients, collaborative providers and multiple donors, drawn from the subsidiary bodies of international organisations, private foundations, universities, institutions and national strategic or developmental funds. The sheer breadth of activities and actors involved in the provision and receipt of capacity building makes its effectiveness, as well as the relevance or role of the international organisation, difficult to measure.

The reciprocal value of capacity building to States as well as to the ICC can be understood through the complementarity principle under which the Court seizes jurisdiction, as well as the co-operation regime in which the Court functions. As States hold the primary duty to exercise criminal jurisdiction,[13] the Court can operate only where a State fails to exercise jurisdiction: the more States are able to comply with their responsibilities and obligations, the more efficient the Court will be, and the more functional the system established by the Diplomatic Conference will be. As the Court is unable to enforce compliance by States in this regard, managerial compliance arguably provides a solution to the statutory deficit. Furthermore, due to the limited enforcement powers of the ICC, the Court is reliant on State co-operation for the arrest and surrender of persons, other forms of co-operation and assistance,[14] as well as the enforcement of sentences.[15] Strengthening the capacity of States to co-operate or assist in these fields will thereby strengthen the Court's own efficiency. As such, the provision of capacity building, where it

[13] Preambular paragraphs 4, 6 and 10, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Statute of the International Criminal Court, 17 July 1998.

[14] *Ibid.*, article 93.

[15] *Ibid.*, see Part X.

strengthens national capacity to fulfil its obligations and responsibilities under the Statute, serves to strengthen the ICC's own operation as well as increase State compliance.

4.2. The Definition and Nuances of Capacity Building under the Rome Statute

While numerous agencies of international organisations operate a variety of capacity building services in support of their respective mandates, the practice is not so clearly consolidated within international criminal tribunals and little effort has been made to locate the praxis of capacity building as part of the statutory or inherent powers of international criminal tribunals.[16] In its first decade of practice, the ICC has been tentatively mindful that, as a permanent international criminal tribunal, its response to the needs and capacities of its members may need to be more systematic.

What follows is a brief overview of the statutory basis for such actions, as well as a summary of the subsequent practice of the Court organs. While the legal framework of the ICC does not expressly authorise it to conduct capacity building programmes for States, the Presidency and Prosecutor have considered the powers provided to the Court to conclude agreements with external organisations to be sufficient to enable capacity building programmes to be established. This section concludes by observing the divergence of opinion between the organs of the Court and the Assembly of States Parties (ASP), which has sought to limit the activities of the Court to what it considers to be the Court's core judicial mandate.

4.2.1. Sources of Law Available to the Court to Determine the Legal Basis for Capacity Building

Determining the applicable law available to the Court is the departure point for any determination of its legal basis to provide capacity building

[16] Previous international criminal tribunals such as the temporary tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) were compelled to conduct capacity building activities with the States under their jurisdiction, as part of their completion strategies, forming responsive programmes, in partnership with other international organisations. ICTY and UNICRI, see *supra* note 12; ICTY, OSCE/ODHIR and UNICRI, see *supra* note 12.

activities. Article 21 directs the Court[17] towards a hierarchy of sources of law that it must apply.[18] While some commentators have considered that ordinary meaning of "the Court" refers only to the judicial chambers, and thus that the hierarchy of law serves only as a guide to the judges,[19] article 34 of the Statute clearly states that the Court consists of the Presidency, the Appeals, Trial and Pre-Trial Chambers, the Office of the Prosecutor and the Registry.[20] As such, the hierarchy of law is applicable to the determinations of each of the Court Organs. The ASP is absent from the list of responsible Organs, although its powers are established in Part XI of the Statute, and its authority over the Court and States Parties are referred to in no less than 19 articles.[21] Despite its exclusion as an Organ of the Court, by virtue of its establishment within the Statute, it can be argued that where the ASP is required to exercise its authority, article 21 also applies.

The first source of law is the nuclear family of the Statute, the Elements of Crimes and Rules of Procedure and Evidence. While the Vienna Convention on the Law of Treaties (VCLT) considers that the

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17 Article 34 establishes the individual organs of the Court: the Presidency, Chambers, Registry and Office of the Prosecutor. Rome Statute of the International Criminal Court, adopted 17 July 1998, entered into force 1 July 2002, UN Doc. A/CONF. 183/9 "Rome Statute".

18 M. deGuzman, "Article 21: Applicable Law", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Second edition, Beck, 2008, p. 702; and A. Pellet, "Applicable Law", in A. Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, volume II, Oxford University Press, 2002, p. 1053.

19 deGuzman, see *ibid*.

20 In addition, article 1(2) of the Negotiated Agreement between the ICC and the UN recognises the Secretariat of the ASP, the text of which was approved by the ASP and concluded by the ICC President, thereby indicating their acceptance of the ASP Secretariat as part of the ICC. ICC and UN, Negotiated Relationship Agreement between the International Criminal Court and the United Nations, 22 July 2004. See also, ICC President, Memorandum of Understanding between the International Criminal Court and the Commonwealth on Cooperation, 13 July 2011, article 2, where the ASP Secretariat is considered as an integral part of the Court.

21 Rome Statute, see *supra* note 17. Part I Establishment of the Court: articles 2 and 3, Part II Jurisdiction, Admissibility and Applicable Law: article 9, Part IV Composition and Administration of the Court: articles 36, 42, 43, 46, 49, 51, Part VII Penalties: article 79, Part IX International Cooperation and Judicial Assistance: article 87, Part XII Financing: articles 113, 114, 115, 116, Part XII Final Clauses: articles 119, 121, 122, 123, Rome Statute of the International Criminal Court.

Preamble of any treaty can be valued only as a contextual device,[22] more recent debate, involving commentators who were involved in the drafting process, has considered that the preamble of the ICC Statute forms an integral component of the Statute, albeit of secondary value to the operative text.[23]

Where this "nuclear family" of sources is insufficient, the Court is required to cast its net outside the internal law of the Court, to consider applicable external treaties, principles and rules of international law. Defined as an "imperfect tissue" of sources,[24] the wording of article 21, paragraph 1(b) has been considered as an attempt by the drafters to limit the relevance of external treaties to the Court, including international human rights treaties.[25] Within this secondary tier of sources, this chapter seeks to adopt the subsequent practice in the application of the Statute, as defined in the VCLT, to demonstrate how the Court and other Parties have interpreted the provisions of the Statute. There is little reason to think that the VCLT would not be considered an applicable treaty in this context. The imperfect and ambiguous wording of article 21, along with the fact that the ICC Statute is a constitutive document of an international organisation, would indicate that the "internal dynamics" of the Court will serve to elucidate and determine the outcome of any consideration of the appropriateness of international treaties.[26] The final interpretive tier open to the Court allows resort to the national laws and principles of national laws[27] although this will not be considered in the contribution.

In applying the system of sources, the Court is also required to ensure that its interpretation is consistent at all times with internationally

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22 United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, article 31(2).

23 O. Triffterer and M. Bergsmo, "Preamble", in O. Triffterer and K. Ambos (eds.), *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article*, Second edition, Beck, 2008; see also M. Handler, B. Leiter and C.E. Handler, "A reconsideration of the relevance and materiality of the preamble in constitutional interpretation", in *Cardoza Law Review*, 1990–1991, Volume 12.

24 A. Pellet, "Applicable Law", in Cassese *et al.* (eds.), see *supra* note 18.

25 deGuzman, see *supra* note 18, Pellet, see *supra* note 18.

26 J. Klabbers, *An Introduction to International Institutional Law*, Second edition, Cambridge University Press, 2009, p. 59.

27 Rome Statute, *supra* note 17, article 21(1).

recognised human rights. Some commentators have used this to argue in support of positive complementarity.[28]

4.3. General Provisions to Conclude General Co-operation Agreements

The Statute establishes several opportunities for Court Organs to conclude co-operation or assistance agreements with external parties. These avenues have been used by the Court as the basis for its capacity building activities, ostensibly outsourcing the direct provision of capacity building activities to external parties, while maintaining oversight or providing validation to the programmes of those it concludes agreements with.

4.3.1. Relationship of the Court with the United Nations

Upon its entry into force, the Court was required to conclude a negotiated agreement with the United Nations[29] that was to be approved by the ASP and concluded by the President of the Court. Included in the Statute once it was clear that the Court would not be established as one of the UN's judicial branches, the provision has also established the Court' practice of having the President conclude all general co-operation agreements on behalf of the Court. Article 2 is silent however, on the content or scope of the agreement, leaving it to the negotiation skills of those involved in the process. The status of the Negotiated Agreement is not clarified in the ICC Statute. However, since the ICC and the UN both possess international legal personalities,[30] because the Statute requires that the Agreement be concluded, and because the Agreement was approved by the ASP, it can be considered as part of the internal law of the Court, as outlined in article 21(1).

The Negotiated Agreement establishes a general provision for co-operation, allowing the UN, its programmes, funds or offices to agree to Court requests for other forms of co-operation and assistance not included

[28] C.K. Hall, "Positive Complementarity in Action" in M.M. El Zeidy and C. Stahn (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, Volume II, Cambridge University Press, 2011, pp. 1014–1051.

[29] Rome Statute, *supra* note 17, article 2; and UN General Assembly Resolution 58/79, 9 December 2003.

[30] Rome Statute, *supra* note 17, articles 1 and 4.

within the Negotiated Agreement, where it is compatible with the Charter and the ICC Statute provisions.[31] It is clear that any additional agreement or co-operation is optional, and based upon the consent or approval of the UN office, fund or programme, following a specific request by the ICC. It also requires that the request comply with the provisions of both the UN Charter and the ICC Statute, rather than by interpretation of their respective mandates. The UN currently provides legal technical assistance on themes relevant to the substantive and procedural requirements of the ICC Statute, in areas involving child soldiers, crime prevention and criminal justice reform, human rights, and institutional development.[32]

4.3.2. Request for Co-operation: General Provisions

Article 87 establishes the general grounds for co-operation requests, and authorises the Court to conclude co-operation and assistance agreements with intergovernmental organisations that are consistent with its mandate or competence.[33] Unlike article 2, it requires negotiation upon the initiative of the Court, and the approval of the reciprocating organisation. It would be concluded subsequently by two distinct international organisations based on their legal personality and competences, without the oversight or approval of the membership body of the Court, but arguably would enable the Court to assign international responsibility to those international organisations who failed to comply with the provisions of their agreement.[34] The article distinguishes between the provision of material assistance – documents, materials and information – and "other forms of cooperation and assistance" which it leaves open for negotiation between the two parties, so long as it is in accordance with its competence

[31] Negotiated Relationship Agreement between the International Criminal Court and the United Nations, article 15(2).

[32] Office for Drug-Control and Crime Prevention: Centre for International Crime Prevention (ODCCP/CICP), Office of the High Commissioner for Human Rights (OHCHR), Office of Legal Affairs Codification Division (OLA/COD), United Nations Children's Fund (UNICEF), Office for the Coordination of Humanitarian Affairs (OCHA).

[33] Rome Statute, *supra* note 17, article 87(6).

[34] C. Kress and K. Prost, "Article 87: Requests for cooperation: general provisions" in Triffterer (ed.), see *supra* note 18, p. 1526.

or mandate.[35] The vague wording of the provision gives the Court broader leeway to interpret its scope.

In practice, the Court has concluded a co-operation agreement[36] with the Secretary General of the Commonwealth Secretariat (ComSec)[37] establishing an explicit commitment to conduct capacity building activities with Commonwealth members, in article 8. The provision requires that the ICC and Commonwealth co-operate in order to develop training and assistance programmes for judges, prosecutors, officials and counsel in work related to the Court, and to foster the professionalism required of national actors for the effective functioning of the complementarity regime.

The ICC-ComSec Agreement directly confronts the human and legal capacities of Commonwealth member States who have yet to carry out either their obligations to co-operate with the Court, or to introduce definitions of core international crimes into their domestic laws. The preamble recognises the importance of strengthening the capacities of national judiciaries and judicial processes, to investigate and prosecute serious crimes, and also recognises that States bear the primary responsibility to investigate and prosecute such crimes.[38] However, the press statement of the ICC elaborates on the scope of the assistance

[35] This requires the Court to assess if the other international organisation would be acting *ultra vires* by entering into the agreement, based on the Court's own evaluation of the mandate or competence of the other organisation's mandate, even though this decision should be based on the internal law of the partner organisation, in keeping with its international legal personality.

[36] The press release of the ICC refers to the signing of a co-operation agreement between the ICC and the Commonwealth Secretariat. The titles of the remarks given by both the ICC President and the Commonwealth Secretariat General Secretary refer to a Memorandum of Understanding between the two organisations, while the content of the remarks refer to a co-operation agreement. Without further clarification from the Court or ComSec, it will be referred to as a co-operation agreement. ICC Press Office, "ICC signs cooperation agreement with Commonwealth to jointly support States implementing international criminal law", 13 July 2011.

[37] *Ibid*.

[38] ICC President, "Memorandum of Understanding between the International Criminal Court and the Commonwealth on Cooperation".

measure to include advice and assistance on legislative drafting, which would address legal as well as human capacity issues.[39]

In addition, the ComSec Agreement establishes a general commitment to promote and disseminate the principles and values enshrined in the Statute.[40] Variations of this "promotional" clause can be found in the Framework Cooperation Arrangement with the Organization of American States (OAS)[41] the Memorandum of Understanding between the ICC and the Asian-African Legal Consultative Organisation[42] and the Agreement between the ICC and the European Union (EU) on Cooperation and Assistance.[43] The promotion of principles and values of the ICC Statute, on international criminal law or international humanitarian law typically occurs during trainings, conferences, and meetings, as part of general outreach and diplomacy, but can also be understood as one of the first efforts in targeting capacity deficits.

The EU Agreement on Cooperation and Assistance includes a direct reference to the EU's support for capacity building activities. In addition to the general commitment to promote the values of the Statute, the EU Agreement establishes EU support for the development of training and assistance for judges, prosecutors, officials and counsel, in work related to the Court.[44] However, it does not do so in collaboration with the Court, but separately through a range of global or bilateral donor mechanisms; through its direct sponsorship of the Visiting Scholar and Internship programmes of the ICC; and through the ICC's Legal Tools Project.

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39 ICC Press Office, "ICC signs cooperation agreement with Commonwealth to jointly support States implementing international criminal law", 13 July 2011.

40 Inserting a special focus of such promotion to the norms of international humanitarian law.

41 ICC President, "Exchange of Letters between the International Criminal Court and the General Secretariat of the Organization of American State for the establishment of a Framework Cooperation Agreement", 18 April 2011, article 1(i) and (ii).

42 ICC President, "Memorandum of Understanding between the International Criminal Court and the Asian-African Legal Consultative Organization", 5 February 2008, article 2.2.

43 ICC President, "Agreement between the International Criminal Court and the European Union on Cooperation and Assistance", 1 May 2006, article 6.

44 *Ibid.*, article 16.

4.3.3. Other Forms of Co-operation under Part IX of the Statute

Article 93(10), entitles States to request assistance or co-operation from the ICC when they are conducting investigations into or trials on crimes involving conduct falling under the ICC's definition of crime, or a serious crime at the national level.[45] Formed as part a broad provision that elaborates on the "other forms of assistance" to be provided by States to the Court, it is the only statutory provision that reverses the direction of the requesting and requested entities. Whereas the ICC's cooperation regime focuses primarily on the obligation of States towards the Court in the functioning of the Court's duties article 93(10) is the only provision that requires the Court to consider States' requests for assistance in their own endeavours to investigate and prosecute the perpetrators of crimes under the ICC statute, albeit "discretionary"[46] in nature. While the Rules of the Court indicate that the request should be submitted to Registrar, they are required to transmit the request to the Office of the Prosecutor, for the parts of the request that relate to the pre-trial stage, or to the relevant Chamber, in circumstances where the request relates to proceedings already underway.[47]

The scope of reverse co-operation or assistance to be provided is not determined by the provision, although the indicated forms of assistance refer to the transmission of material assistance,[48] including documents, evidence, transcripts *et cetera*, as well as the questioning of persons detained by the Court. [49] The remaining sub paragraphs concern the safety and security of witnesses, victims, experts and other bodies or individuals who have provided information that forms the subject of any request, as well as the permissions that may be required before any such material is released to the requesting State. As the provision is "in-exhaustive"[50] in its scope, it clearly provides considerable interpretive

[45] Rome Statute, *supra* note 17, article 93(10).

[46] Kress and Prost, see *supra* note 34, p. 1586.

[47] Rules of Procedure and Evidence, 3 September 2002, rule 194(2).

[48] Rome Statute, *supra* note 17, article 93(10)(b)(i)(a).

[49] *Ibid.*, article 93(10)(b)(i)(b).

[50] F. Gioia, "Reverse Cooperation and the architecture of the Rome Statute: a vital part of the relationship between States and the ICC", in M.C. Malaguti (ed.), *ICC and International Cooperation in Light of the Rome Statute: Proceedings of the Workshop Held in Lecce on October 21–22, 2005*, Quaderni/Università degli studi di Lecce, Isti-

discretion on behalf of the Court in deciding whether to provide assistance, and also to States in formulating their request to the Court.

While the scope of article 93(10) can clearly support a request for capacity building by a State, the provision entitles them to do so only where they have initiated an investigation or trial in respect of conduct that is prohibited under the Statute. Should the Prosecutor or Chambers be thus minded, a practice could emerge whereby national jurisdictions open investigations or prosecutions into ICC crimes while simultaneously requesting the Court to provide some degree of assistance, be it capacity building or otherwise.

Since it became operational, the Office of the Prosecutor has considered that it can actively assist national investigations and prosecutions through information exchange as envisaged under article 93(10),[51] including the sharing of databases of non-confidential materials or crime patterns with national judiciaries, following their formal request and the Prosecutor's determination that credible protection systems for judges and witnesses exist.[52] Indeed, much of the concept of positive complementarity involves providing support or assistance to States in

tuto superiore ISUFI, Euromediterranean School of Law and Politics, Argo, 2007, p. 7; and O. Triffterer (ed.), see *supra* note 18.

51 ICC Office of the Prosecutor, *Informal Expert Paper: The Principle of Complementarity in Practice*, 2003.

52 To date, the only public request for article 93(10) assistance was made by the government of Kenya and was rejected by the Pre Trial Chambers. The OTP also made reasoned arguments for the rejection of this request, based on procedural flaws and evaluations on the integrity of the request. Government of the Republic of Kenya, "Request for Assistance on behalf of the Government of the Republic of Kenya pursuant to Article 93(10) and Rule 194", International Criminal Court, 21 April 2011; Government of the Republic of Kenya, "Application on behalf of the Government of Kenya for leave to reply to the Prosecutor's Response of 10 May 2011 and Corrigendum of 11 May 2011 to "Request for Assistance on behalf of the Government of Republic of Kenya pursuant to Article 93(10) and Rule 194"", 1 May 2011; Government of the Republic of Kenya, "Request on behalf of the Goverment of Kenya in respect of its Application for Leave to Reply to the Prosecutor's Response of 10 May 2011 and Corrigendum of 11 May 2011 to "Request for Assistance on behalf of the Government of Republic of Kenya pursuant to Article 93(10) and Rule 194"", 31 May 2011; ICC Pre Trial Chamber II, "Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence", no. ICC-01/09.

their efforts to fulfil their Rome Statute responsibilities, although this is not organised on the basis of article 93(10) requests.

4.4. Powers of the Prosecutor to Form Agreements with respect to Investigations

Unlike the other Organs of the Court, the Office of the Prosecutor (OTP) is provided with several opportunities to engage directly with States Parties. This could provide potential opportunities for exchanges of skills but also put the OTP in a privileged position of understanding the capacity deficiencies of States with respect to the ICC responsibilities and obligations more fully than many other international actors.

The first occasion when the OTP can engage with States over their national responses towards the conduct of ICC crimes is at the commencement of preliminary examination.[53] The Prosecutor has sweeping authority to seek additional information from a breadth of actors, to facilitate analysis of the seriousness of the information at the Office's disposal. Given the preliminary status of the examination, it can be expected that additional information would be required on the alleged conduct, any identified suspects as well as national judicial efforts to address the alleged violations of the complaint(s). Through the Jurisdiction, Cooperation and Complementarity Division of the OTP, the Prosecutor is able to request information from all relevant States as well as international organisations, NGOs and reliable sources. It can be expected that a wealth of information and knowledge pertaining to the capacity of State institutions can begin to accrue from this point onwards, much of which may be used by the OTP in their considerations of the State's ability and willingness to execute its responsibilities.

The OTP also has coercive compliance powers over States' national judicial efforts following the deferral of a situation or case from the jurisdiction of the ICC to the national judicial services.[54] When this

[53] Under the Statute this can occur following the exercise of the Prosecutor's *proprio motu* powers, under article 15(2), or through the powers of the Prosecutor to initiate an investigation, under article 53(1). Rule 104(2) of the Rules and Procedure extends the powers of article 15(2) to the initiation of all investigations under article 53(1)–(2). See also M Bergsmo and J. Pejic, "Article 15: Prosecutor" in Triffterer and Ambos (eds.), see *supra* note 23, p. 586.

[54] Rome Statute, *supra* note 17, articles 18(3) and 19(11).

occurs, the Office is required to review and monitor the State's investigation[55] and can seek to refer the case back to the Pre Trial Chambers if the State in question is considered to be unwilling or unable to continue with the investigation in question.[56] After a positive outcome in the first review, the Prosecutor can also request the State to provide periodic progress reports on its investigations and subsequent prosecutions, and the State is required to respond without undue delay.[57]

While these provisions provide the OTP with a choice of coercive compliance mechanisms, and provide the opportunity to receive information from States regarding the capacities of their national judicial services, they do not entitle the Prosecutor to take any action other than coercive measures. Article 54(3)(c) and (d) on the duties and powers of the Prosecutor with respect to investigations, however, entitles the Prosecutor to conclude co-operation arrangements and agreements with international organisations, in accordance with their respective competence and/or mandates,[58] in order to facilitate the conduct of the Prosecutor's investigations. This could arguably be used to respond to any noted capacity inefficiencies or deficiencies of States relevant to any ICC investigation, in order to enable the State to better execute its responsibilities domestically but also, more significantly, in regard to the Court's own investigation. This supplements the general obligation to co-operate in Part IX of the Statute, by providing the Prosecutor with its own independent power to form co-operation or assistance agreements for the execution of its function.

4.4.1. Subsequent Practice under Provisions to Form Partnerships for the Investigation and Prosecution of ICC Cases

Strengthening the capacity of national legal services to adjudicate upon ICC crimes has been a recurring theme in the first nine years of the work

[55] "The Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation", *ibid.*, article 18(3).

[56] ICC Assembly of States Parties, Rules of Procedure and Evidence, rule 56(1).

[57] Rome Statute, *supra* note 17, article 18(5).

[58] *Ibid.*, article 54(3).

of the Office of the Prosecutor. The ICC's assessment of and response to national (in)capacity has moved beyond legal evaluations of a State's ability and willingness to prosecute carried out by the OTP and the Chambers, to include pre-emptive responses towards any States ability to conduct its responsibilities, often referred to as an approach of "positive complementarity". This approach has been based upon evaluation of the independence and general powers of the Prosecutor, the complementarity principle, the powers of the Prosecutor to form co-operation agreements in the context of investigations, and the notion of 'reverse' co-operation established in article 93(10).[59]

While they have limited legal value, the early Expert Papers of the Office of the Prosecutor envisaged direct engagement with member States by the Office of the Prosecutor, indicating that the Prosecutor could actively assist national investigations and prosecutions through information exchange as envisaged under article 93(10), and provide technical advice on all aspects under the Prosecutor's mandate as well as training for the purpose of creating a network of States able to conduct investigations and prosecutions.[60] The direct provision of these compliance measures reflected an early view of the complementarity regime of the Court as "a mechanism to encourage and facilitate compliance of States with their primary responsibility to investigate and prosecute core crimes".[61]

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[59] For evaluations on the OTP approach to Complementarity, see W.W. Burke-White, "Implementing a Policy of Positive Complementarity in the Rome System of Justice", in *Criminal Law Forum*, 2008, vol. 19, pp. 59–85; W.W. Burke-White, "Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of Justice", SSRN eLibrary; M.M. El Zeidy, "Principle of Complementarity: A New Machinery to Implement International Criminal Law", in *Michigan Journal of International Law*, 2001, vol. 23, p. 869; Gioia, see *supra* note 50; Hall, see *supra* note 28; C.K. Hall, "Developing and implementing an effective positive complementarity strategy", in C. Stahn and G. Sluiter, *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff, 2009, vol. 48; J.K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, Oxford University Press, 2008, International Courts and Tribunal Series; J.K. Kleffner and G.Kor, *Complementary Views on Complemenarity: proceedings of the International Roundtable on the Complementary Nature of the International Criminal Court, Amsterdam, 25/26 June 2004*, TMC Asser Press, 2006; and C. Stahn, "Complementarity: A Tale of Two Notions", in *Criminal Law Forum*, 2008, vol. 19, pp. 87–113.

[60] ICC Office of the Prosecutor, see *supra* note 51.

[61] *Ibid.*, para. 3.

By 2006, the direct provision of capacity building was downplayed in favour of the collaborative dimensions of positive complementarity, with the OTP encouraging genuine national proceedings, relying on national networks and participating in a system of international co-operation.[62] By 2009, the rejection of direct provision of capacity building was made explicit by the OTP, which clarified that it would not be involved directly in the provision of capacity building or technical assistance but would instead encourage genuine national proceedings and rely on its networks of co-operation.[63]

The OTP has undertaken a range of activities to encourage or promote genuine national proceedings, from various diplomatic briefings and reports to international organisations to specific bilateral meetings and programmes established with States. The OTP Policy also outlined the Office's willingness to support, develop or enhance national capacity to conduct investigations or prosecution through interpretation of article 93(10), which establishes the opportunity for the Court to provide assistance to States by offering to share information collected by the Office, databases of non-confidential materials or crime patterns with national judiciaries, following their formal request and the Prosecutor's determination that credible protection systems for judges and witnesses exist.[64]

The Prosecutor has used his powers to establish co-operation agreements with States and international organisations to establish co-operation programmes with international organisations as well as other entities, three of which the Office refer to as co-operation networks: the Legal Tools Project[65] that forms the focus of this anthology; the Law Enforcement Network, which invites officials, experts and lawyers from

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62 Statement of the Prosecutor of the International Criminal Court, Luis Moreno-Ocampo, *Seventh Diplomatic Briefing*, 29 June 2006; ICC Office of the Prosecutor, *Report on the activities performed during the first three years (June 2003 – June 2006)*, 12 September 2006; ICC Office of the Prosecutor, *Report on Prosecutorial Strategy*, 14 September 2006.

63 International Criminal Court, *Prosecutorial Strategy 2009–2012*, 1 February 2010, para. 5.

64 See *supra* note 52.

65 ICC Office of the Prosecutor, "The Office's Proactive Approach to Cooperation with External Actor", in *Report on the activities performed during the first three years (June 2003 – June 2006)*, at 32.

situation countries to participate in OTP's investigative and prosecutorial activities*;* and Justice Rapid Response, an inter-governmental initiative to provide rapid deployment of investigative teams to secure evidence during or immediately after hostilities are taking place, where conduct may amount to crimes within the ICC threshold.[66]

The rationale underpinning this collaborative approach is twofold: first, by strengthening effective functioning of the national systems, those States will be better equipped to support the Court's own work; second, stronger State ability to investigate and prosecute will contribute towards a stronger international system, thereby reducing reliance upon the ICC. Positive complementarity thus closely mirrors the managerial compliance models of other international organisations.

Of course, the OTP retains its hard "coercive" powers to investigate violations that may amount to ICC crimes[67] on territories that are connected to the conduct in question, and it does so with the ultimate purpose of determining whether the responsible States are taking sufficient steps to carry out national investigations and prosecutions over similar conduct.[68] The OTP appears to be adopting a dual approach to non-compliance of States: persisting with its core mandate to investigate and prosecute, while also attempting to adopt a "problem-solving approach" in-keeping with current analyses of rule conformity, which have stressed that compliance measures yield greater effectiveness where coercive and managerial mechanisms are combined.

4.5. Legal Status of ASP Reports and Resolutions

The (ASP) has engaged with the Court's efforts to provide or facilitate capacity building and asserted its view that the Court should limit its activities to what it defines as its "core judicial function". The Statute

[66] ICC Office of the Prosecutor, *Prosecutorial Strategy 2009–2012*; ICC Assembly of States Parties, Resolution, Cooperation, 26 November 2009, ICC/ASP/8/Res.2. This has also been used to conclude agreements with Interpol and the World Bank. See ICC Office of the Prosecutor and Interpol, *Co-operation Agreement between the Office of the Prosecutor of the ICC and INTERPOL*, 22 December 2004.

[67] Triggered by UN Security Council referrals, referrals by States, as well as through his *proprio motu* powers.

[68] Perhaps more than other international courts, the ICC can pierce through the veneer of State sovereignty and the immunities of State leaders, raising the stakes for compliance assessments by any State.

establishes the ASP as bearing responsibility for the administrative, non-judicial management of the Court, including administrative management oversight of the Court, appointment and removal of Judges, the Registrar and Prosecutors, approval of the budget, resolution of non-judicial disputes among States and consideration of non-cooperation by States.[69] It also bears responsibility for the adoption of amendments to the Statue following receipt of proposals by States Parties, although the ASP cannot of itself propose amendments.[70] The ASP also considers itself responsible for the adoption of normative texts.[71] The Statute does not empower the ASP to conclude agreements on the interpretation of the Statute, nor on the application of its provisions, nor does article 21 refer to ASP outputs as sources of law or as interpretive aids for the purpose of the exercise of the Court's functions.

The ASP is supported by its executive body, the ASP Bureau, and is entitled to form subsidiary bodies in order to better inform itself of key policy and substantive matters of interest to States.[72] The ASP Bureau is complemented by a Secretariat that provides independent servicing, administration and technical assistance,[73] although in practice the Assembly has delegated this power to the ASP Bureau.[74]

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69 Rome Statute, *supra* note 17, article 112(2)(a) to (g), including Non-States Parties who have signed a jurisdiction agreement with the Court, article 87(5) and (7) and article 121(2)(f).

70 Rome Statute, *supra* note 17, article 121.

71 Assembly of States Parties, see http://www.icc-cpi.int/Menus/ASP/Assembly/, last accessed on 12 November 2011.

72 Rome Statute, *supra* note 17, articles 121(2)(c) and 121(3). The Bureau consists of 21 members, including one President and two Vice Presidents, who are elected to serve terms of three years in duration.

73 ASP2/Res.3, 12 September 2003.

74 This should be seen in light of its annual resolution inviting the Bureau to create those mechanisms it considers appropriate. The first request to establish working groups in support of the Bureau's mandate was made in ASP/2/Res.7, 2003. A second formula, authorising the creation of subsidiary bodies arose in ICC-ASP/3/Res.8, while the final formula that is now repeated in subsequent annual resolutions on "Strengthening the International Criminal Court and the Assembly of States Parties", "[w]elcomes the work by the Bureau and its two informal working groups and invites the Bureau to create such mechanisms as it considers appropriate and to report back to the Assembly of States Parties on the result of their work", ICC-ASP/4/Res.8. The delegation of powers from the ASP to the ASP Bureau is consistent with international practice, where the subsidiary bodies of an organ can undertake powers delegated to them

Notwithstanding their powers to approve the budget or to adopt Statutory amendments, ASP decisions, Reports and Resolutions can be considered as important expressions of the opinion of the membership body of the ICC, or consensus amongst States Parties, which may influence the activities of the Court. This is of particular significance where additional budgetary resources may be requested by the Court in order to pay for the Court's engagement in capacity building activities established under its international agreements. While financial considerations of international tribunals have typically been considered as an 'administrative consequence' of its activities, the allocation of funds has become an important factor in policy-making,[75] particularly with the escalating costs involved in running international criminal tribunals, which have caused States and commentators alike to engage critically with the role, function and evaluation of international criminal justice institutions.

4.5.1. Reports and Recommendations of the ASP

The ASP has taken an active position in seeking to influence and determine the scope and application of capacity building by the Court, through its Secretariat, Bureau and subsidiary bodies, as well as through the Resolutions that come out of its annual Assembly meetings.[76] The

from the constituent organ, so long as the subsidiary body does not increase the obligations of the international organisation or its Members. See Schermers and Blokker, para. 224, who ask if powers can be delegated to Member States to be performed within its territories. This can be explored subsequently in the context of the ASP Bureau recommendations for standard setting to be provided between States.

[75] H.G. Schermers and N.M. Blokker, *International Institutional Law*, Fourth edition, Martinus Nijhoff Publishers, 2003, para. 925; T. Ingadottir (ed.), *The International Criminal Court: recommendations on policy and practice: financing, victims, judges, and immunities*, Transnational, 2003; T. Ingadottir, "Financial Challenges and their Possible Effects on Proceedings", in *Journal of International Criminal Justice*, 2006, vol. 4, pp. 294–299; and E.A. Posner and J.C. Yoo, "Judicial Independence in International Tribunals", in *California Law Review*, 2005, vol. 93, pp. 1–75.

[76] ICC Assembly of States Parties, Resolution, Complementarity, 8 June 2010, RC/Res.1; ICC Assembly of States Parties, Resolution, Strengthening the International Criminal Court and the Assembly of States Parties, Eight session, 26 November 2009, ICC/ASP/8/Res.3; ICC Assembly of States Parties, Cooperation, ICC/ASP/8/Res.2; ICC Assembly of States Parties, *Report of the Bureau on Stocktaking: Taking stock of the principle of complementarity: bridging the impunity gap*, March 18, 2010, ICC-ASP/8/51, ICC Assembly of States Parties, resumed Eighth

Stocktaking Exercise of the Review Conference provided the stimulus for the ASP to address capacity building by the ICC. Two Focal Points were appointed to the Bureau, which co-ordinated the stocktaking exercise on complementarity, working through the ASP Bureau Hague Working Group. They produced a report titled *Taking stock of the principle of complementarity: bridging the gap*, compiled an information pack of key capacity building projects for delegates,[77] and convened a formal stocktaking event on complementarity as well as a side event. At the conclusion of the Review Conference, Resolution 1 on complementarity requested the ASP Secretariat to facilitate exchange of information between actors in pursuit of strengthening domestic jurisdictions, and called upon the Court to submit a report in that regard to the Assembly.[78]

The Bureau's Report (hereinafter referred to as the Report) engages with the Prosecutor's definition of positive complementarity, which it broadly interprets as the strengthening of national jurisdictions. However, the report sets out its own interpretation of capacity building and tries to limit the Court's role to that of an indirect actor. It also reduces the prominence of capacity building by describing it as a voluntary mechanism between States rather than as a component of the Court's complementarity regime.

In accepting positive complementarity as an element of the complementarity principle, the Report justifies positive complementarity as a process to aid in the reduction of vertical and horizontal impunity gaps within the ICC system of justice[79] and equates the term with capacity building:

> [P]ositive complementarity refers to all activities/actions whereby national jurisdictions are strengthened and enabled

Session; ICC Assembly of States Parties, Resolution, Review Conference of the International Criminal Court, 25 March 2010, ICC/ASP/8/Res.9

77 ASP Bureau Focal Points on Stocktaking Complementarity, *Focal Points' compilation of examples of projects aimed at strengthening domestic jurisdictions to deal with Rome Statute Crimes*, Review Conference of the Rome Statute, 30 May 2010.

78 ICC Assembly of States Parties, Resolution, Complementarity, see *supra* note 76.

79 Here it defines horizontal gaps as impunity that may emerge *between* those situations investigated by the Court and those that are not, while vertical gaps occur *within* a situation, between those who are brought before the Court and those perpetrators who are not, ICC Assembly of States Parties, *Report of the Bureau on Stocktaking: Taking stock of the principle of complementarity: bridging the impunity gap*, para 14, see *supra* note 76.

> to conduct genuine national investigations and trials of crimes included in the Statute.[80]

The Bureau follows contemporary dimensions of capacity building, requesting States to address the human capacity of State institutions by targeting the skills and knowledge of police, investigators, prosecutors, judges and defence counsel; the organisational capacity by facilitating the development of witness and victim protection schemes, forensic programmes, and the construction and sustainable operation of courthouses and prison facilities and institutional/legal capacity by providing legislative assistance to States which have yet to enact legislation incorporating the Rome Statute into domestic legislation.[81]

The Report identifies four scenarios in which it considers that capacity building could occur. They can be loosely organised into preventative, catalytic and responsive scenarios.

4.5.1.1. Preventative Scenarios

This refers to situations in which no crimes under the jurisdiction of the Court have been committed. Most States Parties can expect to fall into this category, although they are required to be ready and able to conduct their responsibilities to exercise jurisdiction as well as their obligations to co-operate with the Court and combat illegal activities that are linked to the commission of ICC crimes.[82]

4.5.1.2. Catalytic Scenarios

This includes situations in which crimes under the jurisdiction of the Court may have been committed, including in States under preliminary examination by the ICC, where violence or conflict is or has been experienced and where no decision has been made to initiate an investigation. Here, capacity building can be a catalyst for domestic proceedings as well as ready all relevant States to provide the co-operation required for investigations either at international or national fora.[83]

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80 *Ibid.*, para. 4.
81 *Ibid.*, para. 17.
82 *Ibid.*, paras. 20–21.
83 *Ibid.*, paras. 22–23.

4.5.1.3. Responsive Scenarios

The Report identifies two scenarios that can be considered as responsive to the Courts exercise of jurisdiction, one of which involves the active exercise of jurisdiction by the Court, while in the other the Court has already concluded its investigations and prosecutions. In the first scenario, where the Court is investigating and prosecuting crimes under its jurisdiction, there may be several areas where capacity building will be beneficial both to the Court's own operations, for example to support arrest and surrender mechanisms, witness and victim participation and other co-operation mechanisms, but also to support national systems in carrying out their own domestic proceedings.[84] In the second scenario, where the Court has concluded investigations and prosecutions of those most responsible, capacity building can be used to prevent vertical impunity within the State, by supporting any on-going judicial activities in the territorial jurisdictions.[85]

4.5.2. Limitations to the Direct Involvement of the Court in Capacity Building Programmes

Unlike the approaches of the Court under the auspices of the article 87 agreements, or those of the Prosecutor through positive complementarity and article 54 agreements, the Report confronts the provision of capacity building by the Court and seeks to limit its direct involvement to that of a catalyst, stressing the narrow mandate of the Court as a judicial body, rather than as a development organisation or implementation agency. The Report also warns against the activities of the OTP in this regard as their capacity building efforts place a financial and resource burden on the function of the Office in particular and the Court in general. In the view of the ASP Bureau, the Court's capacity building work should be limited to its core judicial mandate, as established in its statutory documents. Capacity building should only occur where it directly supports that limited core judicial mandate, such as in the exchange of information between authorities and with the involvement of national law enforcement experts with the Prosecutor's investigations.[86]

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[84] *Ibid.*, paras. 24–25.

[85] *Ibid.*, paras. 26–27.

[86] *Ibid.*, para. 42–45.

4.5.3. Role of States and the ASP in the Provision of Capacity Building

The Report stresses the role of inter-State co-operation, which is not regulated or specified in the ICC Statute, although co-operation practices between States are governed by bilateral State co-operation agreements.[87] This proposal is not accompanied by any serious identification or analysis of the costs and benefits of such an approach, and it is doubtful whether an informal inter-State approach would ensure greater compliance with Statutory requirements or enable stronger national jurisdictions.[88]

Finally, the Report suggests that the Secretariat should establish a designated function to facilitate exchange of information between the Court, States, international organisations and civil society organisations with the purpose of strengthening national jurisdictions. Taking this up in the Review Conference Resolution on Complementarity, the Secretariat has responded by allocating a legal officer as a Focal Point on Complementarity,[89] and by creating an extranet website intended to provide an information base on complementarity, which includes information on key actors and their activities, and also facilitates contact between donors, recipient States and providers to strengthen national capacity.[90] Although the activities of the Secretariat Focal Point are till very much a work in progress, they will serve only as a connecting nodal point and will not advance capacity building. This is however, in keeping with the work of the UN Office of Legal Affairs, which also maintains a website of all technical assistance or capacity building programmes provided by UN agencies as well as more specialised bodies, such as the UN Counter Terrorism Committee.[91]

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87 *Ibid.*, para. 28–36.

88 *Ibid.*, para. 37–41.

89 Currently this is Gaile A. Ramouter (aspcomplementarity@icc-cpi.int).

90 ASP Secretariat Focal Point and extranet – ICC Press Office, ICC-ASP-20110802-PR707.

91 See E. Luck, "Tackling Terrorism", in D. Malone (ed.), *The UN Security Council: from the Cold War to the 21st century*, Lynne Rienner Publishers, 2004, pp. 96–100; E. Rosand, "Resolution 1373 and the Counter Terrorism Committee: The Security Council's Capacity Building", in G. Nesi (ed.), *International Cooperation in Counter-Terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism*, Ashgate, 2006.

4.6. Conclusions

In conclusion, the engagement of the Court in providing capacity building to national legal services can serve as a valuable mechanism to ensure that States are able to comply with their responsibilities to exercise jurisdiction over the commission of crimes included under the ICC Statute. Furthermore, as States Parties are obliged to co-operate with the Court in the exercise of its jurisdiction, the provision of support to States to facilitate their obligation serves to reinforce compliance with the ICC system and enhance the functioning of the Court. Whereas the Statute establishes a range of coercive compliance mechanisms, the brief review conducted here establishes that there are some options that can be interpreted as supporting managerial compliance mechanisms, such as article 93(10) requests for assistance or co-operation of the Court and provisions that enable the conclusion of co-operation agreements with international organisations, where it can be demonstrated that the international organisation is entitled to provide capacity building services, underpinned by the object and purpose of the Court as exhibited through complementarity. Finally, while the ASP has limited authority to check the functioning of the Court, it has expressed its general support for strengthening national jurisdictions as a method to reduce vertical and horizontal impunity gaps, and its preference that the Court not engage directly in such activities.

5

Legal Empowerment: Capacity Building in Core International Crimes Prosecutions through Technology Applications♣

Aleksandra Sidorenko*

5.1. Introduction

International tribunals have the capacity to prosecute the core international crimes of genocide, crimes against humanity and war crimes. But are other jurisdictions similarly equipped to conduct investigations of considerable complexity?[1] The subject of this chapter is the domestication of core international crimes in national jurisdictions through the development of local capacities, a process widely referred to as "positive complementarity".

By drawing on work done in the area of development studies, this chapter develops and argues for a legal empowerment approach to positive complementarity. In Section 5.2., it briefly describes the concept of positive complementarity. Section 5.3. introduces the concept of legal empowerment, as elaborated in the area of development studies, and applies it to positive complementarity. It explains why this concept is both

♣ The author would like to express her deep gratitude to Professor Morten Bergsmo for the original ideas and direction of this research and to Professor Cheah Wui Ling for her comments and assistance.

* **Aleksandra Sidorenko** holds a law degree from the American University of Central Asia (Kyrgyzstan), and master degrees in Information and Communication Technologies Law and in Public International Law (University of Oslo). She has working experience as a lawyer in the commercial law firm "Consultant" and as a research assistant in several development projects in Kyrgyzstan. While studying in Norway, she has done research in legal information retrieval and legal empowerment in international criminal justice. She currently works as a research assistant at the Norwegian Centre for Human Rights of the University of Oslo, co-ordinating its contribution to the population of the Core International Crimes Database and developing a research project in the area.

1 P. Murphy and L. Baddour, "International Criminal Law and Common Law Rules of Evidence", in K.A.A. Khan, C. Buisman, and C. Gosnell (eds.), *Principles of Evidence in International Criminal Justice*, Oxford University Press, 2010, p. 152.

relevant and important for the realization of positive complementarity and how it influences its implementation substantively and procedurally. Sections 5.4. and 5.5. describe the substantive aspects of adopting a legal empowerment approach to positive complementarity, and Section 5.6. sets out the procedural implications of adopting such a legal empowerment approach. The latter focuses, in particular, on the tools and methods that will enable the efficient realization of such an empowerment approach.

As conceptualised in this chapter, a legal empowerment approach to positive complementarity requires dialogue and exchange between three fields of study: (1) the legal empowerment initiative in development studies; (2) international criminal law; and (3) legal information management through technology application. Appreciating and maximizing the relationship between these three fields are essential to developing an empowerment approach to positive complementarity. This chapter explores this relationship by examining three clusters of research questions.

First, the concept of legal empowerment has generally focused on eradicating poverty, strengthening property rights, and encouraging grassroots initiatives. This concept has yet to be applied to international criminal justice. The question that this chapter addresses is whether legal empowerment may be applied to international criminal justice. If so, how may the ability of individual States to prosecute core international crimes be enhanced to contribute to the legal empowerment of society as a whole?

Second, internationalized criminal legal institutions have accumulated an abundance of legal practices and modes of legal reasoning. The need to transfer such capacity to national authorities has recently been articulated through the concept of *positive complementarity*. This chapter seeks to identify and explain a useful synergy between the concepts of legal empowerment and positive complementarity in the area of international criminal justice.

Last, but most importantly as we move forward, the challenge ahead is to efficiently introduce international criminal jurisprudence to different stakeholders working in national jurisdictions. This is achieved through technology applications that improve the retrieval, management, documentation and exchange of legal information between networks of relevant stakeholders. What types of technology applications may facili-

tate this process of legal empowerment in the field of international criminal justice?

In brief, I aim to show specialists and policymakers why the concept of legal empowerment and the domestication of international criminal justice are interrelated, and how technology may assist in advancing their common agendas. This chapter is committed to the idea that the investment of attention and resources in such a legal empowerment approach to positive complementarity will bring about beneficial, immediate and spill-over effects that are necessary for stabilization, development, responsibility, and better governance.

5.2. The Evolution of Positive Complementarity

The International Criminal Court (ICC) was founded on the principle of its complementarity to national jurisdictions. In brief, based on this principle, the ICC will only take on a case if national courts do not exercise their jurisdiction, or when their exercise does not meet the standards of willingness or ability as defined under article 17 of the Rome Statute.

It is a reality that the ICC will never be able to prosecute all those responsible for mass crimes. The ICC Office of the Prosecutor (OTP) needs to focus on situations of greatest concern and on people bearing the greatest responsibility. If States fail to address impunity on their own accord, horizontal impunity gaps may develop "between situations that are investigated by the ICC and situations that for legal and jurisdictional reasons are not" as well as vertical gaps "between those most responsible brought before the Court and other perpetrators who are not".[2]

The complementarity principle may be interpreted as a concession to the priority to national jurisdictions over the prosecution of core international crimes and a recognition of State sovereignty, conceived to encourage States to conduct genuine national proceedings. The Rome Statute conveys a message: "prosecute or risk international interference".[3] The reality is, however, that national institutions prove all too frequently to be unable or unwilling to address international crimes, while the capa-

[2] ICC Review Conference of the Rome Statute, *Report of the Bureau on Stocktaking: Complementarity. Taking stock of the principle of complementarity: bridging the impunity gap*, 2010, para. 14.

[3] J. Stigen, *The Relationship between the ICC and National Jurisdictions*, Martinus Nijhoff Publishers, 2008, p. 473.

bility of ICC, as a single institution, to prosecute core international crimes is severely limited.

The conception of positive complementarity sees the relationship between the ICC and national jurisdictions not as competitive in nature, but as proactive. In 2010, the Review Conference of the Rome Statute adopted a working definition of positive complementarity: "all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute".[4] The actual implementation of this concept has been and continues to be subject to research by a number of organizations.[5] It has nevertheless been acknowledged that more can be done to better bring together and co-ordinate different activities, to raise awareness of opportunities and to mainstream international criminal law throughout existing rule of law programs.[6]

Carsten Stahn and William Burke-White present positive complementarity as a relation between the ICC and national jurisdictions with respect to their shared responsibility to prosecute.[7] The ICC's legal regime alludes to, or provides for, this shared responsibility in several instances. For example, paragraph 6 of the preamble of the Rome Statute refers to the duty of domestic jurisdictions to prosecute international crimes, while article 54(1) states that the ICC Prosecutor shall "take appropriate measures to ensure effective investigation and prosecution of crimes within the jurisdiction of the Court". Thus, this obligation is shared between both the national authorities and the ICC. Article 54(3)(d) of the Rome Statute in turn allows the ICC Prosecutor "to enter into such ar-

4 ICC Review Conference of the Rome Statute, *Report of the Bureau on Stocktaking*, see *supra* note 8.

5 Among them are international research projects including the following: C. Stahn and L. van den Herik (eds.), *The ICC and Complementarity: from Theory to Practice*, Cambridge University Press, 2010; the DOMAC project, see Reykjavik University, "Impact of International Courts on Domestic Criminal Procedures in Mass Atrocity Cases", available at http://www.domac.is/, last accessed on 14 November 2011.

6 Judge Sang-Hyun Song, President of the International Criminal Court, *Review Conference: ICC President and Prosecutor participate in panels on complementarity and co-operation*, ICC Press Release, 3 June 2010.

7 C. Stahn, "Complementarity: a tale of two notions", in *Criminal Law Forum*, 2008, vol. 19.; W.W. Burke-White, "Proactive complementarity: The ICC and national courts in the Rome system of international justice", *Harvard International Law Journal*, 2008, vol. 49, no. 1.

rangements and agreements […] as may be necessary to facilitate cooperation by a state". This provision enables the Prosecutor to arrange a platform of dialogue between the ICC and States. The ICC-OTP has adopted a number of policy positions aimed at implementing positive complementarity.[8] The Assembly of States Parties has also adopted a resolution recognizing "the desirability for States to assist each other in strengthening domestic capacity to ensure that investigations and prosecutions of serious crimes of international concern can take place at the national level".[9] The primary responsibility for capacity-building alongside development and rule of law programmes lies with the international community. But there should be "a small dedicated unit or person should be tasked within the Court working on this issue and acting as a facilitator or broker".[10] The concept of positive complementarity has therefore been transformed from simply articulating a co-operative relationship between the ICC and a State, to becoming a new task on today's development agenda which involves States, international organizations and civil society.

5.3. A Legal Empowerment Approach to Positive Complementarity

The new agenda of positive complementarity may be criticized for advancing legal imperialism, that is, an effort by the international community to transpose an alien legal framework, such as legal notions, standards and sources, on weaker States without taking into account national contexts, and for the purpose of extracting a benefit or exercising power over another State. This may be seen as a form of legal imperialism, a term used by researchers to refer to "massive efforts to transplant Western institutions" through a "missionary drive".[11] The very concept of human

[8] ICC Office of the Prosecutor, *Informal expert paper: Principle of complementarity in practice*, 2003; ICC Office of the Prosecutor, *Prosecutorial Strategy 2009–2012*, 2 February 2010, p. 5

[9] Review Conference of the Rome Statute, *Resolution on "Complementarity"*, 8 June 2010, RC/Res.1, para 5.

[10] "Interview with Ambassador Kirsten Biering on positive complementarity", in *ICC Newsletter*, January 2010, ASP Special edition 10.

[11] J.Q. Whitman, "Western Legal Imperialism: Thinking About the Deep Historical Roots", in *Theoretical Inquiries in Law*, July 2009, vol. 10, no. 2.

rights has been criticized as a Western-centric interventionist policy.[12] The ICC has been equivocally accepted by some States. Notable criticism has been expressed by the United States. The U.S. Ambassador for War Crimes described the ICC as "an attempt to impose a justice mechanism" on the world.[13] The Rome Statute has been referred to as "a product of fuzzy-minded romanticism" and "not just naive, but dangerous" by the US senior state officials.[14]

While recognizing these concerns, I aim to show that building the domestic capacity of States to prosecute core international crimes may be understood in terms of legal empowerment, and the benefits of doing so outweighs any of the risks associated with undue external influence upon the States concerned. To elaborate on this concept of legal empowerment, this chapter draws on the work done by scholars in development studies. Adopting a legal empowerment approach to positive complementarity influences the way we understand the substantive goals of international criminal justice and procedurally implement it.

A legal empowerment approach is supported by the fundamental assumptions of international criminal law and the text of the Rome Statute. It should be recalled at this point that international criminal law reflects the fundamental reactions of society to the most serious crimes. The counterclaim to the legal imperialism critique is that the reach of international criminal justice reflects universal values held by every society, irrespective of particular cultural, historical, or other contexts. Differences, disagreement, and misconceptions may arise due to insufficient awareness, lack of information exchange, or an inability or lack of capacity to prosecute core international crimes. The creation of such a domestic capacity to prosecute core international crimes will go towards ameliorating such disagreement.

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[12] Y. Onuma, "Towards an intercivilizational approach to human rights", in W. Kull (ed.), *Debates on Issues of Our Common Future*, 2000, p. 47.

[13] P.-R. Prosper, Remarks at the Harvard Colloquium on International Affairs, 13 April 2002, on file with W.W. Burke-White, cited in W.W. Burke-White, "A community of courts: toward a system of international criminal law enforcement", in *Michigan Journal of International Law*, 2002, vol. 24, no. 1, p. 5.

[14] J.R. Bolton, Under-Secretary of State for Arms Control, quoted in N.A. Lewis, *U.S. is set to renounce its role in pact for world tribunal*, New York Times, 5 May 2002, cited in *ibid.*, p. 5.

Positive complementarity should ensure that the capacity building efforts supportive of domestic prosecutions attain the standard established in article 17 of the ICC Statute, which states that cases are inadmissible to the ICC "unless the State is […] unable genuinely to carry out investigation or prosecution". In other words, capacity building efforts should result in cases being inadmissible before the ICC, as States are deemed genuinely able and willing to carry out these activities. Article 17 may very well serve as the definitional threshold for legal imperialism, defining it as activity that far exceeds what is necessary to create an ability to investigate or to prosecute.

It should be noted how this proposal defines and explains the relationship between legal empowerment, legal imperialism, and positive complementarity. Positive complementarity, as earlier explained, addresses itself to states that are either *unwilling* or *unable* to prosecute. I suggest that concerns of legal imperialism are applicable to States that are *unwilling* to prosecute or adopt a particular concept. Instead, legal empowerment targets States that are *unable* to prosecute. Thus, the agenda of positive complementarity, insofar as it deals with the *inability* to prosecute, represents not legal imperialism, but legal empowerment. Lack of comprehensible legal information should not be an excuse to renounce prosecutorial and investigatory efforts, but it often explains the lack of national prosecutions and, even, interest in international criminal law.

In developing a legal empowerment approach to positive complementarity, this chapter draws on the work done by policy-makers and researchers working in the area of development studies. A legal empowerment approach to development does not advocate an entirely new vision of development. Rather, it emphasizes commonalities among existing development projects which have proved to have a positive impact. Most of all, it focuses on bottom-up approaches and the equipment of individuals or groups. Legal empowerment may go by other names, and it includes a variety of projects which in one way or another implement a human rights framework according to which individuals, groups and populations may assert their rights. Development literature has put forth several definitions of legal empowerment. For example, legal empowerment

is defined as "the process whereby disadvantaged groups acquire greater control over decisions and processes affecting their lives".[15]

Legal empowerment is also viewed as an alternative to adopting a "rule of law" strategy. While the latter's "top-down, state-centered approach concentrates on law reform and government institutions, particularly judiciaries", a legal empowerment approach is described as "a manifestation of community-driven and rights-based development, grounded in grassroots needs and activities but can translate community-level work into impact on national laws and institutions. It prioritizes civil society support because it is typically the best route to strengthening the legal capacities and power of the poor".[16]

The concept of legal empowerment gained momentum with the establishment of the UN Commission on Legal Empowerment of the Poor and is widely discussed in the context of poverty eradication. The commission envisions a route to development that includes an estimated four billion of the world's poor into the realm of law so that they may effectively participate in developmental processes. Its report, "Making the law work for everyone", sets out its inclusionary agenda by focusing on four pillars: access to justice and rule of law; property rights; labor rights; and business rights. The Commission recognizes that the first pillar, "access to justice and rule of law", in effect guarantees all the other pillars.[17]

Others view legal empowerment in a broader and more multifaceted way.[18] For example, Stephen Golub generally defines legal empowerment as "the use of law to specifically strengthen the disadvantaged".[19] Examples of beneficial initiatives include strengthening local NGO-monitoring of the delivery of medical services and reforming customary justice systems used by the poor by decreasing their biases and increasing

[15] L. Cotula, *Legal Empowerment for Local Resource Control: Securing Local Resource Rights Within Foreign Investment Projects in Africa*, International Institute for Environment and Development, London, 2007, p. 18.

[16] S. Golub, *Beyond rule of law orthodoxy: the legal empowerment alternative*, Carnegie Endowment for International Peace, 2003, Rule of Law Series no. 41, p. 3.

[17] Commission on Legal Empowerment of the Poor, *Making the law work for everyone*, 2008, Volume I, pp. 5–6

[18] S. Golub (ed.), *Legal Empowerment: Practitioners' Perspectives*, International Development Law Organization, 2010, no. 2.

[19] *Ibid*.

their respect for human rights standards.[20] Given these diverse views, the question of how best to achieve legal empowerment remains vibrant, and those working at the forefront welcome new initiatives.

Legal empowerment has also been viewed in light of international human rights law. This "enables us to draw upon the existing human right instruments and draw upon principles which have now been clearly established in the international community".[21] International human rights law has now in turn acquired its counterpart, international criminal law, which ensures that the most fundamental of human rights obligations are implemented. Legal empowerment – as articulated in development studies – aims to adopt a bottom-up approach that prioritizes putting the rule of law, access to justice, and human rights into practice; adopting a legal empowerment approach to international criminal justice would adopt a similar approach and prioritize the same values in the prosecution of international crimes. In addition, it should be noted that the fundamental values pursued in an legal empowerment approach to development – access to justice, the rule of law, and human rights – will be greatly facilitated by ensuring domestic capacities to prosecute international crimes. In other words, the two apparently disparate disciplines are intimately connected, mutually supportive, and bridged by the concept of legal empowerment.

Perspectives of *international* criminal justice have not been afforded much attention in the literature on legal empowerment. The closest instance of a link between empowerment of the poor and access to *national* criminal justice was reported by Paralegal Advisory Service in Malawi.[22] A number of local paralegals were commissioned with providing legal advice to the prison population in order to speed up the processing of a case against them. By empowering prisoners to argue for bail, enter a plea in mitigation, conduct their defense and cross-examine witnesses, the paralegals' service eliminated unnecessary detention, accelerated the processing of cases, reduced case backlogs, improved equality of arms in

[20] *Ibid.*

[21] A. Sengupta, "The Political Economy of Legal Empowerment of the Poor" in D. Banik (ed.), *Rights and Legal Empowerment in Eradicating Poverty*, Ashgate, London, 2008, p. 35.

[22] A. Stapleton, "Empowering the poor to access criminal justice: a grassroots perspective", in Golub (ed.), *Legal empowerment: Practitioner's perspectives*, see *supra* note 18.

court, and reduced remand population. By gaining access to police stations and prisons, this paralegal advisory service could monitor arrests and reduce the number of cases flowing into the system and hampering it. According to the author commenting on this practice, it benefits the vulnerable by entitling them to national constitutional guarantees, and also catalyzes reform by changing institutional attitudes.

Legal empowerment appears not to have directly engaged the discourse on international criminal justice partly due to a preconception reiterated throughout the literature that an over-reliance on international criminal justice will cause "the large share of the international community's available resources […] be drawn into reactive rather than proactive strategies thus enabling states to refrain from more complex, costly and time-consuming protective initiatives geared towards addressing the structural causes of human rights violations".[23]

In the sections that follow, I demonstrate how a legal empowerment approach to international criminal justice and positive complementarity would look like. In particular, I demonstrate how the immediate objectives and indirect spill-over effects of international criminal justice may be understood in legal empowerment terms by taking a bottom-up approach and securing the rule of law, access to justice, and human rights.

5.4. A Legal Empowerment Approach in Assessing the Immediate Effects of International Criminal Justice

How may the immediate effects of international criminal justice be understood in terms of legal empowerment? Although no targeted research has been made to date, the following preliminary conclusions may be extracted from existing scholarship. In brief, the retributive, deterrent and reconciliatory goals of international criminal justice go towards building the rule of law, ensuring access to justice and securing equal respect for human rights. It should be noted, however, that these goals and its effects are intertwined and may be of different importance depending on the jurisdiction concerned and based on its experience of conflict.

[23] G.J. Andreopoulos, "Violations of human rights and humanitarian law and threats to international peace and security" in R. Thakur and P. Malcontent (eds.), *From Sovereign Impunity to International Accountability: In search for Justice in a World of States*, UN University Press, 2004, p. 91.

5.4.1. Retribution

The notion of retribution is extrapolated from the theory of punishment substantiating national prosecution. When a particular community emerges from a conflict, holding perpetrators accountable has a deep psychological impact. "Deep-seated resentments […] are removed and people on different sides of the divide can feel that a clean slate has been provided for coexistence".[24] This observation is unequivocal where all fractions of society agree on the guilt of perpetrators.

However, people can also differ radically in their judgments of recent history as to what went wrong and who is responsible. Retribution carried out by one party to a conflict may harm another party detrimentally, affecting mutual reconciliation. "Each is thus obliged – by circumstance, not shared morality – to engage the other in hopes of persuading a more general public, and perhaps even an immediate opponent, of the superiority of a favored historical account. To be persuasive to anyone, one must display a measure of civility, even towards those one would prefer, in ideal circumstances simply to kill or suppress".[25] Mark Osiel argues that in such circumstances solidarity may be achieved through civil dissensus: "It is precisely the genuine uncertainty of result that gives a liberal show trial both its normative legitimacy and the dramatic intensity so conspicuously absent where conviction on all charges is a foregone conclusion".[26]

By prosecuting individuals, regardless of their position, and by avoiding collective guilt, international criminal justice emphasizes individual accountability to the rule of law and its equal application.

5.4.2. Restoration

Apart from moral satisfaction, international criminal justice is able to restore by providing compensation to the victims. A move towards reparations is taken by the Rome Statute. Victims may express their views via legal representatives when their personal interests are affected. The ICC

[24] K.C. Moghalu, "From sovereign impunity to international accountability", in Thakur and Malcontent (eds.), see *supra* note 23, p. 216.

[25] M. Osiel, *Mass atrocity, collective memory, and the law*, Transaction Publishers, 1997, p. 41.

[26] *Ibid.*, p. 280.

can order reparations, including restitution, compensation and rehabilitation, commensurate with loss or injury based on articles 68 and 75 of the Rome Statute. Articles 94 to 98 of the Rules of Procedure and Evidence entitle the Court to order awards on its own motion either individually or through the Trust Fund for victims.

Another instance of international justice actors seeking redress for victims is the adoption by the UN General Assembly of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law of 2006.

The implementation of reparation initiatives has been spotty up until the time of writing because the extent of harm caused by these crimes dwarfs the limited resources of a State or an accused. It has been suggested that "reparation programs should always include a number of different measures rather than a single one and should combine individual and collective, material and symbolic reparations. These characteristics are greater determinants of success than the actual amount of monetary reparations, which will in most cases not approach the tort-damages ideal".[27]

The type of restoration international criminal justice can achieve is called "constructive accountability" in international human rights law and "restorative justice" in national criminal law. Central to the latter's philosophy are ideas about repairing harm and resolving conflicts rather than punishing the offender and allocating blame.[28] The former concept describes the process whereby a State determined to be responsible for violations of human rights is obliged to report to human rights bodies on the measures taken to prevent further violations.

The Commission for Reception, Truth, and Reconciliation in East Timor is an example of a State body that focuses on implementing a restorative process. The Commission is charged with truth-seeking functions regarding human rights violations. It can hold hearings and has

[27] E. Wiebelhaus-Brahm, "Summary of regional and thematic studies", in M.C. Bassiouni (ed.), *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization, and Post-Conflict Justice*, Intersentia, 2010, p. 121.

[28] M. Groenhuijsen, "Victim's rights and restorative justice: piecemeal reform of the criminal justice system or a change of paradigm?", in H. Kaptein and M. Malsch (eds.), *Crime, Victims and Justice*, Ashgate, 2004.

broad investigatory powers to request information and summon witnesses. Worthy of note is the reconciliation process whereby perpetrators guilty of less serious crimes are allowed to reconcile with victims and communities, while the credible evidence of serious crimes revealed during public hearings is directed to a prosecutor.[29] International criminal justice applied in this way not only confers punitive accountability, but can also be restorative because it allows exploration of the reasons why violence occured. Restorative measures that address the needs of victims affirm the equal importance of all under the rule of law and the importance of access to justice for all. The rights of all, including the victimized, are acknowledged and addressed.

5.4.3. Deterrence

No empirical data exists to date to support the proposition that prosecution of international crimes has brought about deterrence and prevented their further commission, although "human experience reveals that [deterrence] works best when the likelihood of prompt punishment is somewhat certain", and an effective system of apprehension and prosecution is in place.[30] This function is particularly controversial in the area of international criminal justice as it claims that the prosecution of core international crimes committed in one jurisdiction may deter their commission in another.

It is aptly noted, however, that in order for deterrence to evolve, the threat of prosecution should focus on the leaders of armed forces, whether military or civilian, or the leaders of law enforcement agencies. In conflict situations "where the group leader exercises absolute control over members of the group, those within such groups are at a mercy of their respective leaders". Moreover, deterrence seems to be more effective where discipline, command and control exists within the group.[31] These assumptions lead to the conclusion that prevention takes effect when

[29] B.S. Lyons, "Getting untrapped, struggling for truths: The Commission for reception, truth and reconciliation (CAVR) in East Timor", in C. Romano, A. Nollkaemper, J. Kleffner (eds.), *Internationalized Criminal Courts and Tribunals*, Oxford University Press, 2004, pp. 99–121.

[30] M.C. Bassiouni "Assessing conflict outcomes: accountability and impunity" in Bassiouni (ed.), see *supra* note 27, p. 28.

[31] *Ibid.*, p. 29.

leaders of armed forces enforce discipline and humanitarian law within the group due to the threat of their potential prosecution. The probability of prosecution should therefore be enhanced by enabling national authorities of States to exercise jurisdiction.

The relationship between international criminal prosecution and stabilization has been explored by Payam Akhavan, who argues that "political climates and fortunes change, and the seemingly invincible leaders of today often become the fugitives of tomorrow. Whether their downfall comes through political overthrow or military defeat, the vigilance of international criminal justice will ensure that their crimes do not fall into oblivion, undermining the prospect of […] future political rehabilitation". He argues that both the ICTY and the ICTR marginalized nationalist political leaders and other forces who were involved in the ethnic conflict and had taken part in core international crimes committed at that time. They "changed the civic landscape and permitted the ascendancy of more moderate political forces backing multiethnic coexistence and nonviolent democratic process".[32]

Others forcefully argue that individual perpetrators are products of States and other organizations that calculate their costs and benefits before resorting to the commission of crimes. Motivation arises from the in collectivity itself and not from its individual agents. Therefore, perpetrators "are convinced of the rightness of their goals and develop corresponding neutralization techniques like denying responsibility, blaming the victim, and rejecting the reality of victimization".[33]

Currently, national criminal justice institutions are not prepared to discern and prosecute the root causes of large patterns of violence, which lie in wrongful decision-making of States or non-State actors. They do not therefore deter the commission of core international crimes as much as they are able to deter the commission of regular violence.

Finally, the prosecution of core international crimes committed by former leaders remain in the collective memory of the community that experienced it, and judgments may serve as legal precedent. The study of

[32] P. Akhavan, "Beyond impunity: Can international criminal justice prevent further atrocities", in *The American Journal of International Law*, vol. 95, no. 7.

[33] P. Stolle and T. Singelnstein, "On the aims and actual consequences of international prosecution", in W. Kaleck, M. Ratner, T. Singelnstein and P. Weiss (eds.), *International prosecution of human rights crimes*, Springer, 2007, p. 42.

collective memory of the Holocaust in Germany indicates that a network of agencies co-operating in its aftermath, working according to an international law framework, can build constructive narratives without reconstructing facts for the benefit of political expedience.[34] The limitations of international criminal justice in forming collective memory are that it can be applied either too broadly or too narrowly. An overly-broad application of a narrative set out in a past judgment to a more ordinary situation risks misinterpretation by the general public, which can easily extrapolate the lessons to today's similar yet differing conditions. Overly-narrow individualization of guilt, on the other hand, mitigates the accountability of a larger circle of those responsible.[35] "In seeking to influence collective memory […] judges and prosecutors need to be able to acknowledge publicly and explain law's limits and potentialities".[36] The pursuit of such deterrent objectives may arguably ensure the future stability of the system, which is necessary for the building of long-lasting justice institutions and a rule of law culture.

5.5. A Legal Empowerment Approach to Assessing the Indirect Spill-over Effects of International Criminal Justice

5.5.1. Instituting Procedures and a Culture of Governmental Oversight and Information Access

The establishment of a specialized body to prosecute core international crimes builds authority and expertise over crimes committed by States or non-State authorities. Such authority and expertise can be used to detect non-international crimes – those not amounting to international crimes but which involve State or non-State authorities. Examples of such crimes include the cruel treatment of prisoners or detainees, harassment or attacks on journalists or political dissidents, and the violent suppression of public demonstrations.

To successfully investigate international crimes, the investigatory authorities need to be given access to official documents and governmen-

[34] M.J. Gallant and H.M. Rhea, "Collective memory, international law, and restorative social processes after conflagration: the Holocaust", *International Criminal Justice Review Online*, 28 April 2010.

[35] Osiel, see *supra* note 25.

[36] *Ibid.*, p. 164.

tal institutions. National units trained in the detection of core international crimes must be entitled to visit, interview and question, and access information about, among other things, the treatment of detainees in prisons, the military activities which the state is engaged in, and internal orders issued by governmental officials in the areas where crimes may be committed. Thus, capacity building activities will necessarily include or be conditioned on such access, and the putting in place of more transparent law enforcement or governmental procedures. Procedures may be instituted on a generalized basis and apply not only to international crimes. These attempts may in turn contribute to establishing a culture of information access and governmental transparency.

The experience and expertise of fact-finding bodies used in the investigation of core international crimes may be transferred to bodies charged with the oversight of government in non-international crime matters. Such fact-finding bodies perform important supervisory, investigatory and review functions, and have been recognized or established in various treaties. For example, the Optional Protocol of 2006 to the Convention against Torture obliges States Parties to establish an independent national preventive mechanism at the domestic level, which also has a mandate to inspect places of detention. Such fact-finding activities assist in the collection of information that is substantively relevant for further criminal prosecution to be conducted by national units charged with the suppression of core international criminality.

There is particular need to put in place oversight procedures with respect to law enforcement because these authorities are often the least transparent of governmental bodies. Their decision-making is difficult to trace and easy to conceal through State secrecy and security laws. By increasing control and oversight over this branch, the ability to prosecute international crimes is enhanced. Fact-finding bodies investigating potential wrongdoings by law enforcement authorities may serve as catalysts for increased accountability and control by issuing clear findings of wrongdoing and making recommendations.

A notable illustration of such oversight is the Mexican National Human Rights Commission, which was organized in the wake of political assassination of party activists during the period between 1989 and 1994. This governmental body was charged with investigation of post-electoral violence between the then ruling party and the leftist party *Partido de la Revolución Democrática* (PRD), the blame for which was placed mostly

on the ruling party members and their hired. The Commission was to review in detail how the Mexican criminal justice system processed crimes committed against the PRD victims.

The commission revealed that despite the abundance of evidence and judicial action taken with respect to suspects, the police either failed to apprehend convicted State officials, policemen and hired guns or failed to adequately investigate their crimes. The extent of impunity afforded to the perpetrators, according to the Commission, could not be justified by resource constraints as it recognized that the most vagrant failures occurred *specifically* in response to the crimes against PRD party members. Reportedly, the homicides were committed by State officials and members of the police, and in an extensive pattern of perpetuated impunity, the State was found to have acquiesced in the homicides of the PRD party members.[37] The commission issued recommendations, but these were not implemented by the agencies concerned.[38] Despite the unfortunate fate of the Mexican commission's recommendations, its efforts are illustrative of the way a pattern of law enforcement can be supervised and criticized for insufficient action.

5.5.2. Fight Against Corruption

As explained above, the prosecution of core international crimes may lead to the institution of information access procedures, supervisory mechanisms and a culture of governmental oversight. I contend that this, in turn, strengthens a criminal justice system's ability to trace and prosecute corrupt practices.

Though not much work has been done on the relationship and overlap between the commission of international crimes and corruption of State officials, a number of preliminary views have been expressed. The susceptibility of State officials to be complicit in or induce violence is more often than not coupled with their susceptibility to corrupt practices. Research from different countries indicates that arbitrary arrests and detention, torture, and rape by the police create a fertile environment for police corruption and co-operation with organized crime.[39]

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[37] *Ibid.*

[38] *Ibid.*, p. 286.

[39] R. Sarre *et al.*, *Policing corruption. International perspectives*, Lexington Books, Oxford, 2005, pp. 3–17.

Moreover, the commission of large-scale violence requires financing. The misappropriation of financial resources for such crimes is, however, only possible once the ruling elite possesses the repressive forces to quiet dissent. Mass oppression, violence and corruption are, therefore, closely linked and mutually reinforcing. There is, therefore, the need to effectively deal with corruption and the criminal violence that accompanies it. However, prosecution of such violence assumes the ability to uncover the source of financing and assess its legality.[40]

An example of this is the recent inter-ethnic violence which occurred after the president of Kyrgyzstan, Kurmanbek Bakiyev, was ousted in April 2010. According to the prosecutor tasked with investigation of crimes, presidential supporters of the ousted president distributed money among the residents of the poorest regions of the country (35–50 USD per day) for them to take part in mass action which led to violence and destruction. The sheer numbers making up the restive population exceeded the staff of the national police and army by 20 to 30 times.[41] The interim government lost control of the masses. Police forces and the military reportedly joined the attack against civilians in several episodes.[42]

The change of government in the Kyrgyz Republic made it possible to launch investigations into the corrupt activities committed by the members of the ruling elite. The president and his son, who was also charged with corruption, are currently under protection of Belarus and the United Kingdom correspondingly. This example undescores the serious consequences which may result from corrupt practices and the need for leaders to be held responsible for embezzlement.

Recent scholarship links international criminal law and corruption by arguing that corruption in itself may amount to a crime against human-

[40] According to the US secret cables, the ICC Prosecutor alleged the secret fortune of Omar Al-Bashir to be USD 9bn, see http://www.guardian.co.uk/world/us-embassy-cables-documents/198641, last accessed on 8 September 2011.

[41] Вадим Ночевкин "Конец империи Бакиевых", "The end of Bakiev's empire" (author's translation), Delo No, 7 July 2010, available at http://delo.kg/index.php?option=com_content&task=view&id=1509&Itemid=60, last accessed on 8 September 2011.

[42] New York Times, Kyrgyzstan, http://topics.nytimes.com/top/news/international/countriesandterritories/kyrgyzstan/index.html?scp=1&sq=kyrgyzstan%20police&st=cse, last accessed on 8 September 2011.

ity.[43] A plethora of anti-corruption treaties have been adopted and ratified since 1995: the OECD's 1997 Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; the EU's 1997 Convention on the Fight against Corruption involving Officials of the European Communities or Officials of Member States; the UN's 2000 Transnational Organized Crime Convention; the UN's 2003 Convention against Corruption; as well as regional instruments.

As a commentator has observed, corrupt practices may amount to a crime against humanity when a "[corrupted] government forcibly displaced a local community without measures for their subsequent welfare in order to bestow land and mining rights to a foreign investor. In the process, many of those unwilling to leave have been murdered by security forces, while the underlying contract between the investor and the government rendered access to food and medicine for the civilian population for the next 10 years almost impossible".[44] The author recognizes that at the level of corrupt practices, the direct intent to eventually destroy the population may be absent. However, article 30(2) of the ICC Statutes makes awareness that such consequences occur in the ordinary course of events sufficient for the purpose of proving intent.[45]

International law may not yet have answered the question of whether corruption may amount to crime against humanity. National units empowered to prosecute core international crimes can be assigned to investigate allegations of corruption to prevent core international crimes in light of the inter-relationship between these two crimes as explained above. It should be noted that defining corrupt practices as a crime against humanity allows the immunity of State officials charged with corrupt practices to be waived, thus, enabling the enforcement of universal jurisdiction against them.

5.5.3. Empowerment of Civil Society

Civil society and other non-State actors within a State are able to play an important role in collecting and disseminating information about international crimes which may be used in future investigations and prosecu-

[43] I. Bantekas, "Corruption as an international crime and crime against humanity", in *Journal of International Criminal Justice*, 2006, vol. 4, no. 3, pp. 466–484.

[44] *Ibid.*, p. 474.

[45] *Ibid.*

tions, thus creating internal pressure within a State to treat allegations of human rights violations seriously. NGOs are likely to be closest to the area where atrocities occur and are arguably free from State-centric bias. A legal empowerment approach to positive complementarity should include the provision of technical expertise to NGOs so as to enable them to collect evidence that may be used in the prosecution of core international crimes. Indeed, NGOs have been able to participate and contribute in international criminal proceedings before international tribunals and courts owing to, for instance, article 15(2) of the Rome Statute and article 18 of the ICTY Statute which permits the submission of information to the prosecutor and *amici curiae* briefs.

NGOs are often better placed to gather evidence and testimony as witnesses or survivors may not trust formal bodies. For example, an Australian NGO investigating international crimes in the former Yugoslavia sent out questionnaires to immigrants and refugees from the region requesting information about events witnessed during the conflict.[46] The collected screening kits were then faxed to the prosecutor with only the ID numbers of witnesses disclosed. Members of the ICTY Office of the Prosecutor subsequently identified and interviewed several witnesses as a result of the NGO's activity.[47]

NGOs may also perform important analytical functions. M. Cherif Bassiouni, in sharing the experience of the Commission of Experts established to investigate violations of international humanitarian law in the former Yugoslavia, assessed the reports of NGOs as very helpful and commented that "the level of analysis they achieved indicated a true effort and genuine commitment […] to produce verifiable facts".[48] Some reports, however, did not provide sufficient details about the events. For example, many did not contain names and contacts of witnesses, did not disclose the original sources, and did not even indicate whether original sources are available, such as affidavits, photographs, medical or autopsy reports. Some potentially very useful sources of first-hand information were stored in boxes piled up in a room, which led to problems in retriev-

[46] H. Durham "NGOs at international criminal tribunals", in Thakur and Malcontent (eds.), see *supra* note 23, p. 174.

[47] *Ibid.*, pp. 175–180.

[48] M. Cherif Bassiouni, "The Commission of Experts pursuant to Security Council Resolution 780", in R.S. Clark and M. Sann (eds.), *The Prosecution of International Crimes*, Transaction Publishers, 1996, p. 88.

ing relevant information. Numerous reports contained allegations of victimization, but most of them did not provide legally relevant or admissible evidence of violations.[49]

In that case, so as to structure the dispersed data according to a common methodology and generate prosecutorial strategy, a database was compiled.[50] First, all source documents were described and stored by a documentarian. The data analysts subsequently selected information about each incident according to the guidelines established by legal staff, such as names, locations, and alleged violations. The database "(1) generated reports by information category; and (2) made possible "context" sensitive searches (that is, search by keyword – comment by the author)".[51] The database, however, was compiled in the United States by specialists who were not witnesses to the conflict and required considerable financial investment.

This illustrates the need to set out common guidelines and establish a common electronic platform for all NGOs in the proximity of the conflict for evidence documentation purposes. In particular, NGOs should be informed about a common methodology of systematizing evidence of core international crimes violations. They should be trained to provide verifiability and details of the data that they find. They should be trained as to the relevance and admissibility of particular pieces of evidence. Thus, it is important that both prosecutorial agencies and civil society speak the same language of legal requirements when making allegations that core international crimes occurred. The language NGOs speak should be familiar to the national authorities that they address, third States that may exercise universal jurisdiction, and international courts, so that one of them could exercise jurisdiction upon the call of the NGO equipped with sufficient evidence.

One should nevertheless be aware of the fact that NGOs can act out of partisan motives. Solely incriminating or exonerating evidence may be collected to favor the party they may wish to protect. Creating a list of NGOs empowered to perform investigation in a particular area may serve as a guarantee of NGO competence.

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[49] *Ibid.*, pp. 80–84.

[50] *Ibid.*, p. 74.

[51] *Ibid.*, p.78.

5.5.4. Empowerment of Media

Media reports can function as an instrumental source of evidence for international crimes. Prosecutors and defense counsel have often referred to television interviews, video footage, magazine articles and recorded speeches of military leaders to prove or disprove complex legal elements of international crimes.[52]

There has yet to be intensive research on how the media's collection and portrayal of information may be done in a way that most effectively furthers investigations and prosecutions. There is a need to consider if media reports should meet any minium requirements, how should they be stored, what kinds of questions and persons may be interviewed on site, or what kinds of photographs are permitted. It also needs to be considered how the media may better co-operate with civil society groups and national units prosecuting core international crimes.

This proposal seems even more warranted in the light of the UN General Assembly's work on the "Communication for development programmes in the United Nations system"[53] which considers how to develop specific media strategies to address the development challenges of vulnerable communities. It is recognized that "professional communication practice is limited and professional journalistic practice is to some extent compromised as a result of inadequate attention to communication capacities in development planning process".[54] In particular, UNESCO has developed a set of indicators of free, independent, and pluralistic media, which refers to, among others, *professional capacity-building* and *infrastructural capacity*.

5.5.5. Improvement of Inter-State Co-operation

Although international crimes have peculiar characteristics distinguishing them from regular trans-border crimes, they share similar characteristics with the latter in requiring international co-operation.[55] Another parallel

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[52] International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Radislav Krstić,* Judgment, Trial Chamber, IT-98-33-T, 2 August 2001.

[53] UN General Assembly, *Communication for development programmes in the United Nations system*, 10 August 2010, A/65/276.

[54] *Ibid.*, p. 10.

[55] OSCE ODIHR Final Report, see *supra* note 57, p. 15.

to be drawn between core international crimes and other complex trans-border cases, such as organized crime and serious fraud, lies in the need to relate overwhelming amounts of facts to the legal requirements.[56]

There is therefore a need to construct a co-operation platform between States to assist each other in the prosecution of core international crimes. Such a platform will also result in the establishment of a co-operative environment for the investigation and prosecution of international crimes as well as other complex trans-border and factually rich crimes, such as terrorism, trafficking in human beings, drug trafficking, fraud and money laundering.

The type of co-operation most implicated in core international crimes prosecution is (1) the arrest and extradition of the accused from one State to another, and (2) the production and exchange of evidence or assistance in investigation. Problems may arise when a requested State refuses to co-operate for one reason or another, or when more than one State seeks to exercise jurisdiction over the same offence or defendant.

National units empowered to prosecute core international crimes need to be interoperable regionally and worldwide to ensure mutual legal assistance in core international crimes cases.

Particularly valuable to international criminal justice is the headway made by judicial co-operation agencies in Europe.[57] Eurojust is aimed at the stimulation and improvement of co-ordination between national authorities.[58] It consists of national representatives who have access

[56] M. Bergsmo, O. Bekou and A. Jones, "Preserving the overview of law and facts: The Case Matrix", in A. Smeulers (ed.), *Collective Violence and International Criminal Justice: an interdisciplinary approach*, Intersentia, 2010, p. 420, reproduced as chapter 3 above.

[57] These problems were described in *Pro Eurojust Report*, 2001, pp. 13–14.

[58] "When Eurojust acts through its national members concerned, it: (a) may ask the competent authorities of the Member States concerned, giving its reasons, to: (i) undertake an investigation or prosecution of specific acts; (ii) accept that one of them may be in a better position to undertake an investigation or to prosecute specific acts; (iii) coordinate between the competent authorities of the Member States concerned; (iv) set up a joint investigation team in keeping with the relevant cooperation instruments; (v) provide it with any information that is necessary for it to carry out its tasks; (vi) take special investigative measures; (vii) take any other measure justified for the investigation or prosecution; (b) shall ensure that the competent authorities of the Member States concerned inform each other on investigations and prosecutions of which it has been informed; (c) shall assist the competent authorities of the Member

to criminal records, registers of arrested persons, investigation registers, DNA registers and the registers of individual Member States. States generally resort to mutual legal assistance between one another. If the requests are not responded to or if they require special consideration, States may request Eurojust to co-ordinate mutual legal assistance. In 2009, 1,372 requests for assistance from national authorities were registered by Eurojust.[59]

Based on its mandate, Eurojust may ask national authorities to take specific casework action, such as judicial co-operation in respect of witnesses and victims or obtaining objects, data and documents; resolve the problem of extradition; and recommend which State is in a better position to prosecute the offence. With regard to the latter issue, Eurojust has issued guidelines on the choice of jurisdiction in cross-border crimes, which may well be of guidance to national units commissioned with the prosecution of core international crimes.[60]

Particularly encouraging is the practice of establishing joint investigation teams by agreement between participating States. Teams of investigators may either be seconded to a State where most of the investigative activities will be carried out, or these investigators may work from their own Member States. Each investigator may request its national authorities to undertake specific law enforcement action and take part in such action abroad pursuant to the powers provided for in the agreement on the joint investigation team.[61] This practice has already yielded impressive results.[62]

Creation of networks of national authorities empowered to partake and execute requests of international judicial assistance, such as the Network of contact points in respect of persons responsible for genocide and

States, at their request, in ensuring the best possible coordination of investigations and prosecutions; (d) shall give assistance in order to improve cooperation between the competent national authorities". *Council Decision on the strengthening of Eurojust and amending Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime*, 15 July 2009, art. 6.

59 *Eurojust Annual Report 2009*, p. 14.

60 Eurojust, *Guidelines for deciding which jurisdiction should prosecute*, Annual Report, 2003, Annex, p. 60.

61 Joint Investigation Teams Manual, 23 September 2009.

62 Eurojust, *Eurojust contact point for child protection*, in Eurojust News, April 2010, Issue No. 2, p. 3.

crimes against humanity,[63] and contact points for specific crimes regionally and internationally, is an ongoing process which is crucial to a legal empowerment approach to positive complementarity. These instances of integration and co-operation have already been implemented to combat global crime threats, such as terrorism, piracy and drug trafficking, and are increasingly advocated to apply to the action plan to end impunity using universal jurisdiction.[64]

With the decreasing role of international(ized) tribunals, the community of domestic courts must be self-aware of its powers and opportunities by building relationships and sharing information. To that end, it has been argued that "in a system in which information is power and in which compliance at the interstate level can be managed through collaborative guidance and assistance, regulatory norms and implementation guidelines will enhance the effectiveness of the overall system".[65] Prospects of collaboration are more feasible once technological applications are geared towards interstate co-operation. The chapter to follow will address such applications.

5.6. A Legal Empowerment Approach to Implementation: Empowering Stakeholders and Technological Applications related to the Prosecution of Core International Crimes

As explained above, adopting a legal empowerment approach to positive complementarity is relevant and necessary. Its basis rests on the text of the ICC Statute and finds support in other areas of international law, specifically, development studies and human rights law. The previous section explained how the direct and indirect effects of international criminal justice may be understood in light of a legal empowerment approach. This section explains the procedural implications of putting such a legal empowerment approach to positive complementarity into practice. It focuses on the stakeholders to be empowered and the empowerment tools to be implemented. It will first explain how there needs to be investment in

[63] *Council Decision setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes*, 13 June 2002, 2002/494/JHA.

[64] Amnesty International, *Ending Impunity: Developing and implementing a global action plan using universal jurisdiction*, October 2009.

[65] Burke-White, see *supra* note 13, p. 98.

certain domestic stakeholders. The rest of the section then identifies and describes the empowerment tools available.

This section's focus on empowerment tools emphasizes how – apart from professional and financial investment – a great deal can be achieved by developing software tailored for national units charged with the prosecution of core international crimes and civil society wishing to monitor how States discharge their obligations under the Rome Statute. The applications described below aim to (1) provide better access to legal information, (2) ensure better case management, (3) streamline contact between different actors, and (4) ensure that documented violations of human rights may be organized into criminal case evidence.

5.7. Investing in Important Stakeholders of Domestic Criminal Justice Systems

In order to build capacity to prosecute international crimes at the domestic level, national specialists have to be trained and given access to well-elaborated databases designed for the prosecution of international crimes. The establishment of a specialized national agency for prosecution of core international crimes should also be considered as this will facilitate the transmission and accumulation of large amounts of professional knowledge. The capacity accumulated within such a specialized unit needs to be shared with other units throughout the country and with other specialists through internships, rotation, short term contracts. In this manner, there will gradually be a significant body of national governmental staff within a state who are trained to prosecute core international crimes.

Such training has additional professional advantages. As opposed to national criminal justice, international criminal justice – by its very nature – deals with crimes connected to, and involving, State authorities or organized non-State groups or entities. International criminal jurisprudence has developed the means to investigate and link the responsibility of State authorities or other entities and groups to the resultant violence through various modes of liability, as opposed to national criminal justice which focuses, at best, on the responsibility of immediate perpetrators. Through complex and scrupulous means of proving participation, State or non-State leaders can be brought to criminal justice in conformity with the *nullum crimen sine lege* principle.

The prosecution of international crimes also requires one to prove the commission of underlying acts and contextual elements. Such underlying acts as killing, causing bodily or mental harm, enslavement, or unlawful deprivation of liberty are familiar to national authorities on a routine basis. International criminal justice in turn enables national authorities to unify the pattern of underlying criminal acts into a larger picture through contextual elements of core international crimes.[66] The voluminous international criminal jurisprudence interpreting, *inter alia*, "manifest pattern", "widespread or systematic attack", "armed conflict", or "in the context of" enables the national authorities to systematize massive information about a crime, focusing on the larger picture and the root cause of violence affecting society in that State. These skills in managing such voluminous information are important and transferable to the prosecution of other types of organized crimes.

International criminal jurisprudence has to a large extent been regarded up until now as an alien enterprise. Most national authorities prefer to categorize international crimes as national crimes, conducting their investigations on this basis pursuant to national criminal laws, rather than prosecuting them as international crimes.[67] National implementing laws may be lacking or imprecise. There may be an unfamiliarity with international criminal and humanitarian law. For most prosecutors and courts, ordinary crimes "are better developed and yield more precedents to rely on".[68] It is also easier to prove multiple counts of murder rather than genocidal intent or existence of armed conflict in case of genocide and war crimes. There may be concerns regarding the unforeseeable evolution of international criminal and humanitarian rules. Such lack of precision endangers the *nullum crimen sine lege* principle of criminal justice.

These concerns can be addressed by empowering national profesionals with the appropriate tools that enable them to access, manage, and organize information efficiently and effectively. In what follows, I will describe tools which have greatly enhanced the ability of these national professionals.

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66 Elements of Crimes document of the International Criminal Court, 9 September 2002.

67 For a comprehensive study of this tendency, see W.N. Ferdinandusse, *Direct Application of International Criminal Law in National Courts*, Asser Press, The Hague, 2006.

68 *Ibid.*, p. 105.

5.7.1. Provision of Access to Legal Information

Access to legal information is pivotal for the very ability to prosecute the crime and ensure the quality of the process. As observed by Bergsmo, Bekou and Jones, the "process of judicial cross-referencing between different tribunals has been thought to play part in increasing the quality of decisions produced by judicial institutions. The jurisprudence of established institutions may provide valuable guidance to newly created national and international mechanisms, which may be applying certain provisions for the first time. Furthermore, it can serve to broaden the scope of ideas and approaches introduced by counsel and contemplated by the judiciary".[69]

The Legal Tools Project is a leading example of a tool that enables the transfer of legal information in international criminal law, strengthening national capacities to prosecute.[70] The Legal Tools Database can be accessed through search and browse functions on the Website.[71] It classifies international criminal law material according to the nature of the source, state, type of tribunal, or name of the accused. Its international scope allows a user to conduct research across states and across jurisdictions. For instance, a specific search engine for national implementing legislation allows states to compare approaches taken with respect to the implementation of core international crimes in states that share their legal tradition.

A commendable direction in the development of effective retrieval of legal information is the classification of legal sources according to the value, novelty and content of the legal rules they contain. Constantly evolving jurisprudence is contained in the voluminous judgments, each amounting to 300 pages in average, which may at times contradict one another. It is a daunting task for national authorities, especially those whose native language is not English, to keep abreast of the field.

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69 Bergsmo, Bekou and Jones, see *supra* note 56, p. 422.

70 ASP Bureau Focal Points on Stocktaking Complementarity, *Focal Points' compilation of examples of projects aimed at strengthening domestic jurisdictions to deal with Rome Statute Crimes*, Review Conference of the Rome Statute, RC/ST/CM/INF.2, 30 May 2010; OSCE ODIHR Final Report, *Supporting the Transition Process: Lessons Learned and Best Practice in Knowledge Transfer*, September 2009, p. 56.

71 Legal Tools Database, available at www.legal-tools.org, last accessed on 10 September 2011.

The Case Matrix, an electronic case management software discussed below, contains a valuable "Elements Digest" that provides structured access to subject-matter law in the jurisprudence, approximately 700 pages, and a "Means of Proof Digest" that provides structured access judicial deliberation as to the application of facts and evidence to the legal requirements of core international crimes and modes of liability, approximately 6,400 pages,[72] which are available to the Case Matrix users involved in the prosecution of core crimes. Retrieval of the relevant jurisprudence becomes easier as the user is able to input the criteria of search (alleged crime and mode of liability of the accused). Another benefit of the digest is its non-partisan nature which does not favor particular jurisprudence.

The development of database digests of core international crimes jurisprudence according to the legal requirements deliberated by a judicial body is a necessary development for national authorities to access the law. An effort in this respect has been undertaken by the International Criminal Tribunal for the Former Yugoslavia, which compiled the Appeals Chamber Case-Law Research Tool.[73] It arranges leading Appeals Chamber's decisions and judgments according to the articles of the ICTY/ICTR Statutes, Rules of Procedure and Evidence, other instruments, such as Codes of professional conduct, Geneva Conventions, and the UN Charter's provisions, and according to the notions referred to in the judgments. The following is an excerpt from the research tool:

Article 7(1) ICTY / Article 6(1) ICTR	Aiding and abetting	*Blagojević and Jokić AJ*	9 May 2007
		Muhimana AJ	21 May 2007
	Aiding and abetting **by omission**	*Brdjanin AJ*	3 April 2007
		Orić AJ	3 July 2008
		Mrkšić and Šljivančanin AJ	5 May 2009
	Committing	*Seromba AJ*	12 Mar. 2008
	Committing **by omission**	*Orić AJ*	3 July 2008
	Instigating	*Nahimana et al. AJ*	28 Nov. 2007

[72] Bergsmo, Bekou and Jones, see *supra* note 56, p. 414.

[73] ICTY Appeals Chamber Case Law Research Tool, available at www.icty.org/sections/LegalLibrary/AppealsChamberCaseLawResearchTool2004onwards, last accessed on 10 September 2011.

		Boškoski and Tarčulovski AJ	19 May 2010
	Omission	*Ntagerura et al. AJ*	7 July 2006
		Galić AJ	30 Nov. 2006
		Orić AJ	3 July 2008

The judgments and decisions referred to in the research tool are summarized. Additionally, the ICTY website offers summaries of the most significant decisions, orders and judgments issued by the ICTY before 2004.

It is desirable that this approach is taken with respect to not only appeals but also trial judgments and decisions, across national and internationalized jurisdictions. A feature of this research tool is to concentrate on the most important terms characteristic of a notion or an article. It however depreciates the value of derivative and more nuanced interpretations of each rule which are not considered to be major or which are pronounced in *obiter dicta*.

5.7.2. Case Management Software

One of the tools offered by the Legal Tools Project is the case management software Case Matrix, specifically designed for the prosecution of core international crimes. This is by far the most cutting-edge program in international criminal justice.[74] Case management software is pivotal to ensuring the efficiency of the process[75] and guaranteeing the rights of the accused. At the start of 2010, the Case Matrix possessed the following functionalities:[76]

- A framework for registering cases by country/situation, suspect, incident and legal classification;
- A collection of key sources in international criminal law;
- Elements Digest and Means of Proof Digest referred to above;
- A database table where the user may relate particular pieces of evidence, including audio or video files, electronic docu-

[74] Review Conference of the Rome Statute, see *supra* note 70; OSCE ODIHR, see *supra* note 70, p. 56.

[75] *Ibid.*, p. 42.

[76] Bergsmo, Bekou and Jones, see *supra* note 56, p. 414.

ments, to legal requirements of the alleged crime and the mode of participation in the crime.

The latter functionality provides a list of means to prove every legal requirement of a case, that is, types or categories of facts which can constitute evidence. Every means of proof is linked to a digest analyzing the legal requirements of crimes and providing the cases where such means of proof were employed. Furthermore, the evidence can thereby be mapped to provide an "x-ray" overview of the evidentiary status of each case.[77] The environment can be customized according to the users' role in the case, such as judges, investigators, prosecutor, defense counsel, victim's representatives, NGOs. Therefore, the Case Matrix file is accessible to different actors as the case progresses from investigation to proceedings in the courtroom.

By following the logic of international criminal law, the Case Matrix solves the challenge of keeping an overview of the facts and evidence as opposed to the legal requirements they satisfy. The logic of the Case Matrix was endorsed by Pre-Trial Chamber of the ICC in the case of *Prosecutor v. Jean-Pierre Bemba Gombo* (Situation in the Central African Republic) and *the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* (Situation in the Democratic Republic of the Congo), where the Pre-Trial and Trial Chambers of the ICC directed the Prosecutor to submit a table linking the evidence and facts the prosecution intends to rely on in the trial to the constituent elements of charges against the accused and alleged modes of liability.[78]

National units empowered to prosecute core international crimes should be trained in international criminal law through the use of the Case Matrix. It is a very useful way to keep the national authorities informed of the developments in international criminal and humanitarian law and construct their prosecutions in accordance with the standards set by the international practice. The evidence structured in the Case Matrix will not stay

[77] See International Criminal Court, "What are the ICC Legal Tools", available at www.legal-tools.org/en/what-are-the-icc-legal-tools/, last accessed on 10 September 2011.

[78] ICC, *Prosecutor v. Jeanne-Pierre Bemba Gombo*, ICC-01/05-01/08-55, "Decision on the Submission of an Updated, Consolidated Version of the In-depth Analysis Chart Incriminatory Evidence", 10 November 2008; ICC, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-956, "Order Concerning the Presentation of Incriminating Evidence and the E-Court Protocol", 13 March 2009.

idle, even if the evidence is not enough for a full-fledged conviction. The structured evidence may be used to construct a criminal case for human rights violations not amounting to core international crimes. The work of national units can therefore contribute to the prosecution of lesser crimes by transferring the information to other prosecutorial authorities.

Adoption of the Case Matrix by national authorities prosecuting core crimes worldwide creates a prospect for their collaboration in the future. Prosecutorial authorities of several States conducting investigation of the same incident or against the same suspects may communicate with one another through similar platforms, referring to similar legal requirements.

5.7.3. Documentation of Violations

As more functionalities of the Case Matrix are being developed,[79] more research is necessary as to how civil society documenting human rights violations can structure the collected data according to legal requirements for crimes. To date, a number of software applications have been developed to help NGOs collect and systematize testimonies about human rights violations suffered by individuals or members of affected groups.

For instance, Martus,[80] a software developed by Benetech,[81] is a database system which allows human rights organizations to describe each reported violation by filling out bulletins and grouping them according to certain criteria (by the nature of violation and geographic area). To describe the incident, the NGO may enter certain amount of data (such as location, date, summary, nature of violation, keywords, source of information, victim information, information about perpetrator, and attachments). The program allows exportation and importation of bulletin data, printing out reports, sharing reports with colleagues, and searching the database. The data stored in Martus can be encrypted and transmitted to a web server.

[79] Bergsmo, Bekou and Jones, see *supra* note 56, p. 415.

[80] Martus, available at www.martus.org, last accessed on 10 September 2011.

[81] Benetech, available at www.benetech.org, last accessed on 10 September 2011.

OpenEvSys, a database system developed by HURIDOCS,[82] offers similar functionalities as Martus, based on "Who did What to Whom" logic:

- Recording, browsing and retrieving information on events violations, victims, perpetrators;
- Extracting event reports;
- Searching data of abuse;
- Managing and tracking interventions into event (such as legal or medical aid);
- Placing an event into a chain of events.

Well-elaborated software allowing browsing, searching and sharing of the documented data on violations, seems to be an expedient application for making *immediate* records of violations when interviewing the victims. However, to make *legally relevant* analysis linking massive records to allegations of who is responsible for the violence, who was targeted, what were the goals of perpetrators, that is, to explain the violations with the records and help officers bring about their legal consequences, does not seem to be possible with these database systems.

The subject of further research is how to approximate evidence gathered by NGOs to the law bringing about legal consequences of the violations. As mentioned in the section above, the creation of a uniform software may create avenues for collaboration between several NGOs operating with the same violation, or share the legally relevant evidence with national units empowered to prosecute such crimes, whether in the same state or abroad under the head of universal jurisdiction.

5.7.3.1. Database of Competent Authorities and Contact Points

The MLA tool Atlas[83] allows the identification of locally competent authorities that can receive requests for mutual legal assistance, and provides a channel for the direct transmission of requests according to the selected measure.

The user chooses the State where the request is sent and answers questions narrowing the range of enforcement action possible, such as

[82] Huridocs, "OpenEvsys – for documenting violations", available at www.huridocs.org/openevsys, last accessed on 10 September 2011.

[83] *Ibid.*

"Are particularly serious organized crimes and war crimes involved?", "Are very serious economical or environmental crimes involved?", "Location of enforcement action" and "Is the immediate reaction required?", and is led to a list of measures or inquiries the authority want to apply for. By selecting one of nearly 60 enforcement measures available in that country, an officer accesses contact of the responsible authority.

5.7.3.2. Database of Legislative Requirements for Enforcement Action

The MLA Tool Fiches Belges[84] allows officers to be informed of the legislative framework for the particular enforcement action in a requested country. The user selects a country and the type of enforcement action needed. For instance, "Agents and informers – Infiltration" category in the state of Austria brings the following list of enforcement action:

- Infiltration by undercover agents of the requested State (201)
- Infiltration by agents of the requesting State in the territory of the requested State (202)
- Infiltration by an informer of the requested State (203)
- Handling of informers (204)

The user may select the enforcement measure and view the commentary as to the definition and scope of the measure, alternative measures with the same purpose, competent body, practical modes of execution of the measure, and conditions for assistance or participation of agents of the requesting State in the execution of the measure.

5.7.3.3. Compendium Wizard

The wizard allows the user to draft letters rogatory online by following the structure of the wizard. First, the user checks whether the request for the specific measure is available in the country. The user selects the language of the letter rogatory, the contact point that will be charged with execution of the request, and the authority that sends the request. The nature of the request is described in the following categories:

- Persons concerned by the request;

[84] *Ibid.*

- Urgency and confidentiality of the request;
- Conventions applicable to the case;
- Facts and legal qualification for free input of the text;
- Requested activity;
- Request to acknowledge the receipt of the letter rogatory; and
- Requesting video conference.

The development of collaborative software between the different units charged with the prosecution of core international crimes and empowered to respond to the letters rogatory when needed alleviates problems related to the quality of drafting, language barriers and disparate legal requirements for law enforcement action in each jurisdiction.

Subject to sufficient agreement between states and their commitment to appoint the contact points, judicial authorities will become more accessible. It remains a subject of further research how the infrastructure can be customized and tailored for a larger audience of States improving their ability to prosecute core international crimes.

5.7.3.4. Judicial Collaboration Platform

A notable development for judicial collaboration in international criminal justice is the effort to create Judicial Collaboration Platforms (JCPs) in the EU and pre-accession countries. These judicial platforms are to be built in accordance with certain logics.[85]

The co-operation platform secures the environment of each user working from its national jurisdiction. As soon as the prosecution activities need to be taken by another jurisdiction, the system creates a collaboration gateway between the two officers responsible for prosecution in their home jurisdictions. A collaborative environment with shared documents and evidence is created between the two jurisdictions.

Access to the JCP is protected by means of a digital certificate issued by a certification authority, stored in user's smartcard and protected by biometry. The infrastructure, effects and developments of these pilot projects may be helpful for developing avenues of communication be-

[85] M. Cislaghi, D. Pellegrini, E. Negroni, "A new approach to international judicial cooperation through secure ICT platforms", in *European Journal of ePractice*, October 2008, no. 5, p.4.

tween the national units tasked with prosecutions of core international crimes.

5.8. Conclusion

This chapter has argued that there is a need to adopt a legal empowerment approach to positive complementarity. Such an approach is supported by the text of the Rome Statute and draws on work done in other areas of international law, such as development studies. It requires a bottom-up approach that is focused on certain core values, namely rule of law, access to justice, and human rights. Adopting such an approach shapes how we understand and justify the substantive direct and indirect effects of international criminal justice, and how it is implemented by enhancing domestic capacities to prosecute international crimes. With respect to the former, a legal empowerment approach explains how the direct and indirect effects of international criminal justice should be understood in terms of a legal empowerment bottom-up approach and goals, such as the rule of law, access to justice and human rights. With respect to the latter, a legal empowerment approach requires adequate investment in stakeholders of domestic criminal justice systems and the maximization of appropriate tools.

PART II:
SOME FEATURES OF THE LEGAL TOOLS AND THEIR DEVELOPMENT

6

The Metadata Scheme of the Legal Tools Project

Volker Nerlich[*]

6.1. Introduction

The Legal Tools Database (hereinafter LTD) comprises information of great diversity. It contains judicial decisions, filings of participants to judicial proceedings, laws, international legal instruments and their preparatory works, academic writings, links to websites, as well as other publications. These resources are written in various languages and stem from, or relate, not only to the International Criminal Court (hereinafter ICC), but potentially all criminal jurisdictions in the world. The diversity of the LTD is one of its main strengths because it adequately reflects the complexity and multiple dimensions of international criminal law and justice, broadly defined. At the same time, the diversity of the LTD also represents a challenge: how can it be ensured that users actually find the resources relevant to their searches?

In the age of advanced full-text search engines, one might think that this should not be a problem, and indeed, the LTD is equipped with a powerful full-text search tool.[1] But full-text searching quickly finds its limits in a large and multilingual database: if a user looks for the word "murder" by way of a full-text search, the search will not yield resources that discuss the subject, but use a different term or are written in another language (consider "homicide", *"meurtre"*, *"Mord"*). Similarly, a full-text search may often not be precise enough and therefore yield too many results in a database comprising thousands of documents. Imagine a user who is looking for the latest jurisprudence of the Appeals Chamber of the

[*] Dr. **Volker Nerlich** LL.M. is Legal Officer in the Appeals Division of the International Criminal Court and a member of the Legal Tools Advisory Committee. The views expressed are those of the author and cannot be attributed to the International Criminal Court.

[1] See the description of the full text search engine at http://www.legal-tools.org/en/search-the-tools/help/, last accessed on 14 November 2011.

International Criminal Tribunal for Rwanda (ICTR) on murder as a war crime under Common Article 3 of the 1949 Geneva Conventions. A simple full-text search for the word "murder" is likely to result in hundreds, if not thousands, of hits, most of which will be irrelevant to the search.[2] The user would have to spend much time browsing through all results to identify the resources he or she is looking for. Another challenge is that not all resources in the LTD are stored in an electronic format that allows full-text searching. Thus, a relevant resource may not be picked up by the full-text search engine because the engine cannot "read" the content of the resource.

In light of the above challenges, it soon became evident in the Legal Tools Project that in addition to full-text searching, the LTD should also provide for searching by metadata. "Metadata" is defined as a "set of data that describes and gives information about other data".[3] Typical metadata are, for example, the title of a resource, the language in which it is written, or the resource's date. In the LTD, the metadata for each resource are stored separately and linked to the resource which they describe. In a metadata search, these metadata themselves are searchable and will direct users to a resource.[4] It is possible to combine several metadata fields (for example, to search for resources with a given title and date), and to combine metadata searching with full-text searching.

The extraction of metadata from resources also allows standardization: the first day of the year 2010 may appear in one resource as "1 January 10" and in another resource as "Jan. 01, 2010". A full-text search for "1 January 2010" would not find either of these two resources. In the metadata, however, the dates of all resources are stored in a uniform manner, for example, as "01 January 2010". If users are looking for a document of a specific date, they can use a metadata search in the standard date format, which would yield all documents of that date, irrespective of how the date is expressed in the resource. Thus, the metadata scheme of the LTD is not only relevant for those interested in

[2] On 8 January 2010, a full-text search in the LTD for the word "murder" yielded 2,278 results.

[3] *Oxford English Dictionary Online*, Draft revision September 2009, "meta-, *prefix"*, last accessed on 8 January 2010.

[4] The metadata search is available at http://www.legal-tools.org/en/search-the-tools/advanced-search/, last accessed on 14 November 2011.

the technical aspects of the database, but for anyone who wishes to search it efficiently.

In the following pages, I shall describe some aspects of the metadata scheme of the Legal Tools Project. The first section summarizes the development of the metadata scheme. The second section describes the categories of metadata collected for the LTD. The third and final section provides an outlook on the future development of the LTD metadata scheme.

6.2. Developing a Metadata Scheme

From the beginning, the work on the metadata scheme for the LTD was aimed at facilitating access to the resources contained in the Legal Tools. The guiding question for the development of the scheme was as follows: which metadata searches should be available to the users of the LTD in order to make searching easy, reliable and fast? The metadata scheme would in many respects define and determine the architecture metadata search within the LTD. Once the scheme had been implemented, it would be difficult to correct errors or to provide for searches that were not foreseen in the scheme. When developing the metadata scheme, it was therefore necessary to anticipate how users may wish to access the resources contained in the LTD. The diversity of the materials contained in the LTD as well as the fact that the LTD would be used by different user groups (practitioners, academics, students, and so on) for various purposes made this a challenging task.

It soon became clear that two principal search scenarios have to be distinguished: in the first scenario, a user is aware of the existence of a particular known resource (for example, a given judgment of the ICC Appeals Chamber), and wants to retrieve it through the LTD. In such a situation, users are likely to search by the title of a resource, by its date, document numbers or other pieces of information that allow the identification of a resource. In the second scenario, the user is not seeking to retrieve a particular resource from the LTD, but may, for example, want to know whether there are any judgments of the ICC on genocidal intent or on a particular question of procedural law. Here, users are using the LTD not merely for searching, but for researching. Clearly, the metadata scheme should cater for such a scenario as well. In most such cases, users would be relying on the full-text search as well as on key-

words, a specific type of metadata;[5] the function of the other metadata is to reduce the number hits and to increase their relevancy (for example, a user may search for the term "murder" by way of full-text searching, but limit the search to resources from, say, the ICTR Appeals Chamber).[6]

The approach to the development of the metadata scheme was to allow for an intuitive search by metadata, tailored to the field of international criminal justice. The specific perspective of the search function also explains some apparent "inconsistencies" in the metadata scheme. For example, under the LTD metadata scheme, the ICTR and the International Criminal Tribunal for the Former Yugoslavia (hereinafter ICTY) are considered separate institutions, and not merely sub-organs of the United Nations Organization. While this is, legally speaking, incorrect, it is explained by the fact that a user will probably look for the ICTR and ICTY as separate institutions, and not necessarily look for them under the heading "UN". Considering ICTR and ICTY as separate institutions also made it easier to map in the metadata the entities within these tribunals, such as the various chambers, the registry and the prosecution.

While the metadata scheme for the LTD thus had to be "tailor-made", the Legal Tools Project did not have to start from scratch. In the early stages of the Legal Tools Project, a large amount of metadata was collected for the *travaux préparatoires* of the Rome Statute. The metadata elements used for this collection provided a solid starting point for the development of a more comprehensive metadata scheme for the LTD. Furthermore, the Legal Tools Project had already developed an extensive "Naming Convention" for the naming of electronic files, which could be used for the metadata scheme. In addition, the ICC's Registry maintains, in compliance with rule 15(1) of the Rules of Procedure and Evidence, a "database containing all the particulars of each case". This so-called Court Management System (hereinafter CMS) contains the judgments, decisions and orders issued by the Chamber of the ICC, as well as all filings by the parties and participants to ICC proceedings (hereinafter ICC court records) and collects several metadata against each document (for

5 On the key word scheme of the LTD, see F. Eckelmans, "Taxonomy of Consensus: The ICC Keywords of the Legal Tools" in the present volume.

6 On 8 January 2010, a full-text search in the LTD for the word "murder" limited to the Appeals Chamber of the ICTR yielded only 32 documents, as opposed to 2,278 results for the word "murder" alone.

example, the title of the document, date, document number, and the related case). As all public ICC court records are also contained in the LTD, the metadata scheme sought to align the metadata for the LTD with those contained in the CMS. A correspondence table maps which metadata fields in the CMS correspond to the metadata fields in the LTD.

Another reference point for the metadata scheme of the LTD was the element set of the Dublin Core Metadata Initiative.[7] All metadata elements of the LTD are based on, or derived from, elements and definitions developed by the Dublin Core Metadata Initiative, and their relationship has been recorded in a reference table. This was done to ensure compliance with widely-used standards, to facilitate transferability, and to build on the Initiative's specialized knowledge on the use of metadata.

Originally, the metadata scheme was developed in tabular format. The table listed all metadata elements, their definition, their scope of application, and so on. On the basis of this table, a "Metadata Manual" was drafted, which groups the metadata elements, provides further explanation and gives examples. The Metadata Manual, which is annexed to this book, serves primarily as guidance for the outsourcing partners of the Legal Tools Project, who collect the metadata for the resources. Nevertheless, the Metadata Manual also provides valuable information to the users of the LTD.

6.3. Categories of Metadata Fields in the Legal Tools Database

The LTD metadata scheme currently consists of 76 elements, reflecting the complexity of the database. The Metadata Manual identifies 12 different groups of metadata elements. This grouping of the elements was done primarily to indicate which elements are related and to make it easier for the outsourcing partners entering the metadata to carry out their work. Some of the metadata elements are descriptive (for example, the title and language of a described resource), while others are analytical, that is they require the person entering the metadata to analyse the content of the resource. The key words are an important analytical metadata element, which is dealt with extensively elsewhere in this volume.[8] Some

[7] See Dublin Core Metadata Initiative, available at http://www.dublincore.org, last accessed on 14 November.

[8] Eckelmans, see *supra* note 5.

metadata elements will not be used for searching purposes, but are required for technical or quality control purposes (for example, date of collection of the metadata). Other metadata elements will only be displayed on the results screen (for example, links to related resources).

Although there are 76 metadata elements, the advanced search screen of LTD currently has only 18 fields for metadata searching (in addition to the field for full text searching). This is partly due to the fact that, as described in the preceding paragraph, not all metadata elements are used for searching purposes. The smaller number of metadata search fields on the search screen is also a result of combining searches in different elements. For example, the first group of metadata elements ("Information relating to the title of the resource") comprises seven metadata elements. The users of the LTD, however, will not be confronted with all different elements: on the search screen, the "Title search" box automatically searches all seven metadata elements.

A large number of metadata elements are collected only for "judicial resources", that is, documents that relate to judicial proceedings. The LTD being a legal database, judicial resources are of particular importance and more detailed metadata searching should be possible for these resources than for non-judicial resources. Thus, for example the place of the court, the names of the judges, and the names of the accused persons are recorded. Several of these metadata elements reflect that "judicial resources" generally will be related to cases. By searching for a particular case, a search in the LTD will yield all resources contained in the database that relate to a given case.

Depending on the metadata element, the outsourcing partners enter the values for each element either as free text (for example, the title of a resource), or choose values from an existing list (so-called validated values; for example, a list of all languages or states). Such lists help to avoid inconsistencies in the LTD, and they are therefore used as much as possible. This includes so-called open lists: if certain values (such as the names of courts or of authors of publications) are likely to be used several times in the database, new values are automatically entered into a list and can then be used in the future when entering metadata. The users of the LTD may also make use of the lists: for some metadata elements, users are required to pick a value from a list (for example, the metadata elements "source type" and "language"); for other elements, users may enter free text in the search field, but may also select a value from a list

comprising all values currently used (for example, the metadata element "place of court").

6.4. Outlook

Although the general architecture of the LTD metadata scheme has to be fixed, it nevertheless remains, at this stage, "work in progress". In light of the experience gained through implementing the scheme, the metadata and their definitions have been occasionally amended or modified. The outsourcing partners of the Legal Tools Project are particularly involved in this process because when collecting metadata for the resources contained in the LTD, they can identify ambiguities or deficiencies in the metadata scheme.[9] Until now, however, the changes to the original metadata scheme have been relatively minor and amounted primarily to clarifications and smaller adjustments.

As stated above, the principal aim of the metadata scheme is to facilitate searching in the LTD. The metadata-based search engine has been made available to the public only recently. The experience of the users with the search engine will tell whether the current metadata scheme adequately fulfils this purpose, or whether the scheme may have to be revised more fundamentally.

[9] Version 1.2 of 11 November 2009 of the Metadata Manual reflects the current status of the metadata scheme.

7

Taxonomy by Consensus: The ICC Keywords of the Legal Tools

Franziska C. Eckelmans*

7.1. Introduction

This chapter focuses on a description of the keywords of the International Criminal Court (hereinafter ICC), the purposes for which they were created, and their implementation into the Legal Tools via the search engine of the Legal Tools Database. It seeks to clarify their structure and to exemplify them. Other contributions to this book describe in more detail the purposes of the Legal Tools, which is an electronic collection of decisions, legal documents, academic articles and other material relevant to the field of international criminal law.[1]

The ICC keywords and metadata were developed to enable efficient scientific research through electronic search engines. While this article focuses on the ICC keywords, the metadata scheme of the Legal Tools is addressed in the previous chapter by Volker Nerlich. Both the Metadata Manual and the ICC keywords are reproduced in annexes to this book.

7.2. The Creation of the ICC Keywords

The Legal Tools Advisory Committee (hereinafter LTAC) of the ICC was set up in late 2005. One of its main tasks was to make the Legal Tools accessible to a broader audience. Apart from making documents available in an ordered fashion on the web site of the ICC, the LTAC lent its authority at an early stage to the idea that they also had to be accessible via a search engine.[2] Such a search engine had to conform to high

* **Franziska C. Eckelmans** is Legal Officer, Appeals Division, International Criminal Court, and member of the Legal Tools Advisory Committee. The opinions expressed in this article are those of the author and do not necessarily reflect those of the ICC.

1 ICC, "What are the ICC Legal Tools?" available at http://www.legal-tools.org/en/what-are-the-icc-legal-tools/, last accessed on 12 November 2011.

2 *Ibid.*

standards of electronic research in the area of law. Consequently, other search engines in this area, such as the ones used by the WESTLAW or HUDOC[3] databases, and the needs of users were studied.

The legal texts of the ICC are well-suited to the creation of keywords. They are comprehensive not only with respect to the substantive law, but are also very detailed with respect to applicable procedural law. Furthermore, being to a large extent State-made law, they promise a certain stability.[4] Considering its mandate and jurisdiction, the ICC will be the only criminal court on the international level in the foreseeable future.[5] As such, the ICC and its legal texts might increasingly provide an example to national jurisdictions, not only with respect to the crimes or rules on cooperation which State Parties are obliged to incorporate in their national systems, but also with respect to procedural provisions, that can be used in future hybrid tribunals, for example.[6]

Against this background, in 2006, the LTAC consulted the ICC Legal Tools Expert Advisory Group (hereinafter LTEAG),[7] which is composed of leading IT and law experts. The experts described the development in search engine technology especially with respect to smart research tools, and the success of full-text searches by indexing. They also pointed out problems relevant to the creation of intelligent search

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3 HUDOC is the name of the search engine of the European Court of Human Rights, see http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en ; WESTLAW is a widely used search engine for legal research, see http://web2.westlaw.com/signon/default.wl?fn=_top&rs=WLW10.01&ifm=NotSet&vr=2.0&bhcp=1.

4 The Rome Statute, the Rules of Procedure and Evidence, and the Code of Professional Conduct for counsel are legal texts made by or with the assistance of the Assembly of States Parties.

5 The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) are in the middle of their respective completion strategies. The work of the ICTY will probably come to an end by 2014 (see http://www.icty.org/sid/10016, last accessed on 2 February 2010), while the work of the ICTR will probably be completed before that date (see http://www.ictr.org/default.htm, last accessed on 2 February 2010).

6 See, for example, article 33(1) of the ECCC Law allowing the court to seek guidance (under certain conditions) on "rules established at the international level".

7 See International Criminal Court, "Work on the Tools", available at http://www.legal-tools.org/en/work-on-the-tools/, last accessed on 14 November 2011.

technology. It transpired that one of the goals of developing search technology is to create smart and efficient research systems for many different fields – for example, not only that of law – at the same time. The goal of the Legal Tools Project though, was to create an advanced search environment for documents collected relevant to one field of law only, that is, international criminal law, on the basis of a rather stable system, that is, the legal texts of the ICC. Experts confirmed that for such a limited system that is coherent in itself, the establishment of keywords can still be considered a useful tool, especially where documents in different languages are included in the database.

Following this, the LTAC started establishing two sets of keywords. One set included legal provisions broken down into their smallest parts, while the other set consisted of substantive keywords. The Rome Statute, Rules of Procedure and Evidence, Regulations of the Court, the Code of Professional Conduct for counsel and some provisions of the Regulations of the Registry made up the legal provision keywords. An example of how a legal provision has been broken down is the following:

Article 17 Rome Statute
- Article 17.1 Rome Statute
  - Article 17.1.a Rome Statute
  - Article 17.1.b Rome Statute
  - Article 17.1.c Rome Statute
  - Article 17.1.d Rome Statute
- Article 17.2 Rome Statute
  - Article 17.2.a Rome Statute
  - Article 17.2.b Rome Statute
  - Article 17.2.c Rome Statute
- Article 17.3 Rome Statute

Based upon the legal texts, the work of creating substantive keywords, that is, legal terms, started. The LTAC sought to create a taxonomy of relevant legal terms, in the form of an index. It was thought that the added value of an index is that the legal terms are connected to the provisions of the legal texts of the ICC.

The introduction of TRIM, the ICC's record and document management system, facilitated development of the Legal Tools keywords. The TRIM system has a metadata field called "Thesaurus

terms". The Thesaurus terms have the following characteristics. Each Thesaurus term must be unique: that is, one term has only one meaning. Thesaurus terms can be alphabetically or hierarchically ordered. Different relationships can be created for each term: first, a relationship to one or more hierarchically higher term(s); second, a relationship to one or more hierarchically lower term(s); third, a simple relationship to one or more other terms, showing that there is a connection between two terms. Terms can also be merged without losing relevant information. Information input is handy and relationships of any kind are easily created.

Using the TRIM system to develop the ICC keywords had the following advantages:

1. It was simple to amend terms in the process of inputting data, and duplications of keywords could be easily detected;
2. Authority to amend keywords could be limited to a small group of persons;
3. There was the possibility of transferring the keywords including all levels and relations via a CD ROM (ACCESS database) to other systems, especially the search engine of the Legal Tools;
4. There was the possibility of creating a truly modern, smart search system for the Legal Tools; and
5. Staff of the ICC could use the keywords immediately for their memoranda or research products, allowing for the best possible knowledge-transfer between colleagues and to successors (knowledge management).

The LTAC decided to include the Legal Tools keywords as Thesaurus terms in the TRIM system. This allowed for the creation of a small ontology depicting the field of international criminal law on the basis of the ICC's legal texts.[8] With respect to the ICC keywords, the TRIM system made the following possible:

1. Inclusion of all provisions of the above-mentioned legal texts of the ICC;
2. Creation of connections between interdependent legal provisions;

[8] See for the use of the term "ontology" in information science: http://en.wikipedia.org/wiki/Ontology_(information_science), last accessed on 14 November 2011.

3. Inclusion of substantive keywords;
4. Creation of a hierarchy of legal concepts necessitating the following decisions:
   a) Which legal concepts were important enough to create a first level of a hierarchical structure (sometimes leading to the decision of having one term at the same time on the first level of one hierarchical structure and on the second or third level of another hierarchical structure);
   b) What the appropriate substantive keywords for the lower-level terms in each hierarchical structure were;
5. Creation of relational links between legal provisions and substantive keywords; and
6. Creation of relational links between different substantive keywords where concepts were not hierarchically connected but still of interest to researchers because the terms were either frequently considered together or because the concepts expressed by the substantive keywords were necessarily linked.

All keywords, incluing the legal provision keywords and the substantive ones, were included as Thesaurus terms into TRIM. The TRIM system therefore contains the original version of the ICC keywords.[9] The Legal Tools Project consulted the Legal Tools outsourcing partners on the keywords,[10] whereupon it adopted the final version of the ICC keywords in October 2008.

Minor amendments have since been made to the Legal Tools keywords. Any amendments to the ICC Legal Tools are traceable in the ICC Legal Tools Commentary.

While the first web search engine[11] of the Legal Tools did not yet allow for search by keywords, the new search engine facilitates search by keywords, initially in a limited manner. However, most documents in the

[9] Annex II to the present volume only contains the hierarchical structure of the keywords and is made by hand based upon an Excel print-out of the Legal Tools.

[10] See other contributions to this book relevant to the LTAC's outsourcing partners; see also the brochure on the Legal Tools Project, available at http://www.legal-tools.org/fileadmin/user_upload/Legal_Tools_V._Jul09.pdf, last accessed on 12 November 2011.

[11] See http://www.legal-tools.org/en/search-database/, last accessed on 14 November 2011.

Legal Tools Database have not yet been connected to the keywords. The Legal Tools outsourcing partners are currently in the process of determining the most efficient way of connecting the ICC keywords to documents in the Legal Tools.

7.3. Exemplification of the ICC Keywords

7.3.1. Keywords in General

The substantive keywords follow the terminology of the ICC's legal texts.[12] The term used is for example not "arrest warrant", but, in line with article 58 of the Rome Statute, "warrant of arrest". Each substantive keyword is singular and unique and is only used with one meaning. The meaning of a substantive keyword, if in doubt, is often evident from the hierarchical structure of which they are part, or in its link to a legal provision.

The substantive keywords have different hierarchical levels. As a rule, there are two to four hierarchical levels. An example for five hierarchical levels is the following:

1st level: challenge to jurisdiction of the Court or admissibility of a case

A term on the 2nd level: *consequences on investigation of challenge*

A term on the 3rd level: provisional measures under article 19, paragraph 8

A term on 4th level: provisional measures under article 18, paragraph 6

5th level: *significant risk of not preserving evidence*

5th level: *unique opportunity to obtain important evidence*

How were the different hierarchical structures chosen? First, there are the hierarchical structures relevant to the international crimes (for example, genocide, crimes against humanity, and war crimes), the

[12] They are generally spelled in lower case except where the terms are defined in upper case, for example, Additional Protocol I of the Geneva Conventions, Geneva Conventions of 1949, Rome Statute (for example, the term "Bureau of the Assembly of States Party" has up to four hierarchical levels but also forms the second level of the term "Assembly of States Parties").

structure on war crimes being the largest. Then, there is a hierarchy on individual criminal responsibility, many of the relevant sub-terms being at the same time first-level terms and the starting point for hierarchical structures on their own (for example, "grounds for excluding individual criminal responsibility").

A broad part of the substantive keywords relates to the organisation of the ICC and to the procedure before the ICC. In other words, the Divisions, the Chambers, the Judges, the Presidency, the Office of the Prosecutor, the Prosecutor, the Registry and the Registrar are all terms that form the starting point for long hierarchical structures.

There are many hierarchical structures relevant to procedural law, such as "admissibility of a case", "jurisdiction", "investigation by Prosecutor", "arrest and surrender", "confirmation hearing", "disclosure of evidence", "trial", "conviction" "sentencing", "appeal", "appeal proceedings", "compensation to arrested or convicted person", "enforcement", *et cetera*. Then there are subject areas such as "international cooperation", "counsel", "common legal representative", "charges", "witnesses", "participation of victims", "reparations", "protection of persons", and "evidence". Rather technical areas such as "record", "public hearing", "languages", and "hearings" are covered too.

Importantly, the term "applicable law" is a first-level keyword which leads to the legal texts of the ICC that contain all the relevant legal provision keywords.

Courts such as the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone are also named as substantive keywords under the term "international criminal courts/tribunals". Finally, terms such as the "Assembly of States Parties" and "withdrawal from the Rome Statute" are covered too.

The creation of hierarchical structures afforded content choices, an understanding of the structure of the ICC's legal texts and the will to simplify the structure where possible.[13] The hierarchical structure created for the first-level term "superior responsibility" under article 28 of the Rome Statute provides an intersting example: the structure of the

[13] See, for example, the structures of the keyword "superior responsibility" and the keyword "command responsibility"; see also the terms "admissibility of a case" and "jurisdiction".

keywords for article 28 of the Rome Statute has been simplified compared to the structure of the article as such in order to avoid unnecessary duplication between the concepts of command and superior responsibility. The following are the substantive keywords relevant to article 28 of the Rome Statute in hierarchical order:

superior responsibility

chain of command

command responsibility

crimes within effective responsibility and control of superior

effective command, authority and control

de facto authority

de facto organ

de jure authority

failure to take all necessary and reasonable measures

knowledge

awareness that a circumstance exists

awareness that a consequence will occur

ordinary course of events

mental standard lower than knowledge

conscious disregard of information

should have known

official capacity

other superiors responsibility

superior/ subordinate relationship

Such simplification which avoids duplication leads to the result that "command responsibility" has no further sub-terms. A similar simplification has been undertaken for the creation of substantive keywords relevant to article 19 of the Rome Statute. This article empowers different actors, including the Chamber itself, the Defence, States and the Prosecutor, to start proceedings relevant to the jurisdiction of the ICC or the admissibility of a case. The different ways to commence such proceedings have aspects in common but they are also partly diverging. In addition, there appear to be similarities and differences in

procedure with respect to the subject-matter of the proceedings – be it the jurisdiction of the ICC or the admissibility of a case.

Finally, terms have been included that are not part of the ICC system. This relates especially to specific terminology used by other international criminal tribunals. For example, the term "joint criminal enterprise" was included with its three sub-categories: "category I joint criminal enterprise", "category II joint criminal enterprise", and "category III joint criminal enterprise". The term "preparation" has also been included as a sub-term to "individual criminal responsibility", although the Rome Statute does not provide for a similar notion. Similarly, in the evidence section, terms such as "rebuttal evidence" have been adopted. Under the heading "charges", the term "indictment" appears together with several sub-terms. Nevertheless, the inclusion of concepts that do not completely comply with the ICC's procedural or substantive law framework has been kept at a minimum in order to avoid any overlap of meanings and definitions. This is because we expect that the most appropriate ICC keyword should be chosen in order to cover the meaning conveyed by a decision of other international tribunals. In this context, it is necessary to note that future hybrid or national tribunals might apply diverging terminology and procedures too, which should not necessarily lead to an amendment of the Legal Tools keywords where not absolutely necessary.

7.3.2. First-Level Substantive Keywords

The first level of the different hierarchical structures has 200 different keywords. They can be sorted alphabetically. The choice of first-level keywords has been made according to the hypothetical expectations of a researcher on international criminal law as to what should be on the first hierarchical level. Such expectations, so it was considered, derive from the structure of the legal texts and of international criminal law generally. Consequentially, many of the substantial keywords appearing on the first hierarchical level appear also on the second or third hierarchical level relevant to other first-level keywords. The number of "true" hierarchically first-level words is therefore in reality considerably smaller. To give an example: The term "Judicial Divisions of the ICC" has been selected in line with the terminology used in the Rome Statute. The sub-levels thereto are the following three terms: "Appeals Division", "Trial Division" and "Pre-Trial Division": that is, the Divisions which make up

the "Judicial Divisions". The three Divisions though are in themselves first-level keywords.

Secondly, a few words have been created without any sub-levels. This relates to concepts that stand alone, as for example, "*res judicata*" or "gender, definition of" which were related to other concepts, but not hierarchically. Further, concepts that have been covered by other legal terminology in the ICC keywords are also included. However, since many researchers are likely to be looking for such terms that form part of the terminology of international criminal law, they have been linked (non-hierarchically) to similar terms used in the ICC keywords.

7.3.3. Lower-Level Substantive Keywords

The lower-level substantive keywords are numerous, but most of them form part of different hierarchical structures at the same time. An excellent example is provided by the terms "functions and powers of [...]" the different Chambers. The sub-levels to this term are often part of other hierarchies relevant to the different procedural stages of the ICC proceedings.[14]

7.3.4. Other Relationships

Apart from the different hierarchical relationships existing for each term, many terms are also interlinked. This shows that relationships between legal concepts exists beyond hierarchies, especially where these concepts are closely connected or where similar consequences can arise in their application. To give an example: the second-level keyword "conviction of guilt beyond reasonable doubt" is connected to the first-level keyword "evidence" and to the second-level term "no reversal of burden of proof", which is part of the same hierarchy. The lower-level term "withdrawal of legal representative", which is part of three different hierarchies ("counsel", "legal representative for victims" and "victims"), is related to the following keywords on the lower hierarchical levels: "withdrawal of defence counsel" and "termination of representation agreement". It is further connected to articles 17 and 18 of the Code of Professional Conduct for counsel and regulation 82 of the Regulations of the Court.

[14] See also the term "participation of victims" and its sub-terms that appear in many different hierarchies too.

7.4. Outlook

As has been shown, the different relationships – hierarchical and non-hierarchical – between substantive keywords and legal provisions lead to an interlinked system that is a source of information in itself; an ontology. The ICC keywords shall serve the researcher interested in a specific topic relevant to international criminal law, or to the ICC by providing related terms or setting a term in different hierarchical contexts. The strength of the system is the flexibility it provides in searching for a keyword, as one keyword leads to another.

The ICC keywords can be transferred easily to any search engine that is used for the purposes of the Legal Tools. A search engine that generally supports the interlinked structure is required. It must also have a high memory capacity in order to upload the ICC keywords quickly and make them visible whenever called upon.

Last but not least, the keywords form part of the TRIM system of the ICC, which is the record and document management system of the ICC. Staff can use the keyword system and make their workspace a source of knowledge.

8

Building Databases for the ICC Legal Tools Project: Data Structures and the National Implementing Legislation Database

Dr. Olympia Bekou[*]

8.1. Introduction

In the years that followed the adoption of the Rome Statute for the International Criminal Court,[1] attention has shifted away from the delicate balances struck at Rome, to the effects of the Rome system of justice has on States, including their role in investigating and prosecuting core international crimes and co-operating with the now operational Court. The creation of the ICC has been heralded as the most important development in international law in the past decade,[2] as the Rome Statute currently numbers 119 State Parties to it.[3] However, those who designed the ICC regime recognised that it was neither realistic from the perspective of resources, nor desirable from the perspective of encouraging the assumption of responsibility nationally, that all crimes falling under the jurisdiction of the ICC be tried centrally at The Hague.

The complementary nature of the ICC ensures that the ICC will only intervene if a State is "unwilling or unable genuinely" to deal with a

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[*] **Olympia Bekou** is Associate Professor in Law and Head of the International Criminal Justice Unit, Human Rights Law Centre (HRLC), University of Nottingham. The author would like to thank Dr. Will Lowe at the University of Maastricht and formerly of the Methods and Data Institute, for introducing me to data structures. All errors or omissions remain hers alone.

[1] See 1998 Rome Statute of the International Criminal Court, A/Conf.138/9, 1998, (hereinafter Rome Statute). The Court was formally established on the 1 July 2002 (hereinafter ICC or the Court).

[2] For an overview of the International Criminal Court, see W.A. Schabas, *An Introduction to the International Criminal Court*, Third edition, Cambridge University Press, Cambridge, 2007.

[3] As of 8 November 2011.

case.[4] Enabling national prosecution of the crimes contained in the Rome Statute constitutes the first step in evading the ICC's jurisdiction.[5] Under the principle of complementarity, States are given the opportunity to investigate or prosecute nationally. To be able to do this, they would arguably need to have provisions incorporating the core ICC crimes, the general principles of liability, as well as the defences found in the Statute. This is seen as an important part of the fight against impunity and supplements any ICC action. Under the regime created by the Rome Statute, States coexist with the ICC and are meant to share the burden of investigations and prosecutions. A first step is therefore necessary: that of the adoption of implementing legislation.

With the advent of positive complementarity, which aims to involve national authorities more, implementing legislation enabling national investigations and prosecutions becomes central to the success of the venture.[6] If the newly found emphasis on positive complementarity

[4] Rome Statute, article 17. Complementarity has been the subject of much academic scrutiny that has focused on its constituting elements and potential ramifications of its use. See, *inter alia*: J.T. Holmes, "The Principle of Complementarity" in R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer, 2002, p. 41 at p. 45; M. Benzing, "The Complementarity Regime of the International Criminal Court: International Criminal Justice between State Sovereignty and the Fight Against Impunity", in *Max Planck United Nations Yearbook*, 2003, vol. 7, p. 592 at p. 599; J.K. Kleffner and G. Kor, *Complementary Views on Complementarity*, TMC Asser Press, 2006; M.M. El Zeidy, "The Principle of Complementarity: A New Machinery to Implement International Criminal Law", in *Michigan Journal of International Law*, 2002, vol. 23, p. 869; I. Tallgren, "Completing the International Criminal Order: The Rhetoric of International Repression and the Notion of Complementarity in the Draft Statute for an International Criminal Court", in *Nordic Journal of International Law*, 1998, vol. 67, p. 107; B. Perrin, "Making Sense of Complementarity: The Relationship Between The international Criminal Court and National Jurisdictions", in *Sri Lanka Journal of International Law*, 2006, vol. 18, p. 301; M. Delmas-Marty "Interactions between National and International Criminal Law in the Preliminary Phase of Trial at the ICC", in *Journal of International Criminal Justice*, 2006, vol. 4, p. 2.

[5] As the ICC Prosecutor said, upon taking up his position in June 2003: "the absence of trials before … [the ICC], as a consequence of the regular functioning of national institutions, would be a major success". Mr. Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, "Statement made at the ceremony for the solemn undertaking of the Chief Prosecutor of the ICC", Ceremony for the solemn undertaking of the Chief Prosecutor of the International Criminal Court, The Hague, 16 June 2003, 2.

[6] In its 2006 Policy Paper, ICC Office of the Prosecutor, Report on Prosecutorial Strategy, September 2006, the Office of the Prosecutor further elaborated on this issue, by

were to succeed,[7] a more systematic approach towards empowering national legal orders is needed. Such an approach would encourage not only closer but also more meaningful interaction between the national and international levels. The outcome of this process would be the allocation of ICC resources to those cases only that bear the greatest gravity together with greater involvement of national courts. As a result of embracing complementarity at the national level, some of the burden will be taken off the ICC which does not have the capacity or the resources to try each and every case falling within its jurisdiction. The enactment of legislation as a means of materialising positive complementarity is therefore more pressing than ever.

The University of Nottingham Human Rights Law Centre (HRLC),[8] as one of the ICC's Legal Tools outsourcing partners, has devised a database which aims to highlight the different implementation

introducing what has now become known as "a positive approach to complementarity": "With regard to complementarity, the Office emphasizes that according to the Statute national states have the primary responsibility for preventing and punishing atrocities in their own territories. In this design, intervention by the Office must be exceptional – it will only step in when States fail to conduct investigations and prosecutions, or where they purport to do so but in reality are unwilling or unable to genuinely carry out proceedings. A Court based on the principle of complementarity ensures the international rule of law by creating an interdependent, mutually reinforcing international system of justice. With this in mind, the Office has adopted a positive approach to complementarity, meaning that it encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation", at p. 5. For the general discussion on positive complementarity approach see: W.W. Burke-White, "Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice", in *Harvard International Law Journal*, 2008, vol. 49, p. 53; W.W. Burke-White, "Implementing a Policy of Positive Complementarity in the Rome System of Justice", in *Criminal Law Forum*, 2008, vol. 19, p. 59.

7 See ICC-ASP/8/Res.3, Strengthening the International Criminal Court and the Assembly of States Parties, Adopted at the 8th plenary meeting, on 26 November 2009, by consensus. Para. 6 reads: "Encourages States Parties to further discuss issues related to the principle of complementarity and to explore proposals by States Parties introduced as "positive complementarity"", available at: http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-8-Res.3-ENG.pdf. See also a discussion paper submitted by Denmark and South Africa at the 8th ASP, entitled: "Bridging the Impunity Gap through Positive Complementarity", dated 6 November 2009.

8 See Human Rights Law Center, University of Nottingham, available at www.nottingham.ac.uk/hrlc.

strategies and cover a wide range of provisions on all aspects of the ICC Statute.

The National Implementing Legislation Database (NILD) contains a comprehensive catalogue of all official versions of national ICC implementing legislation, broken down to fine-grain decompositions ("spans"), which have been "tagged" with corresponding keywords selected from a list of approximately 800 purposely designed keywords. It also contains a list of key State attributes, which impart a broader picture of particular State choices. Finally, NILD includes legal analysis of those provisions that are of particular interest either because they are wider or narrower than the relevant ICC Statute provision, or because they introduce new concepts or notable aberrations.

The NILD aspires to map emerging trends in implementation through the breakdown and analysis of existing legislation, enabling the identification of the requisite standards for the enactment of effective national implementing legislation. It aims to provide guidance to States that have yet to engage in the implementation process, materialising the complementarity promise, assisting NGOs in targeting their advocacy campaigns and serving multiple research purposes.

This chapter identifies the need for a tool such as the one presented here, explains the choices that had to be made in its construction and discusses the procedures and processes employed for its operation, before reflecting on NILD's outputs.

8.2. Implementing the ICC Statute: Some General Issues

Prior to exploring how the Legal Tools can be of assistance of a State's duty to engage in the implementation process, some fundamental questions as to why, when and how a State ought to do so should be discussed. Implementation enables the application of the Rome Statute within national legal orders. Without State assistance, the ICC cannot function, not only because it relies on States to arrest and surrender the suspect sought by the Court,[9] but also because its very jurisdiction is

[9] As Antonio Cassese, the first president of the International Criminal Tribunal for the Former Yugoslavia (ICTY) observed in his paper "On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law" in *European Journal of International Law*, 1998, vol. 9, p. 2, 8: "[The] ICTY is very much like a giant without arms and legs – it needs artificial limbs to walk and

dependent on State action or inaction.[10] However, it is important to emphasise that not all of the provisions of the Rome Statute need to be incorporated into domestic law. State Parties to the Rome Statute, are under an obligation to enact legislation with regard to the ICC's co-operation regime. This can be found in article 88 of the ICC Statute, which is one of the shorter Statute provisions and contains one of very few positive obligations in the Statute.[11] A similar Statute provision does not exist, with regard to the substantive law provisions of the Statute. The fourth and sixth preambular paragraphs which acknowledge the "duty of every State" to investigate and prosecute international crimes are not binding, owing to their positioning outside the main body of the treaty.[12] Nevertheless, it would be advisable for a State to incorporate all the crimes set out in article 5 of the Rome Statute (genocide, crimes against humanity and war crimes) into domestic law, as well as to review the defences and other general principles of international criminal law to determine their compatibility with the ICC regime. Be that as it may, there is no provision within the Statute outlining the methodology for implementation of either the substantive part of the Statute (for example, crimes, defences, *et cetera*) or the co-operation regime (for example, the process of arrest and surrender). It is for each individual State Party to assume an approach to implementation which is suitable to its particular circumstances.[13]

work. And these artificial limbs are state authorities. If the cooperation of states is not forthcoming, they cannot fulfil their functions". This statement is even more relevant with regard to the ICC, which, except for referrals, cannot rely on the United Nations (UN) Security Council for the monitoring of co-operation.

10 See reference to the ICC's complementary jurisdiction above.

11 Article 88 ICC Statute, entitled "Availability of procedures under national law" reads: "States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part".

12 See article 31(2) of the Vienna Convention on the Law of Treaties which provides that the preamble shall be taken into account for interpretative purposes. For an examination of whether an international obligation exists elsewhere see O. Bekou, "A Case for Review of Article 88, ICC Statute: Strengthening a Forgotten Provision", in *New Criminal Law Review*, 2009, 12(3), p. 468 at p. 471 and the following.

13 Various approaches have been adopted in that respect, and individual pieces of such legislation or compilations thereof have been analysed elsewhere. See, *inter alia*, C. Kress *et al.*, *The Rome Statute and Domestic Legal Orders*, vol. II, Nomos Verlagsgesellschaft/il sirente, 2005; C. Kress *et al.*, *The Rome Statute and Domestic Legal Orders*, vol. I, Nomos Verlagsgesellschaft/il sirente, 2000; M. Neuner (ed.), *Na-*

In terms of timing of implementation, the Statute remains neutral, leaving States to decide when implementation takes place. However, since its coming into force in July 2002,[14] a State Party may be requested to co-operate with the now functioning ICC. In order for such a co-operation request to be executed, legislation needs to be in place at the national level. In practice, most States become parties to the ICC Statute first and implement its terms afterwards. States which have not yet joined the ICC regime are under no obligation to enact such legislation. They may wish, however, to consider enacting legislation prior to joining the ICC so as to ensure that there will be no possibility of their being found non-compliant with the Rome Statute once they do.[15]

Despite the unquestionable merits of enacting national legislation, States have generally not risen to the implementation challenge. Out of the 119 State Parties to the ICC Statute, more than 50% of them do not have full implementing legislation. However, of the States that have specifically enacted implementing legislation to comply with article 88 discussed above, most have also included provisions incorporating the substantive law as well.

There are many factors that may contribute to the slow pace of implementation. Drafting national legislation to incorporate the Statute into domestic law takes time. Even when the political will is present, reviewing the compatibility of existing legislation and the preparation of new legislative instruments and their subsequent approval by the relevant

tional Legislation Incorporating International Crimes; Approaches of Civil and Common Law Countries, Berliner Wissenschafts-Verlag, 2003; H. Fischer, C. Kress and S.R. Lüder (eds.), *International and National Prosecution of Crimes under International Law*, Berlin Verl. A. Spitz, 2001; A. Cassese and M. Delmas-Marty, *Juridictions Nationales et Crimes Internationaux*, PUF, 2002. A number of books focusing on the implementation efforts undertaken in different countries have been published by the Max Planck Institut für ausländisches und internationales Strafrecht as part of the "Nationale Strafverfolgung völkerrechtlicher Verbrechen" project. Academic articles have been published in almost every issue of the Journal of International Criminal Justice which constitutes a rich source of information.

[14] The Rome Statute came into force on 1 July 2002, 60 days after the 60th ratification, which took place on 11 April 2002. See Rome Statute, article 126.

[15] The United Kingdom is a good example of a state which implemented first and ratified later. The International Criminal Court Act 2001 (UK) was passed on 24 September 2001 and entered into force on 17 December 2001. The United Kingdom's instrument of ratification was deposited on 4 October 2001, once the Act had been passed.

body, usually the national Parliament, normally takes a substantial amount of time. Moreover, implementation requires expert knowledge and adequate resources to do it properly. Such resources are not always available. Along the same lines, it should not be forgotten that the Rome Statute is a highly complex legal instrument which requires good understanding of a variety of areas, such as criminal law and procedure, international law and process, and human rights and humanitarian law by the national drafters.

Furthermore, ICC implementation may also be affected by certain provisions found in the constitution or type of legal system the State in question follows. It is not unusual for national constitutional provisions to conflict with the Rome Statute.[16] This, in turn, poses problems given that a constitutional provision typically has an elevated status within the said legal system making it difficult to amend. Such conflicts may lead to delays in implementation.[17]

Constitutional issues may prove problematic, particularly when executing an ICC co-operation request. To resolve constitutional incompatibilities, two options are available. The State may either amend the conflicting constitutional provisions or interpret them in such a way so as to allow for the application of the ICC regime at the national level.[18]

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[16] See, for example, H. Duffy "National Constitutional Compatibility and the International Criminal Court", in *Duke Journal of Comparative and International Law*, 2001, vol. 11, p. 5; D. Robinson "The Rome Statute and its Impact on National Law" in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol II, Oxford University Press, 2002, p. 1849; The European Commission for Democracy of the Council of Europe (Venice Commission), "Report on Constitutional Issues Raised by the Ratification of the Rome Statute of the International Criminal Court Adopted by the Commission at its 45th Plenary Meeting (Venice, 15–16 December 2000)", 15 January 2001, CCDL-INF, 2001, 1.

[17] The Venice Commission has identified the following areas as potentially conflicting with the ICC regime: [The] immunity of persons having an official capacity; the obligation for states to surrender their own nationals to the court at its request; the possibility for the court to impose a term of life imprisonment; exercise of the prerogative of pardon; execution of requests made by the court's Prosecutor, amnesties decreed under national law or the existence of a national statute of limitation; and the fact that persons brought before the court will be tried by a panel of three judges rather than a jury. *Ibid*.

[18] For example, in France, the Head of State cannot be prosecuted before the national courts. Therefore, an amendment was made to article 53-2 of the French Constitution

Either way, the resolution of constitutional issues may further slow down the implementation process.

In addition, the position of international law with regard to the national legal system may also pose difficulties regarding the implementation of the Rome Statute.[19] States that follow the dualist tradition require incorporating legislation in order to give effect to an international treaty at the domestic level. Conversely, States that follow the monist legal tradition may – mistakenly perhaps – assume that there is no such need. It has been argued that in a State that follows the pure monist tradition, implementing legislation would be altogether unnecessary, since the Rome Statute would be directly applicable in the domestic legal order and would prevail over any conflicting piece of legislation.[20]

The preceding statement overlooks how monism works in practice. Moreover, it ignores the finer points and subtleties of the Rome Statute's provisions. In any event, not many states follow the "pure" form of monism. Rather, monism and dualism present two extremes and most States find themselves operating somewhere in between.[21] Moreover,

of 1958 to recognise the jurisdiction of the ICC so that any proceedings against the Head of State can take place before the ICC. See A. Buchet "L'intégration en France de la Convention portant statut de la Cour pénale internationale: histoire brève et inachevée d'une mutation attendue", in C. Kress and F. Lattanzi, see *supra* note 13, 65.

19 For a more detailed and sophisticated analysis, see I. Brownlie, *Principles of Public International Law*, Seventh edition, Oxford University Press, Oxford, 2003, pp. 31–33; L. Ferrari-Bravo "International and Municipal Law: The Complementarity of Legal Systems", in R.St.J. MacDonald and D.M. Johnston (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory*, Martinus Nijhoff, Dordrecht, 1983, p. 715; J.G. Starke "Monism and Dualism in the Theory of International Law", in *British Yearbook of International Law*, 1936, vol. 17, p. 66; F. Morgenstern, "Judicial Practice and the Supremacy of International Law", in *British Yearbook of International Law*, 1950, vol. 27, p. 42.

20 The monist tradition dictates that when a state ratifies an international agreement, the self-executing provisions of that treaty apply directly in domestic law and prevail over conflicting domestic provisions. See E. Denza, "The Relationship between International Law and National Law", in M.D. Evans (ed.), *International Law*, Second edition, Oxford University Press, Oxford, 2006, p. 423.

21 See E. Denza, *ibid.*, who examines the approach taken by six different countries. See also F.G. Jacobs and S. Roberts (eds.), *The Effect of Treaties in Domestic Law*, Sweet and Maxwell, London, 1987; I. Seidl-Hohenveldern, "Transformation or Adoption of International Law into Municipal Law", in *International and Comparative Law Quarterly*, 1963, vol. 12, p. 88.

even if a State does follow such a "pure" monist tradition, it does not provide answers as to how the Rome Statute could be applied in the national sphere without specific legislative authority. Although the crimes provisions found in the Statute could, arguably, be directly relied upon in the domestic legal order, the co-operation regime would need further implementation. A State needs to specify in its legislation which is the competent authority, among others, to receive the co-operation request or to arrest the suspect and transfer the latter to the ICC.[22] The authority to execute a co-operation request should, therefore, be explicitly provided for nationally.[23] Hence, putting legislation in place is necessary; and this is independent of the legal system followed and common to all legal traditions.

To conclude, effective national implementation of the ICC Statute depends on many State-specific factors. There is no "one size fits all" approach to implementation and a wide variety of different methods of implementation may be appropriate, depending on the particular circumstances of the State in question. The preceding analysis is aimed at highlighting some of the issues surrounding the implementation of the ICC Statute. Certainly, the complexities associated with the drafting of national implementing legislation and the desire to create an efficient knowledge system to that effect motivated the creation of NILD, which is examined in the sections that follow.

8.3. The National Implementing Legislation Database (NILD)

Before providing an overview of NILD, it is essential to identify the main utility and beneficiaries of this database, which can be summarised as follows:

i) *Helping States materialise the complementarity principle in practice.* As discussed in the previous section, complementarity constitutes a fundamental building block in the edifice of international criminal justice, with implementing legislation being a prerequisite in a State's ability to investigate and prosecute nationally the crimes falling within the jurisdiction of the ICC.

[22] Rome Statute, articles 86, 87(1), 89.

[23] This is also evidenced by the Rome Statute, article 88, *ibid*.

ii) *Assisting national pre-drafting and drafting processes.* The NILD is an invaluable tool for national legislators who have not yet adopted, but are considering or are engaging in the drafting of implementing legislation. The NILD enhances their capability to draft effective legislation by drawing upon previously accumulated experiences of fellow State Parties. As Legislators are often under-resourced, with limited capacity to evaluate the legislative approaches of other States or assimilate the complexities of international crimes and co-operation into national law, such a tool is of particular usefulness. The NILD can also be of assistance to legislators of States which are not Party to the Statute and are in the process of considering accession to it, by providing them with examples of implementing obligations and assisting them in the assessment of national capacity.

iii) *Monitoring the uptake and coverage of the Rome Statute*. States that already have legislation incorporating the Rome Statute may wish to view how this legislation compares with other States' approaches, in order to evaluate whether an amendment may be necessary, or indeed desirable. Through NILD, such States are able to monitor the impact of their legislation on other States and undertake necessary amendments if the content of the Rome Statute changes, or if improvements to the existing legislation are deemed necessary.

iv) *Aiding the Review Conference and future amendments of the Rome Statute.* Use of the NILD was particularly useful prior to the firstICC Review Conference,[24] as well as in aid of future amendments to the Statute. The NILD provides an accurate snapshot of the current uptake and content of implementation of Statute provisions, which assists in identifying particular challenges ahead of a review of the Statute.[25] Implementing legislation offers

[24] The first ICC Review Conference took place in Kampala, Uganda, from 31 May to 11 June 2010.

[25] For instance, an examination of the national provisions on aggression that have already been adopted by some States might provide a useful insight as to how States have provided for the prosecution of the crime domestically. In addition, domestic approaches to the crime of terrorism, or criminalisation of additional punishable acts with regard to war crimes, crimes against humanity and genocide, not currently covered in the Statute, provides a useful point for comparison.

an insight into how international crimes have developed, post-ICC, in order to assess what the legal and practical problems might be, and based on national experience, whether there may be willingness to expand the Court's jurisdiction in the future.[26]

v) *Facilitating the work of NGOs and wider civil society organisations.* Regulators at the national and international levels, will find in NILD a useful tool providing them with easy access to comparative knowledge essential to better monitor implementation of the Rome Statute and effectively plan advocacy campaigns. Moreover, they could identify whether it is possible to engage in positive "forum shopping" in terms of bringing cases involving the commission of core international crimes before a particular jurisdiction.

vi) *Enhancing comparative research.* The NILD provides a "one-stop-shop" comparative research tool, allowing researchers an unprecedented access to information which is not easily available elsewhere. Moreover, section level decompositions are used instrumentally by States, NGOs or private citizens in order to understand the application of international criminal law in national trials. Historians may use the document level information to construct accurate chronologies and track diplomatic relations, whereas social scientists may use the metadata itself to study diplomatic and institutional constraints on state action. For example, ratification dates are data for political scientists interested in diplomatic pressure and international organisations, whereas metadata are useful for lawyers interested in comparing the structure of implementations across a particular region.

vii) *Aiding harmonisation, convergence and consistency in international criminal law and justice*. The NILD, together with the rest of the Legal Tools Database of which it is an integral part, represents an important tool in enhancing consistency in the national application of international criminal law, leading to the improvement of the number and quality of national trials and contributing to the fight against impunity.

[26] National implementing legislation offers an important indication of state practice and was acknowledged as an invaluable source for the content of the review by the Review Focal Point, ICC-ASP/5/INF.2.

8.4. Building NILD – the Early Stages

The NILD started life as a cd-rom compiling many key pieces of national implementing legislation on the back of the author's doctoral thesis. In this early format, these laws were uploaded onto the website of the HRLC so that they could be used as a training tool in ICC implementation training courses organised by the International Criminal Justice Unit of the HRLC.[27] The training courses were aimed at national drafters of ICC-related legislation. They have targeted specific regions of the world and focused on explaining the workings of the Statute and what is expected of States as well as the various options available in order to promote ratification and implementation of the Rome Statute.[28]

The experience gained through the interaction with drafters from those countries who participated in the training courses was invaluable in appreciating the particular challenges States face when they are called to draft national implementing legislation for a complex treaty such as the Rome Statute. For many States, the lack of resources, personnel and international criminal law expertise, combined with the fact that the ICC may not be a top priority, impact on the speed and quality of the adoption of legislation.[29] The need for precise, accurate legal information to be easily accessible to those who are considering implementation is therefore real.

Moreover, the author's experience in working with small island-States[30] further enhanced the view that the task could have been greatly facilitated had the necessary information been available in a single

[27] International Criminal Justice Unit – The University of Nottingham, available at http://www.nottingham.ac.uk/HRLC/AboutHRLC/OperationalUnits/InternationalCriminalJusticeUnit.aspx.

[28] Since 2003, the ICJ Unit has been convening regional training courses to provide detailed technical training about the Rome Statute and national implementation, primarily for government officials responsible for ratification and implementation. In addition to a global training course in Nottingham, training courses were held for the Sub-Saharan Africa, the Asia Pacific, the Middle East and North Africa and Caribbean Regions.

[29] See O. Bekou and S. Shah, "Realising the Potential of the International Criminal Court: The African Experience", in *Human Rights Law Review*, 2006, vol. 6, p. 499 at pp. 502–3.

[30] Namely, bilateral drafting assistance provided to Samoa (with legislation enacted in November 2007), Fiji and Jamaica.

resource. Thus, in its early conception, the NILD was envisioned as a tool to help drafters prepare better ICC-related legislation, tailored to a State's individual needs, whilst respecting the obligation to co-operate fully with the Court. Easy access to information, as opposed to searching through (often complicated) national websites which was then the only option, was another factor considered during that initial period of contemplating the NILD. Equally, the ability to share this knowledge of existing or draft legislation with the widest possible audience soon became a clear objective.

With that came the realisation that NILD's utility had the potential of being of considerable significance to processes wider than the mere drafting of legislation, and additional functionalities had therefore to be incorporated to accommodate this. In that respect, the contribution of the University's Methods and Data Institute (MDI),[31] has been invaluable. Throughout this project, the MDI have been very instrumental in the choice of the metadata schemes so as to reach a technical solution which would not have been possible had it been left to lawyers, but also to make the datasets useful to audiences beyond the strict confines of the legal discipline.

8.5. The Choice of Databases: Data Matrix v. Relational Databases

The NILD is the product of an extensive consultation between the HRLC and the MDI which led first to the creation of an Access database before ultimately migrating altogether to the web application framework currently used.[32] In that period, various solutions were explored and datasets prepared whilst at least four complete metadata entry systems had to be "thrown away".[33] For the architects of NILD, it is clear that this was a necessary process to go through. Having the luxury of tailoring metadata entry systems to the project's changing needs allowed the construction of NILD in a way not envisaged at the beginning of the project. Not having been constrained by a set outcome from the start, other than the production of usefully searchable datasets, is, arguably, one

[31] Methods and Data Institute – The University of Nottingham, available at http://www.nottingham.ac.uk/mdi/.

[32] Django (python) and MySQL both hosted remotely.

[33] F.P. Brooks Jr., *The Mythical Man-Month: Essays on Software Engineering*, 20th Anniversary Edition, Addison-Wesley, 1995.

of NILD's strengths that has allowed the greatest degree of flexibility in the construction of this database.

Throughout that exploration, the HRLC team was guided by the desire for an effective way to accurately and comprehensively conduct comparative research analysis of national implementing legislation. It was widely felt that this is better achieved through detailed data analysis using multi-disciplinary approaches, namely political science methodologies and data analysing techniques.

There are two forms of data structures which are not used in academic circles, but are used for commercial purposes. In the first, structured metadata are added, whereas in the second, data is structured "relationally". Data available on NILD are generated through the use of a "relational" database.

To understand the value of such a database and why this has been chosen for NILD, it is worth examining several extremes. The first extreme consists of qualitative data. A database construed under this, would be a collection of documents.[34] In such an instance, the data collected is not decomposed in any way at all.

The second extreme consists of quantitative data. Such collection of quantitative data involves a data matrix, which, in its simplest form consists of an Excel spreadsheet. A matrix generated this way would contain headings and each of the (infinite number of) rows would contain the relevant data which would be of interest.

Although a matrix works well with historical records for instance, it does not provide maximum functionality when it comes to information that can be found within the documents it contains. With a tabular form, there can be only one matrix per table at the time. Moreover, a data matrix assumes that the person constructing the data knows what each of the rows represents before the data is inputted.[35] In this category, all data is structured as a table. If, however, a different angle is needed, the tables need to be downloaded and reworked to produce the desired outcomes.

[34] For instance, data sorted by country.

[35] For instance, demographic data, ethnic war data, can be adequately depicted using such a data structure.

The NILD develops a relational structure as opposed to a data-matrix to ensure a radical degree of flexibility.[36] Most data sets used in political science and international relations use a data matrix or spreadsheet to provide raw data for analysis, including the Center for International Development and Conflict Management's Minorities at Risk Project,[37] the datasets from the Correlates of War Project, including Militarized Interstate Disputes,[38] and International Governments in the Global System.[39]

The primary methodological innovation in the construction of NILD is the deliberate mix of qualitative information, variable-oriented quantitative data, and legal metadata in the same structure. This innovative combination allows much greater flexibility for researchers who not only wish to do research across disciplinary boundaries, but also across the qualitative/quantitative divide in the social sciences. The use of relational database technology is therefore not merely a way to flexibly express familiar information, but a direct consequence of the need to effectively integrate many types of data into a single structure.

A data matrix could contain national laws implementing the ICC Statute, organised by States, with the State's type of legal system, whether they have signed a Bilateral Immunity Agreement (BIA) with the US, and country covariates, but could only be searched if a particular table (such as the type of legal system) were joined to another (US BIA). In contrast, it may be helpful to think of a relationally structured database as an effective way to allow arbitrarily many distinct but more familiarly-structured datasets to be created. For example, a dataset could be created from NILD which extracts all references to co-operation with the ICC from countries with a common law system and in the Asian region. Or, a dataset could be created which extracts all national legislation which was

[36] C.J. Date, *An Introduction to Database Systems*, Eighth edition, Pearson/Addison-Wesley, 2004.

[37] See http://www.cidcm.umd.edu/mar/.

[38] D.M. Jones, S.A. Bremer and J.D. Singer, "Militarized Interstate Disputes, 1816–1992: Rationale, Coding Rules, and Empirical Patterns", in *Conflict Management and Peace Science*, 1996, vol. 15, no. 2, pp. 163–212.

[39] M. Wallace and J.D. Singer, "International Governmental Organization in the Global System, 1815–1964", in *International Organization*, 1970, vol. 24, pp. 239–287.

adopted between a specified timeframe, and where States had signed a BIA with the US in order, for example, to investigate whether such agreements were pursued more heavily by the US during a particular policy or fiscal year.[40]

One of the desirable consequences of investing in advance in a more complex data representation is that NILD is able to generate subsets of our data tailored to specific research questions, in a form more familiar to researchers. For example, purely qualitative research may require just a subset of the collection of implementing legislation, which can be offered in the form of document collection. In contrast, a quantitative comparative or international relations research question may require a flat variable-oriented representation of the State or international organisation information in the database. This can be provided by selecting the relevant information and using standard database technology (for example, sql queries) to generate a "flattened" dataset suitable for manipulation in standard statistical software.

Although a relational structure is rather more complex to design than the typical data matrix or spreadsheet, it provides substantial flexibility and choice of search options. For instance, a data matrix would be constructed by joining many different tables of information and could only be analysed according to the routes specified when completing this process, and consequently is of particular use to quantitative research. A relational structure therefore presents clear advantages.

However, certain disadvantages may also have to be identified. The first and perhaps the most important of those is the issue of cost. The creation of a relational database incurs start-up costs. Moreover, the relationships among documents contained in the database needs to be determined in advance. That means that all possible questions need to be generated and documents have to be organised in all possible ways at an early stage of the work. The third difficulty relates to the lack of expertise. When it comes to building databases, there is an inherent institutional-sociological miscommunication. As a rule, computer scientists do not tend to interact enough with researchers in social

[40] Since a relational representation is being used, this dataset is created using the SQL language with a large SELECT statement.

sciences. Although commercial legal products used by academics[41] use this type of software, academics do not use this software very often as such. The scarcity of relational databases in social sciences may, nevertheless, be explained by the lack of infrastructure. Many social science and law departments do not have such resources *in situ* or the ability to hire them. This leads to the final reason why relational databases are not common in legal research, which is one of possibility. There is no realisation that such a data structure is possible. If this has not been pointed out to the researcher, it is not possible for him/her to choose such a solution if he/she does not possess such knowledge. The HRLC is in the unique position to have access to and benefit from the expertise of the MDI in that respect.

Comparing NILS to a number of text database tools from social sciences[42] it was concluded that although their text and search representations were quite adequate, they could not easily represent the other types of information NILD is able to represent. Also, as proprietary technologies it was felt that that would limit dissemination. Most importantly, they were not relational, which limited their ability to generate flat datasets for subsequent statistical analysis. Like most commercial content management and document management solutions these tools are designed hierarchically to resemble file-folder relationships.

The non-relational aspect of these kinds of representations is problematic because the end-users may wish to be able to generate text-oriented data for some purposes, but more attribute-oriented data for other purposes, without having to squeeze both types of information into a textual format. Also, the information stored on NILD is genuinely non-hierarchical in the sense that it is not exclusively structured around pieces of implementing legislation, or around States or the organisations they are members of. To 'root' this data using any one of these units of analysis would simply make it harder for researchers with orthogonal interests to manipulate the data. Designing a relational database specifically for NILD was therefore the optimal solution.

41 Such as Westlaw (www.westlaw.com); LexisNexis (http://www.lexisnexis.com); and HeinOnline (http://www.heinonline.org).

42 For example, NVIVO, Atlas-ti.

8.6. Sourcing of Legislation

Having examined the reasons behind construing NILD in the chosen format, let us now turn to a detailed overview of the steps taken and processes that have been established in operating this tool. The starting point is the sourcing of legislation. Desktop research is conducted throughout the project in order to obtain any new or amended national implementing legislation. Obtaining officially sanctioned versions of national legislation in a timely fashion is always a challenge for research of this type. A novel methodology has been adopted in co-operation with the ICC to best tackle this issue. Once new legislation is identified[43], the National Implementation Officer at the ICC is informed.[44] A first letter explaining the nature of the project and requesting an official version of the legislation (which is an obligation under the terms of the ICC Statute) is issued by the ICC, followed by a second letter which requests the legislation by a specified deadline. To date, 46 documents have been secured through this process from a total of 334 documents currently on NILD.[45] The above procedure has been cumbersome and arguably slow, but accurate, whereas a more efficient approach to the issue of legislation sourcing is currently being explored.

A very useful avenue for obtaining new legislation has been through the attendance of the annual Assembly of State Parties meeting, where States notify the meeting of their intention to begin the drafting procedure, or the status of their draft legislation. The "Plan of Action of the Assembly of States Parties for Achieving Universality and Full implementation of the Rome Statute of the International Criminal Court" is also hoped that will assist the process.[46] By attending such meetings, the HRLC team ensures prompt contact with the relevant States and the Court in this regard. This procedure complements other diplomatic channels, enabling the ICC to notify and request States to submit their completed legislation to the team.

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[43] Typically via the Internet, at conferences or meetings, through publicly available sources, NGO reports and direct contact with governments.

[44] This person is within ICC Registry.

[45] Many more pieces of legislation have been sourced by the research team at Nottingham and are currently being processed.

[46] See http://www.icc-cpi.int/Menus/ASP/Sessions/Plan+of+Action/.

8.7. Population of Database Content

Once legislation has been sourced, the next stage in the process, namely the marking of legislation, begins. Marking is understood to be the process by which each piece of legislation is read against a list of keywords and the appropriate one(s) are selected and matched with deconstructed pieces of text known as "spans".

There are approximately 800 purposely-designed keywords (legal metadata), customised to international criminal law, contained in NILD. The keywords reflect the legal structure of the Rome Statute as well as provisions found in national law. Each keyword typically corresponds to an article of the ICC Statute, but may also represent finer decompositions of such article. In addition, procedures found in domestic law are also represented by relevant keywords.[47] The keywords have been constructed in consultation with the International Criminal Court, the Coalition for the International Criminal Court[48] and other expert end-users.

In order to ensure consistency in the marking process, a "codebook", a document containing the keywords, their relationship with the Rome Statute articles, their use, as well as prompts as to other keywords that may need to be considered, has been produced for the internal use of the marking team.

Spans, taken from the complete texts/laws, are "tagged" with such keywords. The presence of documents and their decomposition into spans gives the database large amounts of textual content.[49] For instance, the relevant provision of a national law referring to genocide and its punishable acts is tagged with the "genocide" keyword, as well as with any of the following keywords as they may be applicable: "intent to destroy in whole or in part a national, ethnic, racial or religious group"; "causing serious bodily or mental harm to members of the group"; "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part"; "forcibly transferring children of the group to another group"; and "imposing measures intended to prevent births within the group". The above keywords reflect

[47] The suffix "- national proceedings" is attached to certain categories of keywords.

[48] See http://www.iccnow.org.

[49] Text spans vary in size and nature according to each implementation law, and the database is constructed to allow any length of text span.

the wording of article 6 of the Rome Statute. However, to cater for national peculiarities, additional keywords have been devised. In that respect, if a State in its national law protects additional groups, then the keyword "intent to destroy in whole or in part another group" is also tagged. Or, if additional punishable acts are envisaged, the keyword "genocide- other punishable acts" is also available. Equally, the national penalty for the crime is tagged with "national penalties-genocide".

Once marked and checked,[50] legislation is added to the database both as a complete document (in all languages available) and by individual span, following the procedure described in an inputting manual which has been devised for this purpose and which is being used by the inputters. The inputters use a user-friendly administration site which can be accessed remotely by multiple users at a time to complete the inputting task.

8.8. State Attributes

In order to express the data in the appropriate level of detail and in a way that is maximally useful for both quantitative and qualitative researchers and to practitioners, besides keywords, the NILD also contains some other types of data, namely certain attributes which are also added: States Parties are listed together with all relevant attributes. This includes their geographical location, characteristics of each legal system, membership of international organisations, and the complete text or legislation which implements the ICC Statute together with qualitative indicators, for example "ratified" ("yes/no") and dates (for example date of signature, ratification, *et cetera*). The above data may be of use to lawyers, historians and social scientists alike.[51] The attributes highlights variation amongst States that share a characteristic, that is, the same type of legal system be it common law, civil law, or mixed. By catering for such attributes in the metadata scheme as well as the search function within NILD, comparative research is more easily conducted.

[50] For the process of checking, see *infra*, section 8.10.

[51] See *supra*, section 8.3.

8.9. Framework and Methods for Analysis

The creation of NILD allows a potentially vast range of questions to be answered by searching and filtering different qualitative and quantitative data within the database. In particular, the relational structure of the database allows the generation of a wide variety of data subsets to answer a wide variety of different research questions. In addition, the extensive use of legal metadata assigned to States, legislation, and spans enables searches to be carried out according to predetermined characteristics of data.[52]

The analysis section of NILD develops the procedures which have been in practice during the design of the prototype database, and offers analyses of the individual circumstances of particular provisions of implementing States. It considers how other States have dealt with similar issues and assesses how States have chosen different forms of implementation and the adoption of different procedures nationally. It highlights the unique features or at least certain elements that differentiate particular national approaches from one another. The analysis constitutes an original reference point for the academic community and serves as vital drafting tool for States and wider end users and it comes in two forms. First, in what is described within NILD as an "Overview", that is, a short analysis of the State's overall approach to implementation, positioned together with State attributes and forming part of the general information on a particular State. Second, paragraph-level analysis of each piece of legislationwhich appears below the relevant portion of legislation and which has gradually become visible on NILD in the course of 2010.

The analysis adopts the text of the ICC Statute as its primary framework, contrasting it against the approach taken by each State when implementing each of its articles. Since the goal of national implementation is to effectively incorporate the Statute notwithstanding national specificities, this is an appropriate legal framework for comparative analysis of national legislative instruments.

An "Analysis Framework" has been created and is being filled in for each of the States available on NILD. It replicates the list of keywords

[52] For example, to conduct an analysis of all provisions "tagged" as genocide from States in the Middle East Region.

against which legislation has been marked and also maps whether a particular provision follows, is wider or narrower than the relevant Statute provision, and if so, in what respect.

The framework draws upon wider social science methodologies, as well as comparisons with other international instruments where such frameworks exist. A combination of quantitative and qualitative criteria combined with specific State attributes is employed for the assessment of national legislation, including: timing of legislation enactment; common impediments to implementation (including conflicts with constitutional provisions); membership of international organisations; type of legal system; regional groupings; coverage of the Statute (that is, substantive law, co-operation, general principles, procedural aspects); adoption of a facilitative pro-ICC approach; role of State sovereignty and individual State interests/State-specific concerns; scope wider or narrower than the ICC Statute; domestic codification/in any way alteration/effect on the Statute effectiveness through incorporation; and influence, if any, of external pressures (such as US Bilateral Immunity Agreements) on the quality of legislation, and so on.

Moreover, by searching/filtering the database according to a number of different characteristics of States, legislative provisions *et cetera*, research questions can be refined according to the individual researcher's needs. This provides the greatest scope for analysis and is the most illuminating in terms of differentiating between implementation strategies. Data collected by virtue of this process can therefore be tested against the overall framework and provide the basis for extensive comparative analysis of quantitative and qualitative data contained therein. A State-by-State approach ensures that the main characteristics of each State are highlighted and fed into the overall analysis.

Due care is given to the manner and language in which the analysis is written so as to comply with the aim of the project to provide an objective, precise, factual and dispassionate account of a State's approach to implementation.

From a methodological perspective, the database is the primary tool from which all research questions flow and research outputs are being generated. This method for analysis has been chosen as it allows innovative research questions to be considered which are not generally studied, particularly in the legal context. Law academics and practitioners tend not to use data analysis as a research aid. In part this is due to the

predominant doctrine of black letter law. Such research is considered to involve descriptive analysis and normative evaluation of the judicial decisions and the laws or statutes which is interpretive rather than empirical. In contrast, socio-legal research utilises alternative methodologies, essentially to assess law within the context of the realities of legal practice, considering the socio-political environment in which the legal system functions. Within the socio-legal framework however, the limited technical expertise or collaboration in the use of legal data has impeded the construction of legal databases to a select few legal practitioners and NGOs. The type of data analysis undertaken by this project in the context of researching differentiated implementation strategies of States Parties to the ICC Statute, will facilitate ground-breaking interdisciplinary research in the fields of international criminal law, political science and legal research methodologies. Through an evaluation of the national approaches to the implementation of the core international crimes, defences, and co-operation regime, the NILD is a tool facilitating the determination of compliance with the ICC Statute, assists in identifying gaps and highlights where the incorporation of crimes into domestic law departs from international practice.

8.10. A System of Checks and Balances

In a project involving a large number of documents, keywords and analyses, as well as multiple legal systems, languages and researchers, inconsistencies or (unintentional) mistakes are bound to occur. Eliminating their occurrence as well as ensuring that when mistakes are made, they are (a) corrected and (b) not repeated, a rigorous checking mechanism has been put in place in every stage of the process.

When the HRLC research assistants first identify new pieces of legislation this is checked for relevance, accuracy and trustworthiness of the source prior to it being marked by a senior member of the team. Once marked, each of the keywords chosen is checked for errors, inconsistencies or omissions, which are then rectified prior to inputting. The marker also identifies some preliminary issues that may need to be further explored in the analysis part, and the checker confirms whether this is the case or not. Once legislation has been inputted, spot-checks are performed to ensure that there has not been an error in inputting whereas a meticulous comparison of the results yielded through particular keyword searches reveals whether particular provisions have been tagged

correctly, when read out of the context of the particular legislation and compared with all other provisions tagged with the same keyword. A log of changes made following this process is maintained at all times.

Similarly, when undertaking the drafting of the analysis, the preliminary research conducted by the researchers is checked prior to the filling in of the "analysis framework" by a senior member of the team. Once completed, all information logged is checked by a separate member, before being checked by the project leader and before clearing the linguistic check prior to being uploaded onto NILD.

A worksheet with outstanding tasks and the use of a dedicated calendar where individual tasks and completion targets are logged is accessible by all researchers at all times and serves as a valuable tool of monitoring progress and outstanding tasks.

8.11. Conducting Searches on NILD

The aim of NILD is to provide a fully searchable database able to bring together data in a variety of ways. NILD contains an additional search function to the rest of the Legal Tools Database, given that it is the only tool in the project where paragraph-level searches may be conducted, as opposed to document-level searches. Users interested in whole documents can search for them through the Legal Tools search engine, but for more refined searches, they should use the NILD search interface. Data is searchable in a number of ways including States, documents, keywords, corresponding ICC Statute articles or specific keyword-State relationships.

First, documents are available in original forms (either in Word or PDF format) with a free text search function.

Second, each document is structured with metadata prepared by the ICC Legal Tools Project which are common across the Legal Tools. These metadata constitute the common denominator for describing content across all Legal Tools and links NILD to the Legal Tools Database search platform.

Third, text spans of each piece of legislation available on NILD are searchable using keywords corresponding to different aspects of international criminal law. As each span is labelled or tagged with as many keywords as is relevant, spans are searchable to the end user in a variety of ways.

Fourth, the same segment is searchable according to the section of the Rome Statute that they implement. This allows a comparative view for legal or political scholars interested in comparing the details of specific country's implementation of, for example, provisions relating to torture, or the treatment of prisoners of war. The keyword segmentation never makes coarser distinctions than the sections of the Rome Statute and is therefore derived data not requiring a separate markup task whilst enabling search by Rome Statute article.

Fifth, details of the geography, legal system, and treaty obligations of the State for each piece of legislation are available to be joined with textual data for comparative purposes, or examined alone.

Finally, if the end user wishes to see how a particular keyword has been implemented by a particular State, for example, how "France" has implemented "genocide", he/she can choose the State and keyword from the two drop-down menus available in the keyword-State search function.

Another innovation found in NILD, is the inclusion of "smart relationships", that is, cross-referencing among keywords in the form of suggestions to the user as to other keywords that may be of interest which have been introduced for every keyword found therein. This prompts users to easily further refine their searches or identify related subject matters, allowing comparative analysis as relevant to their purposes. For instance, to continue with the genocide example described above, the database also suggests to the user all potentially relevant keywords pertaining to article 6 of the Rome Statute, as well as a suggestion to also consider "incitement to genocide" which may be of interest as well. Or, when searching the keyword "admissibility challenge", not only does the relevant Rome Statute provision together with a list of States that have implemented it and the particular paragraphs of such legislation come up, but the user is also prompted to consider other instances where an admissibility challenge is found in the Statute, broadening thus the search function.

8.12. Challenges and Limitations

The diversity of raw data, coupled with the inherent differences of the legal systems implementing legislation originates from, require strong comparative legal research skills and the development of procedures that guarantee a fair, accurate representation of data on the database. The use

of a "codebook" to mark legislation, of an "analysis framework", as well as clear management, checking and accountability structures, aim to standardise the approach and to overcome the challenge of working with a variety of legal traditions and outside the context of a particular legal system. The use of research assistants with specific knowledge and expertise, as well as a strong commitment towards the project, an eye for detail and the key skill of precision are important in that respect.

Another challenge faced by this project is a linguistic one. Whilst NILD is capable of representing text in multiple languages and whole documents are available already also in the original language, searches can currently only be conducted in English.[53] Thanks to a truly international team of HRLC staff and students undertaking the LL.M. in international criminal justice and armed conflict degree at Nottingham, who volunteer for this project, the team has been able to work in a number of languages facilitating the collection of information and the writing of associated analyses.[54]

The NILD is a prime example of how social science projects happen. It takes an unprecedented amount of enthusiasm, coupled with commitment both in terms of time, expertise and, above all, effective use of very limited financial resources, to keep the project going. Given that NILD has received very minimal funding overall,[55] the lack of available funds has been replaced by creative ways of work that give a new meaning to efficiency.

8.13. Some Concluding Remarks

The NILD is a versatile tool within the Legal Tools Database which serves a multitude of purposes. It contains a comprehensive and up-to-date collection of the raw data of national legislation that has been adopted by States in relation to the Rome Statute (ICC acts on crimes and co-operation, national criminal codes, criminal procedure codes, constitutions and other relevant legislation). Crucially, it includes a fully-

[53] Whereas NILD's interface has been translated into French, searches are not yet possible in that language. It would be desirable, funding permitting, to make NILD fully available in French and possibly Spanish in the future.

[54] See *supra*, section 8.9.

[55] The initial stage of NILD's construction in 2007 was funded the Canadian and Swiss Ministries of Foreign Affairs.

searchable relational database of all national legislation, which enables users to efficiently identify relevant provisions or sections of any, or all legislations, according to approximately 800 purposely-designed keywords, or Rome Statute articles. Smart relationships and cross-referencing among keywords further facilitate searches. Finally, the NILD contains brief descriptions of a State's overall approach in the form of overviews and paragraph-level analyses, which add a different dimension to the usefulness of this tool.

Many taxonomies and thesauri of legal content exist as metadata for legal materials within particular States. Some metadata schemes have even attempted to cover national law structures across multiple countries.[56] But while national level law has been analysed into quite detailed classifications, international criminal law is described only at a high level of abstraction. The NILD partly supports the continued development and application of a fine grained classification of international criminal law, with the ICC Statute and its provisions as the central focus. Although the development of metadata for international criminal law is not the focus of this project, the provision of national implementing laws decomposed to the clause implementation level and annotated with detailed metadata is one of the most important and useful outcomes of the project. Accurate metadata focuses search according to the legal rather than the textual structure of each implementation and removes language dependence from the search process, as it is no longer necessary to search by keyword. Clause level analysis and metadata annotation are also the features that distinguish this project from existing data in the field.

Overall, the NILD is able to illuminate the variety and diversity of methodologies for implementing international law into the domestic realm through comparative analysis of implementing legislation and to highlight the strengths and weaknesses of different implementation approaches through the application of a pre-defined evaluative framework using political science/data analysis techniques. The NILD also constitutes a suitable example for showcasing and appreciating the use and value of datasets in legal research.

The NILD is an original reference point for a variety of disciplines and serves as vital tool for States, NGOs and wider end-users, having a

[56] For example, the Moys scheme.

substantial effect on the drafting and revision of national implementing legislation. Through the deliberate mix of qualitative information, quantitative data, and legal metadata in this project, facilitated by the use of a relational database, there is scope for much greater flexibility for research cutting across disciplinary boundaries, but also across the qualitative/quantitative divide inherent in social sciences research. The NILD presents a unique opportunity to illustrate the value of databases in international criminal justice and in law more generally, paving the way for mapping previously unchartered territory.

As with the rest of the Legal Tools, the NILD enhances access to justice, the rule of law and good governance, and it has the ability of making a significant contribution towards the improvement of criminal justice systems through its capacity building potential.

9

The Technical Construction of the Case Matrix

Ralph Hecksteden* **and Anne Hecksteden****

9.1. Task and Tool

A main task in the work of a legal adviser is the structural analysis of relevant legal texts in his field of expertise. Structural analysis – as the expression is originaly interpreted in physics – comprises the set of physical laws and mathematics required to study the behavior of structures. For the legal advisor it means isolating the components of legal texts – that is offences, the elements of statutory acts and definitions – as well as their logical coherence. This structured version – or matrix – enables the legal advisor to relate incidents from reality with the exigencies of law enforcement.

For simple cases this matrix may be represented in the brain of a prosecutor. For more complex crimes, for example, core international crimes, an external representation is indispensable. Ideally, this representation will not only show the structure of possible offences and modes of liability, but also allow for a comparative overview on the current evidentiary status and facilitate co-operation within the working group.

In the initial years of the ICC (2002–03), Excel tables, Word files, large printouts and wallpapers fulfilled the task. However, these hand-crafted solutions obviously left something to be desired. In particular with regards to multi-user co-operation, versioning, stability, redundancy and referencing to other resources.

* **Ralph Hecksteden** is a lawyer and academic of the Institute of Informatics and Law (IFRI) at the University of Saarland/Germany. He is the technical developer of the Case Matrix Database. He directs the Legal Informatics Section of the Centre for International Law Research and Policy.

** **Anne Hecksteden,** Dr. med., is a Postdoc at the Institute of Sports and Preventive Medicine (FIFA Medical Center of Excellence) of the University of Saarland, Germany.

The invention to develop a specific "Case Matrix" database platform in international criminal law was done by Morten Bergsmo during the period 1997–2003 when he observed first hand the work of international criminal jurisdictions such as the ICTY. From 2003 onwards, the Case Matrix database has been developed by the Legal Tools Project co-ordinated by Morten Bergsmo, under the auspices of the ICC Office of the Prosecutor. The core components of the Case Matrix development include an independent, ready-to-customise, multi-user database, with a specific, user-friendly data entry, management and visualization surface. From the start, the database platform has been complemented with legal reference services. This is of particular importance as the target user group is not restricted to legal advisers at the ICC Office of the Prosecutor, but includes all legal practitioners and organizations working on core international crimes. This includes court members, but also national practitioners, defence counsels, victim representatives and NGOs. Key sources of international criminal law are incorporated into the Case Matrix, and each element of crime is hyperlinked to an Elements Digest as well as to a comprehensive list of potential means of proof that may constitute evidence.

9.2. Technical Implementation

9.2.1. Environment

9.2.1.1. The Web Application

Being a web application, the Case Matrix is addressed over a network such as the Internet or an intranet. The application dynamically generates a series of web documents in a standard format supported by common web browsers like Microsoft Internet Explorer, Mozilla Firefox or Google Chrome.

9.2.1.2. Cross-border Functionality

A significant advantage of the application is its HTML compatibility. HTML stands for 'HyperText Markup Language' and is the core technology of the world wide web (HTML[1]/XHTML[2]). The

[1] See http://www.w3.org/TR/html4/.

[2] See http://www.w3.org/TR/xhtml11/.

implementation of HTML ensures the correct functioning of the Case Matrix regardless of the operating system (OS) version installed on a given client. Consequently, it will not be necessary to create different clients for MS Windows, Mac OS X, GNU/Linux, and other operating systems, but the application can be deployed in almost every software environment.

9.2.1.3. Software Framework

The functionalities of each web application are provided by a certain software framework. To realize the above mentioned cross-border functionality the software framework for the Case Matrix has to fulfil two main prerequisites. First, it has to be stable and well documented while, secondly, its source-code has to be disclosed and accesible. In addition, the use of an "open source" framework also has major advantages concerning safety and cost. The first choice in this case was and is the so called XAMPP framework.[3] XAMPP is an abbreviation for X (cross platform), Apache, MySQL, PHP and Perl (which is not used by the Case Matrix). The elements of the XAMPP framework fullfill the following tasks within the Case Matrix stack:

- **Apache**

The Apache HTTP Server[4], commonly referred to simply as Apache, is a web server which is used to deliever HTML pages to the client. Apache is developed and maintained by an open community of developers under the auspices of the Apache Software Foundation. The application is available for a wide variety of operating systems, including Microsoft Windows, Novell NetWare and Unix-like operating systems such as Linux and Mac OS X. Released under the Apache License[5], Apache is a free and open source software.

- **MySQL**

MySQL[6] is a multi-threaded, multi-user SQL database management system which has been developed by MySQL AB, Sweden. The company develops and maintains the system, selling support and service contracts,

[3] See http://www.apachefriends.org/en/xampp.html.

[4] See http://httpd.apache.org/.

[5] See http://www.apache.org/licenses/.

[6] See http://www.mysql.com/.

as well as proprietary licensed copies of MySQL. The MySQL AB makes MySQL Server available as a free software under the GNU General Public License (GPL),[7] but they also offer the MySQL Enterprise subscription for business users, and dual-license it under traditional proprietary licensing arrangements for cases where the intended use is incompatible with the GPL.

– **PHP**

PHP[8] is a reflective programming language originally designed for producing dynamic web pages. PHP generally runs on a web server, taking PHP code as its input and creating Web pages as output. However, it can also be used for command-line scripting and client-side GUI[9] applications. PHP can be deployed on most web servers and on almost every operating system and platform free of charge. The PHP Group also provides the complete source code for users to build, customize and extend for their own use. The runtime environment of the Case Matrix database includes PHP 5.2. as default PHP version.

In order to create a user friendly interface, the Case Matrix also employs some additional software tools:

– **JavaScript**

The Case Matrix primarily uses JavaScript in the form of client-side JavaScript which is implemented as part of the web browser.[10] The so-called JS enables the web browser to display enhanced user interfaces and dynamic content which can be edited by the user during his Case Matrix sessions.

– **AJAX**

AJAX is a group of interrelated web development methods used on the client-side to create interactive web applications.[11] This technology, mainly based on JavaScript, allows the client user to exchange data between browser and server. This offers the significant advantage that there is no need for reloading pages during the work session, a process that would impede stability and data security.

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7 See http://www.gnu.org/licenses/gpl.html.

8 Hypertext Preprocessor, available at http://www.php.net/.

9 Graphics user interface.

10 See http://en.wikipedia.org/wiki/JavaScript.

11 See http://en.wikipedia.org/wiki/Ajax_%28programming%29.

9.2.2. Architecture

The Case Matrix Database uses the Model-View-Controller (MVC) architecture. At present MVC is the paradigmatic architectural pattern used in software engineering. The three interdependent parts of MVC architecture are:

Model: The domain-specific representation of the information on which the application operates.

View: Renders the model into a form suitable for interaction, typically a user interface element.

Controller: Processes and responds to events, typically user actions, and may invoke changes on the model.

The aim of using this architecture is a flexible program design that facilitates future modifications or expansions and enables the reusability of components. MVC patterns in web applications on distributed servers and browsers (for example, the Case Matrix) are more complex than the classic MVC pattern. Abstractly, the browser handles the visual representation and direct user input, and not side-specific functions of the Controller and View. The server takes care of the browser-specific control by communicating with it via HTTP and provides the model via HTTP.

9.2.3. Content of the Case Matrix Package

The tools above and the logic of the Case Matrix are zipped in one package knows as the "setup.exe". This approach ensures an easy "out-of-the-box" installation procedure on almost every computer. The logic of the Case Matrix contains around 20,000 lines of code and 40,000 data sets in the MySQL database. A basic set of 2,000 legal texts give the setup file the size of 1.5 GigaByte.

9.3. Functionalities

As a part of the Legal Tools Project, the Case Matrix database bundles four of its main functionalities into one application.

9.3.1. Case Management

The Structure of the Matrix - Data Representation and Entry

The structure of the case management is strictly hierachical. Before the user can enter a specific matrix he has to define some basic characteristics of the case. During this matrix creation procedure the following information has to be entered:

1. Situation (for example, Congo) (see Figure 1 in the Annex to this chapter)
2. Case (for example, The Prosecutor vs. Thomas Lubanga) (see Figure 2 in the Annex to this chapter)
3. Incident (for example, Monuc murder 2003)
4. Suspect (for example, Thomas Lubanga)
5. Crime (for example, Murder)
6. Mode of liability (for example, Command responsibilty)

After inputting this information, the user will see the "masterpage" (see Figure 3 in the Annex to this chapter). This page gives the user an overview over the case with its suspects, incidents and suspected crimes. From here the user can enter the evidence file management (see below), maintain the case, or enter the matrix pages.

The matrix is the core of the application (see Figure 4 in the Annex to this chapter). It offers the user a consistent assignment of facts to the respective legal requirements.

On the left side of the matrix pages, all legal requirements pertaining to crimes in the Rome Statute are displayed, broken down to the smallest components. This is done in the customary way of columns where each right column gives more detailed information than its left-side neighbour.

On the right side of the matrix pages, facts are assigned to the legal requirements on the left. This is done on a timeline where facts are entered according to the corresponding stage of the proceeding. Each stage on the timeline corresponds to a column that is subdivided into a number of data columns for predefined or individual comments and correlation of facts. The timeline starts with the investigation stage followed by pre-trial, trial, appeal and reparation stages. This default

disposition of the timeline is a suggestion of the Case Matrix authors, but may be customized by the user.

Because of the great number of possible trial stages and data columns, the application allows the user to temporarily hide almost every part of the matrix pages. This feature enables the user to focus on specific aspects during the proceedings.

To maintain a piece of evidence, the user has to open a window in the respective fact cell. The window facilitates the registration of diversified information. Only two fields are mandatory (title and text of the fact), but numerous additional information fields are provided for accurate representation of the fact. A piece of evidence may be defined as common for various suspects or incidents, and additional metadata can be assigned to facilitate information retrieval.

To prove the responsibility of a suspect, the matrix pages offers a simple visual system. Only if a corresponding fact has been assigned for every legal requirement of the crime, can the user seek accountability. To fully utilize this functionality, every fact can be marked in different colors for quality (good or unreliable evidence). After closing the work on one matrix pages, the facts can be exported to other Case Matrix users.

The application also provides the possibility to print out matrix pages for “analogue” and “old school” representation.

9.3.2. Evidence File Management

With a built-in evidence file management functionality, the Case Matrix helps the user to administer and control evidence files related to a case, enabling their inclusion as proof of specific legal requirements. All documents can be stored in a hierachical folder structure similar to the file explorer used by operating systems. The Case Matrix provides the user with a basic set of default folders to give the user a quick start [Figure 5].

9.3.3. Digests

The Case Matrix also contains two Digests: the Elements Digest and the Means of Proof Digest, which contain nearly 8,000 A4 pages of material on international criminal law.

Elements Digest: This is a digest on each element of the crimes and legal requirement of the modes of liability in the ICC Statute. It gives

systematic access to discussions in the main sources of international criminal law on core international crimes and modes of liability. Text in this tool does not necessarily represent views of the ICC, any of its Organs or any participant in proceedings before the ICC.[12]

Means of Proof Digest: This tool provides practical examples of the types or categories of fact used in criminal jurisdictions to satisfy the legal requirements of the crimes and modes of liability contained in the ICC Statute. It is a comprehensive document amounting to more than 6,000 A4 pages of text. Text in this tool does not necessarily represent views of the ICC, any of its Organs or any participant in proceedings before the ICC.[13]

9.3.4. Legal Texts

The Legal Texts functionality is a collection of the most important documents in international criminal law, starting from the Nuremberg Tribunals and ending with the latest decisions of contemporary international criminal jurisdictions. It is implemented in the Case Matrix as a browsable folder system with an additional full text search over all documents.

9.4. Becoming a Case Matrix User

At the time of writing, there were more than 120 users of the Case Matrix tool and Case Matrix Network services around the world.[14]

Additional actors in the field of international criminal law may also use the software free of charge after signing a standard Case Matrix Undertaking.[15] The Case Matrix is employed in several courts and tribunals. The ready-to-customize design of the Matrix, the reasonable technical requirements, and the focus on user-friendliness throughout the development process, make the Matrix useful to a variety of justice

[12] ICC, Overview of the Tools, available at http://www.legal-tools.org/en/overview-of-the-tools/.

[13] *Ibid*.

[14] A list of users of Network services is available at http://www.casematrixnetwork.org/users/.

[15] Requests for access to the Case Matrix can be sent to info@casematrixnetwork.org.

actors. The experience and feedback of these users have already had considerable impact on the further development of the Case Matrix.

Annex

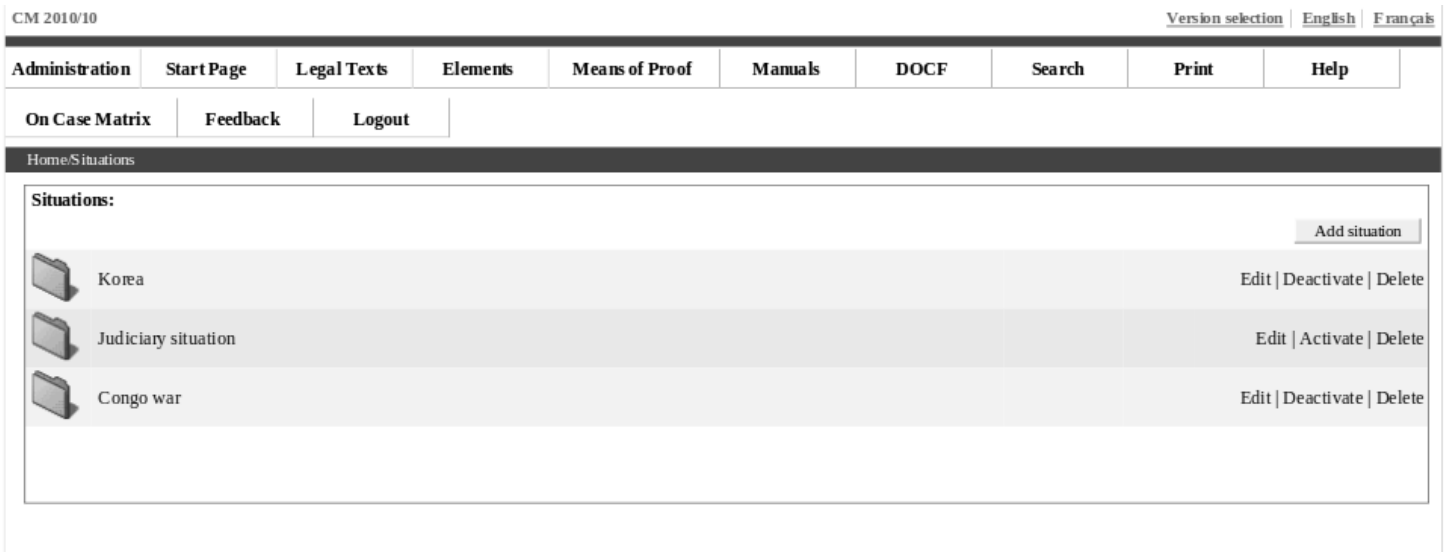

Figure 1.

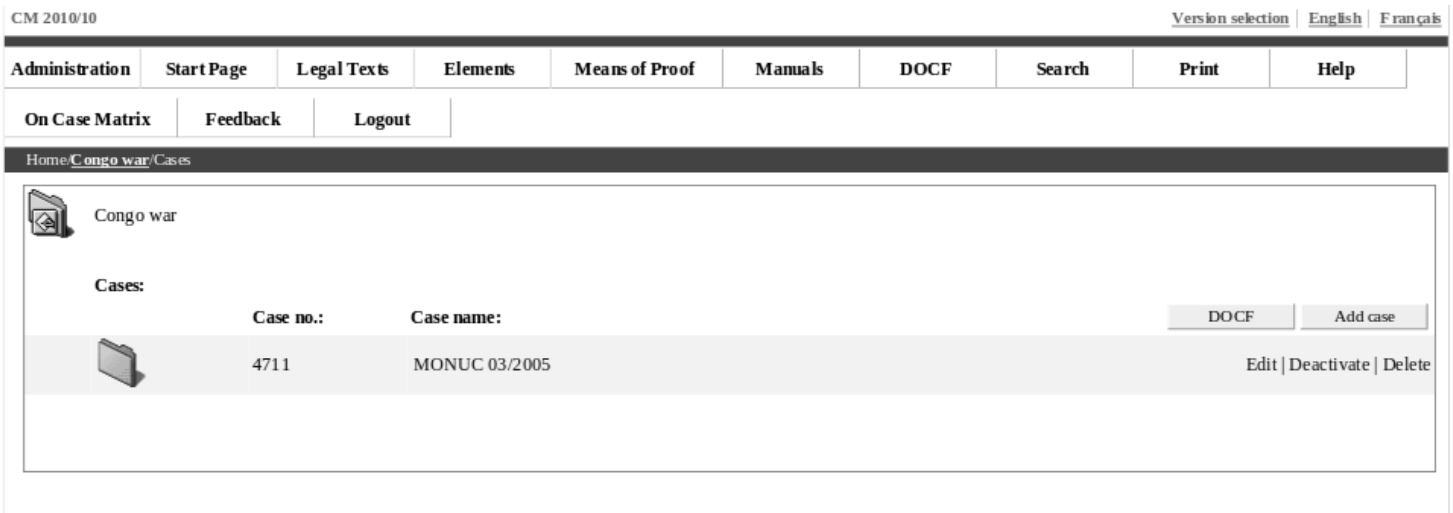
CM 2010/10
Version selection | English | Français
Administration
Start Page
Legal Texts
Elements
Means of Proof
Manuals
DOCF
Search
Print
Help
On Case Matrix
Feedback
Logout
Home/Congo war/Cases
Congo war
Cases:
Case no.:
Case name:
DOCF
Add case
4711
MONUC 03/2005
Edit | Deactivate | Delete

Figure 2.

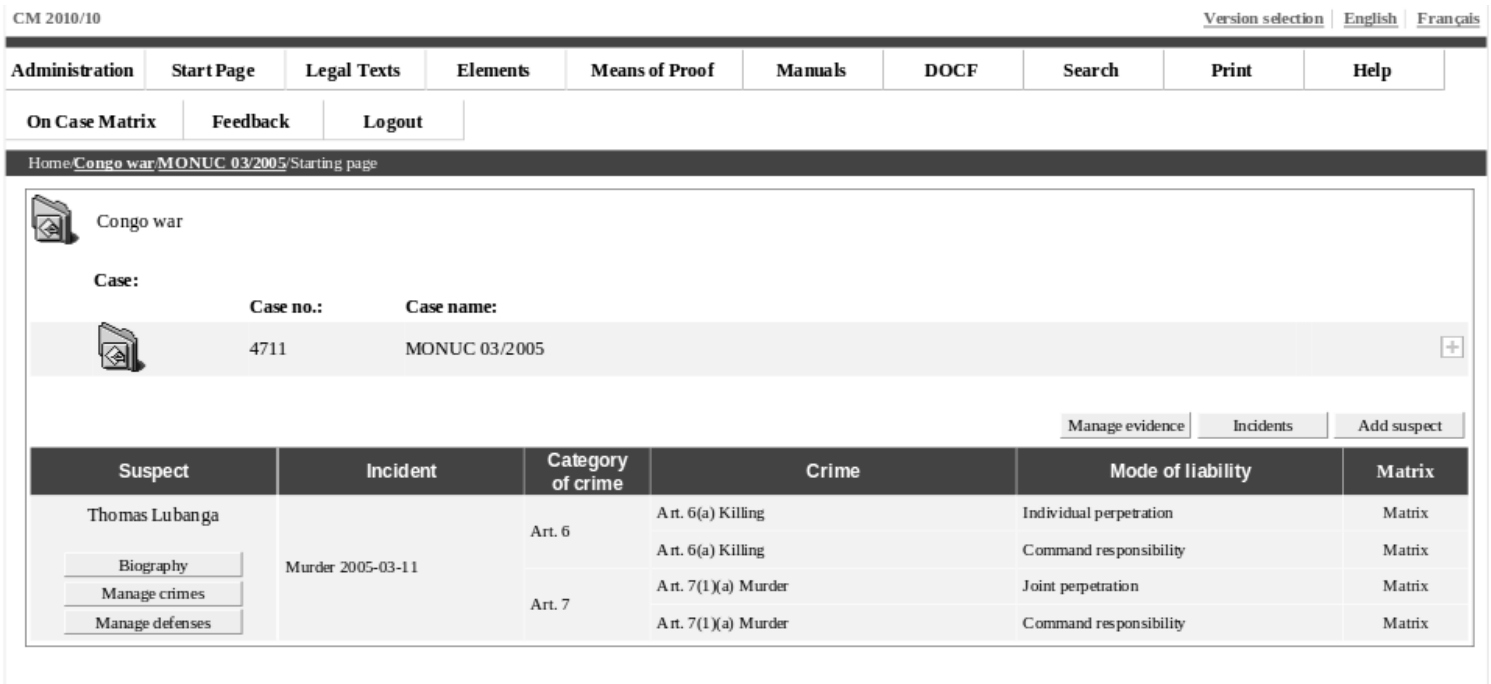
CM 2010/10
Version selection
English
Français
Administration
Start Page
Legal Texts
Elements
Means of Proof
Manuals
DOCF
Search
Print
Help
On Case Matrix
Feedback
Logout
Home/Congo war/MONUC 03/2005/Starting page
Congo war
Case:
Case no.:
Case name:
4711
MONUC 03/2005
Manage evidence
Incidents
Add suspect
Suspect
Incident
Category of crime
Crime
Mode of liability
Matrix
Thomas Lubanga
Biography
Manage crimes
Manage defenses
Murder 2005-03-11
Art. 6
Art. 7
Art. 6(a) Killing
Individual perpetration
Matrix
Art. 6(a) Killing
Command responsibility
Matrix
Art. 7(1)(a) Murder
Joint perpetration
Matrix
Art. 7(1)(a) Murder
Command responsibility
Matrix

Figure 3.

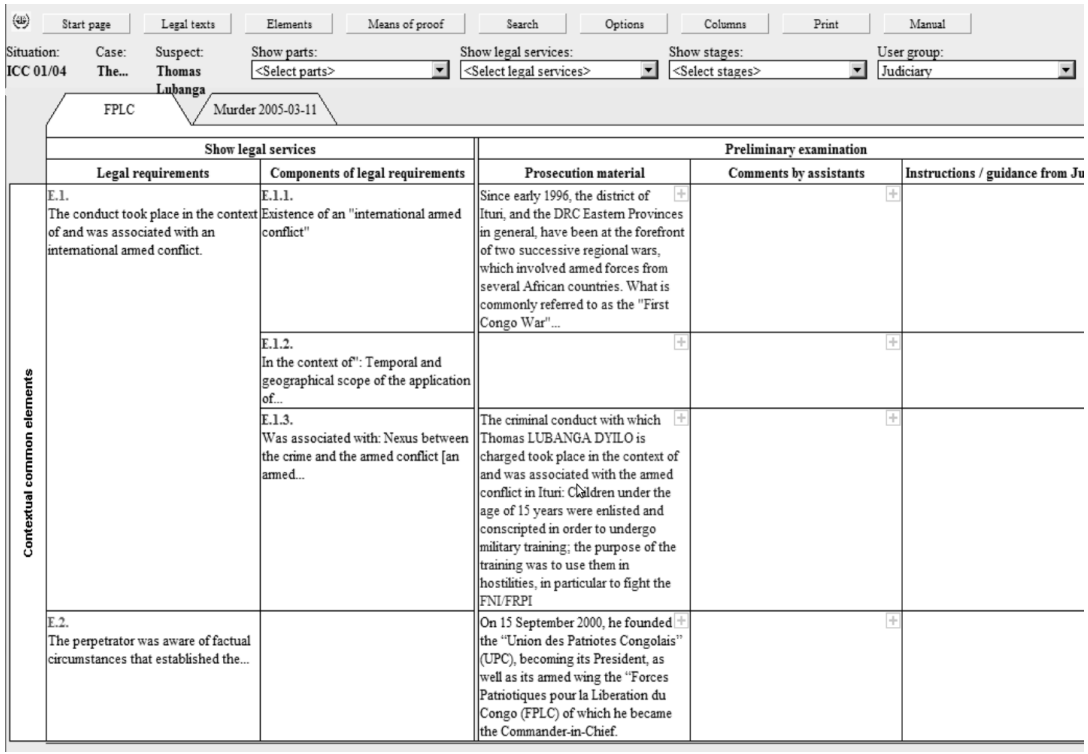
Start page
Legal texts
Elements
Means of proof
Search
Options
Columns
Print
Manual
Situation: ICC 01/04
Case: The...
Suspect: Thomas Lubanga
Show parts: <Select parts>
Show legal services: <Select legal services>
Show stages: <Select stages>
User group: Judiciary
FPLC
Murder 2005-03-11
Show legal services
Preliminary examination
Legal requirements
Components of legal requirements
Prosecution material
Comments by assistants
Instructions / guidance from Ju
Contextual common elements
E.1. The conduct took place in the context of and was associated with an international armed conflict.
E.1.1. Existence of an "international armed conflict"
Since early 1996, the district of Ituri, and the DRC Eastern Provinces in general, have been at the forefront of two successive regional wars, which involved armed forces from several African countries. What is commonly referred to as the "First Congo War"...
E.1.2. In the context of": Temporal and geographical scope of the application of...
E.1.3. Was associated with: Nexus between the crime and the armed conflict [an armed...
The criminal conduct with which Thomas LUBANGA DYILO is charged took place in the context of and was associated with the armed conflict in Ituri: Children under the age of 15 years were enlisted and conscripted in order to undergo military training; the purpose of the training was to use them in hostilities, in particular to fight the FNI/FRPI
E.2. The perpetrator was aware of factual circumstances that established the...
On 15 September 2000, he founded the "Union des Patriotes Congolais" (UPC), becoming its President, as well as its armed wing the "Forces Patriotiques pour la Liberation du Congo (FPLC) of which he became the Commander-in-Chief.

Figure 4.

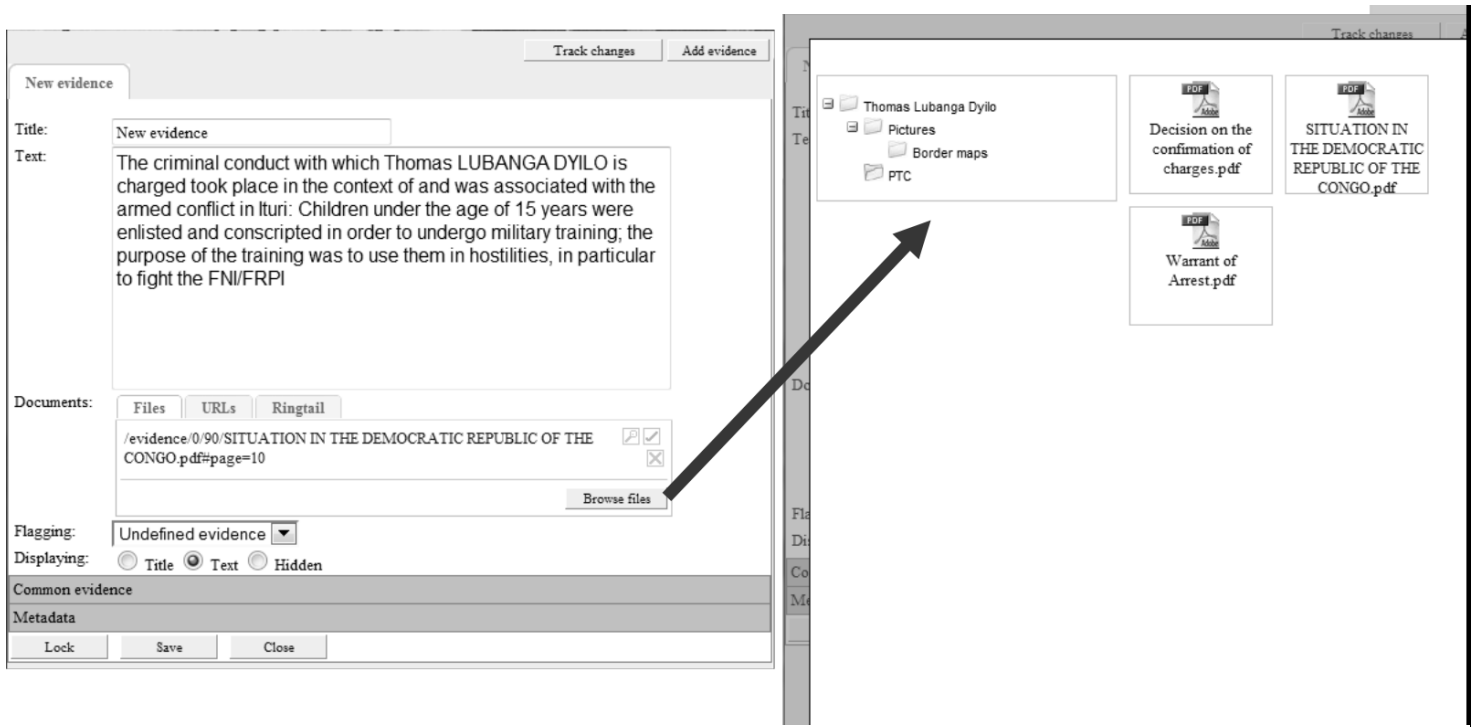
Track changes
Add evidence
New evidence
Title:
New evidence
Text:
The criminal conduct with which Thomas LUBANGA DYILO is charged took place in the context of and was associated with the armed conflict in Ituri: Children under the age of 15 years were enlisted and conscripted in order to undergo military training; the purpose of the training was to use them in hostilities, in particular to fight the FNI/FRPI
Documents:
Files
URLs
Ringtail
/evidence/0/90/SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO.pdf#page=10
Browse files
Flagging:
Undefined evidence
Displaying:
Title
Text
Hidden
Common evidence
Metadata
Lock
Save
Close
Thomas Lubanga Dyilo
Pictures
Border maps
PTC
Decision on the confirmation of charges.pdf
SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO.pdf
Warrant of Arrest.pdf

Figure 5.

10

The Anatomy of the Means of Proof Digest

Sangkul Kim[*]

10.1. Introduction: The Means of Proof Digest and the Case Matrix

The Means of Proof Digest (hereinafter MPD) can be nicknamed "Evidence Map". This map shows the various routes that can be taken to reach the final destination, an island called "Conviction", and all the journeys start from a rocky mountain called "Element". In the course of this trip, travellers must sail through a strait called "Fact/Evidence". The strait is quite notorious for its turbulent waves in the midst of which a number of boats have drifted away forever. Now, however, travellers can relax a little during the trip as all the routes marked in the "Evidence Map" have already been taken by other vigilant travellers and proven to be trustworthy.

The MPD was produced by the Legal Advisory Section (hereinafter LAS) of the Office of the Prosecutor of the International Criminal Court (hereinafter ICC) as part of the Case Matrix database. The idea behind the Case Matrix is nothing more than a white paper with a line in the middle. On the left hand side of the paper, prosecutors are supposed to put down all the elements required to be proven, while on the right hand side, evidence collected for each legal requirement is to be listed. In that way, one can have a snapshot overview of the case, and instantly spot its strong and weak parts. With this simple method, prosecutors can achieve judicial economy in the investigation/prosecution stage by directing limited resources to the weak areas of their case. For lawyers who work on cases involving core international crimes (for example, genocide, crimes against humanity and war crimes), it is, however, not easy to maintain such a piece of white paper mainly because of the size of their cases and the sheer volume of relevant evidentiary materials that far exceed those

[*] **Sangkul Kim** is a researcher at the Legal Research Institute of the Korea University Law School and a Ph.D. candidate at Georgetown University Law Center. Formerly, he was Associate Legal Adviser in the Office of the Prosecutor of the International Criminal Court.

used in ordinary domestic criminal cases. At this juncture, the Case Matrix provides international/domestic prosecutors and others with the "white paper" that facilitates the process of keeping record of evidence *vis-à-vis* each and every element of the crimes they are working on, and elements of the modes of liability. The five-tiered conceptual scheme of the MPD, which we will see in detail below at section 10.2.1., constitutes the backbone of the Case Matrix (which is called "legal services" in the Case Matrix; in the analogy of the "white paper", the "legal services" part is the "left hand side of the white paper" where one would set out all the relevant elements).

10.2. Structure of the Means of Proof Digest

There are four main sections in the MPD: (i) MPD on the crime of genocide (article 6 of the Rome Statute); (ii) MPD on crimes against humanity (article 7 of the Rome Statute); (iii) MPD on war crimes (article 8 of the Rome Statute); and (iv) MPD on modes of liability (articles 25 and 28 of the statute). Each of these four main sections is composed of a number of specific MPDs for each offence or mode of liability as the table below shows:

Category of Crime	Specific MPDs
Genocide (article 6)	5 MPDs on each offence under article 6
	1 MPD on common elements
Crimes against humanity (article 7)	16 MPDs on each offence under article 7
	1 MPD on common elements
War crimes (article 8(2)(a))	11 MPDs on each offence under article 8(2)(a)
	1 MPD on common elements
War crimes (article 8(2)(b))	34 MPDs on each offence under article 8(2)(b)
	1 MPD on common elements
War crimes (article 8(2)(c))	7 MPDs on each offence under article 8(2)(c)
	1 MPD on common elements
War crimes (article 8(2)(e))	18 MPDs on each offence under article 8(2)(e)
	1 MPD on common elements
Modes of liability (article 25)	10 MPDs on each mode of liability under article 25

Modes of liability (article 28)	2 MPDs on each mode of liability under article 28

Technically speaking, every offence set out in articles 6 to 8 and every mode of liability set out in articles 25 and 28 of the Rome Statute has its own MPD. There are six MPDs that do not correspond to any specific offence in articles 6 to 8. These are the MPDs on: (i) common elements of genocide; (ii) common elements of crimes against humanity; (iii) common elements of war crimes in article 8(2)(a); (iv) common elements of war crimes in article 8(2)(b); (v) common elements of war crimes in article 8(2)(c); and (vi) common elements of war crimes in article 8(2)(e). We will have a closer look at the features related to "common elements/contextual elements" in section 10.5.2. below.

10.2.1. Cognitive Platform of the Means of Proof Digest: Five-tiered Hierarchical Concepts

The MPD was developed on the basis of a classification scheme of five hierarchical legal and factual concepts:

- Tier 1: Element of Crime / Element of Mode of Liability
- Tier 2: Legal Component
- Tier 3: Cluster of Means of Proof
- Tier 4: Means of Proof
- Tier 5: Subsidiary Means of Proof

Each item from "Tier 1" to "Tier 4" is to be broken down into several or a number of sub-tiered items. This hierarchical scheme applies to each and every specific MPD on crimes and modes of liability. The definitions of these legal concepts are as follows.

Tier 1, "Element of Crime", refers to the constituent elements of crimes as set out in the ICC Elements of Crimes document that was drafted by the Preparatory Commission and adopted by the Assembly of States Parties of the ICC.[1] Article 21(1) of the Rome Statute provides that the Court shall apply the Elements of Crimes document as primary applicable law. The Elements of Crimes document lists detailed material and mental elements for each and every offence under articles 6 (genocide), 7 (crimes against humanity) and 8 (war crimes) of the

[1] ICC-ASP/1/3(part II-B) as adopted on 9 September 2002.

Statute.[2] In this context, article 9(1) of the Rome Statute should also be noted. It provides, "Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8". Given the wording "shall assist", it is generally interpreted that the Judges of the ICC are not bound by the Elements of Crimes document. This provision was added at the insistence of the United States during the Rome Diplomatic Conference in 1998. In connection with this, Roger Clark's observation is instructive:

> Since the concept [of "Elements"] was new in international practice, like much else in the Rome Statute, we could give it whatever meaning the traffic would bear. It will be up to the judges ultimately to decide whether any particular item in the Elements is compatible with the Statute, but they will no doubt give substantial deference to the work of the Preparatory Commission and the Assembly of the States Parties.[3]

Tier 1, "Element of Mode of Liability" refers to the constituent elements of forms of criminal participation. Compared with the corresponding provisions in the statutes of *ad hoc* tribunals, the Rome Statute has rather detailed provisions in respect of applicable modes of liability under articles 25 and 28. They are, however, definitional provisions and there is no articulation of elements of modes of liability equivalent to the Elements of Crimes document. The task of refining the elements of modes of liability was delegated to the judges of the ICC, and they are currently working on it. A good example thereof would be the development of elements of co-perpetration ("jointly with another") under article 25(3)(a). It is interesting to see the different formulations of those elements made respectively by Pre-Trial Chamber I in the *Lubanga* case and the same Chamber with a different composition of judges in the *Katanga and Ngudjolo* case.[4] In the absence of legal text equivalent to the

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[2] It should be noted that the mental elements set out in the Elements of Crimes document are not exhaustive as, in many cases, the general rule on mental elements as provided in article 30 of the Rome Statute is to be applied. For more detailed discussion about the mental element, see section 10.5.1. below.

[3] R. Clark, "The Mental Elements in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences", in *Criminal Law Forum*, 2001, vol. 12, p. 317.

[4] In both cases, the Pre-Trial Chamber I found two material elements and three mental elements for the "Joint commission" or "Co-perpetration" ("jointly with others" in ar-

Elements of Crimes document, the LAS produced its own tentative version of the elements of modes of liability for the purposes of the

ticle 25(3)(a)). The elements articulated in each case are almost *verbatim*, and the only significant difference can be seen in the second mental element. That is, on 29 January 2007, the *Lubanga* Pre-Trial Chamber stated, "[t]he suspect and the other co-perpetrators must all be mutually aware and mutually accept that implementing their common plan *may* result in the realization of the objective elements of the crime" (emphasis added). By employing the word "may", the *Lubanga* Pre-Trial Chamber made the co-perpetration under article 25(3)(a) something similar to the third category of joint criminal enterprise (as defined by the ICTY Appeals Chamber in *Tadić* case), at least in respect of the mental elements thereof. This formulation was taking the risk of dragging the ICC's version of co-perpetration theory into another controversy concerning the principle of legality that has haunted the theory of joint criminal enterprise. Furthermore, this approach taken by the *Lubanga* Pre-Trial Chamber was also problematic because it was not certain and even quite difficult to say that article 30 (in particular, the wording of "will occur") of the Rome Statute encompasses *dolus eventualis* when one would apply the standards of interpretation of treaty provisions as stipulated in article 31 of the 1969 Vienna Convention on the Law of Treaties, which the ICC Appeals Chamber accepted as the governing rule of the interpretation of the Rome Statute (*Situation in the Democratic Republic of the Congo*, Judgment on Extraordinary Review, ICC-01/04-168 OA3, Appeals Chamber, 13 July 2006, para. 33). The same Chamber, with a different composition of judges (only Judge Silvia Steiner sat on both), pronounced another version of the second mental element in its decision in *Katanga and Ngudjoro* case on 30 September 2008: "The suspects must be mutually aware and mutually accept that implementing their common plan *will* result in the realisation of the objective elements of the crimes" (emphasis added). Although the Pre-Trial Chamber appears to have changed its position on its face, it is not clear and rather confusing as the majority states that "[i]n the *Lubanga* Decision, the Chamber found that article 30(1) of the Statute encompasses also *dolus eventualis*. The majority of the Chamber endorses this previous finding", with Judge Usacka dissenting. The majority is of the view that since they found substantial grounds to believe that the crimes were committed with *dolus directus*, it is not necessary for them to determine the issue of *dolus eventualis.* Unfortunately, both the majority and Judge Usacka just touched upon the issue of *dolus eventualis*, and did not engage in any substantive analysis. See *Prosecutor v. Lubanga*, Decision on the confirmation of charges, ICC-01/04-01/06-803-tEN, Pre-Trial Chamber I, 29 January 2007, paras. 352–354 and 361-5; *Prosecutor v. Katanga and Ngudjolo*, Decision on the confirmation of charges, ICC-01/04-01/07-717, Pre-Trial Chamber I, 30 September 2008, para. 533, footnote 329, and Judge Usacka's dissenting opinion, para. 5 and the following.

MPD,[5] which will be continuously revised and updated in view of developments in the ICC jurisprudence.

Tier 2, "Legal Component", refers to *legal* sub-categorisations of elements of crimes and elements of modes of liability. Each element is broken down into several (or a number of) legal components. For instance, in the MPD on the common elements of crimes against humanity, the element "[t]he conduct was committed as part of a widespread or systematic attack directed against a civilian population" is broken down into four legal components: (i) attack; (ii) directed against any civilian population; (iii) widespread or systematic character of the attack; and (iv) "as part of" (referring to the nexus between the acts of the perpetrator and the attack). The practical benefit of having this sub-categorisation is to enable the users to have an overview of the relevant facts and/or potential evidence in a legally organised manner, corresponding to distinct legal concepts previously intermingled within an element. For the purpose of the MPD, Tier 1 and Tier 2 are concepts of a purely *legal* nature as opposed to the *fact-oriented* categories of Tier 3, Tier 4 and Tier 5, defined below.

Tier 3, "Cluster of Means of Proof", is the highest fact-oriented category within the hierarchical structure of the five-tiered concepts. That is to say, "fact or potential evidence" for the purpose of the MPD starts from this concept. In this sense, the concept of the cluster of means of proof can be best defined as "category of facts". Each legal component is broken down into several (or a number of) clusters of means of proof. Subsequent to the example in the previous paragraph, the legal component of "widespread or systematic character of the attack" is broken down into three clusters of means of proof (that is, "categories of facts") involving: (i) the scale of the attack; (ii) the pattern of the attack; and (iii) the organised nature of the attack. Again, this concept of "cluster of means of proof" in the structure of the MPD assists users in classifying relevant facts and/or potential evidence in accordance with distinct factual themes/groups.

Tier 4, "Means of Proof", is defined as "fact or potential evidence". Most of the means of proof set out in the MPD are taken from the

[5] Those tentative elements of modes of liability were developed on the basis of the articles 25 and 28 of the Rome Statute and the relevant jurisprudence of the *ad hoc* tribunals.

judgments of *ad hoc* tribunals. It is not entirely wrong to use the term "evidence" as opposed to "potential evidence". The latter stresses the perspective of the users of the MPD who confront a new case involving core international crimes. Means of proof set out in the MPD have already undergone the factual and legal scrutiny of judges of the ICTY/ICTR, as they considered, analysed and accepted the adduced facts. Following the line of illustrations in the previous paragraphs, six means of proof are attached to the cluster of means of proof of "the organised nature of the attack": (i) evidence of attacks coinciding with each other, (ii) evidence of preliminary actions taken before the main attack, (iii) evidence of a military or armed group being organised, (iv) evidence of attacks being organised into a number of distinct phases/steps, (v) evidence of the organised employment of means and methods of the attack, and (vi) evidence of the organized use of resources. As seen from these examples, means of proof are the practical reference points for actual investigation or prosecution. Furthermore, members of the judiciary can also benefit from the list of means of proof in the MPD when reviewing actual evidence presented during the trial.

Tier 5, "Subsidiary Means of Proof", are the specific factual examples spotted in the case law of the *ad hoc* tribunals. Each means of proof are to be followed by several (or a number of) subsidiary means of proof. In this context, it should be noted that not all the means of proof have a set of subsidiary means of proof. There are many means of proof that do not have any. Sometimes, however, it is difficult to draw a clear-cut line between the concept of the means of proof and subsidiary means of proof. That is because the distinction between these two concepts stems from a practical need recognised during the actual drafting work for the MPD to have a certain sub-category beneath the Tier 4. For the above-mentioned means of proof of "evidence of preliminary actions taken before the main attack", the MPD specifies three subsidiary means of proof as follows: (i) evidence of installing checkpoints, (ii) evidence of restricting access to buildings/roads/towns, and (iii) evidence of preparing weapons/vehicles/equipments.[6]

[6] One thing that must be recalled is the importance of the "factual findings" part of the *ad hoc* tribunals' judgements for the purpose of spotting the means of proof and the subsidiary means of proof. Although it is far easier to locate the relevant "legal findings" that correspond to a legal requirement than the "factual findings", most of the

10.2.2. Structure Within a Specific Means of Proof Digest: Table of Contents Hyperlinked to Text

With respect to the structure within a MPD, each document consists of two distinct sections: a "table of contents" and the "body texts". The "table of contents" succinctly visualises the five hierarchical legal and factual reference items, each item being hyperlinked to the relevant sources in the body text within the same MPD. For the convenience of the users, the table of contents uses a numbering and colour scheme:

Tier 1: Elements (1-digit-numbering; Green)/Elements (1-digit-numbering; Brown)

Tier 2: Legal Components (2-digit-numbering; Red)

Tier 3: Clusters of MP (3-digit-numbering; Orange)

Tier 4: MP (1-digit-numbering starts with "P [Proof]"; Purple)

Tier 5: Subsidiary MP (2-digit-numbering starts with "P"; Grey)

For an example of how the five-tiered hierarchy is implemented, see this extract below from the MPD on "article 8(2)(a)(ii)-2, Inhumane treatment":

5. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
- 5.1. Infliction of physical or mental pain or suffering
  […]
  - 5.1.3. Evidence of forced labour assignments when the conditions under which the labour is rendered are such as to create danger for the life or health of the victims, or may arouse in them feelings of fear, and humiliation
  - P.12. Evidence of type forced labour assignment
    - P.12.1. Evidence of military assignment on the frontline which exposed civilians to dangerous conditions and a high risk of being injured or killed
    - P.12.2. Evidence of the use of detainees to dig trenches at the front under dangerous circumstances
    - P.12.3. Evidence of humiliating assignments
    - P.12.4. Evidence of civilians being forced to loot
  - P.13. Evidence of working conditions
    - P.13.1. Evidence of payment and compensation
    - P.13.2. Evidence of dangerous conditions
  - 5.1.4. Evidence of civilians being used as human shields

specific evidentiary items (means of proof or subsidiary means of proof) are to be found in the "factual findings".

P.14. Evidence of taking civilians to a place targeted by enemy
P.15. Evidence of those civilians being told or made aware of their being used as human shields
P.16. Evidence of those civilians being watched over by soldiers
P.17. Evidence of those civilians being told that whoever moved would be instantly cut down

5.1.5. Evidence of conduct related to torture

P.18. Evidence of conduct which does not meet the severity requirement of torture
P.19. Evidence of conduct which does not meet the prohibited purpose requirement of torture

For users, the table of contents alone can be a sufficient legal and evidentiary guide. When they need to refer to the source of any legal reference items, say, to provide judges with the authorities related to specific means of proof in the courtroom, users can immediately find the information including the paragraph numbers in the body texts by clicking on the item in the table of contents.

10.3. Functions of the Means of Proof Digest

10.3.1. Overview Function of Law and Facts

In the hierarchical structure explained above, the elements and legal components represent *abstract* law, and the clusters of means of proof, means of proof and subsidiary means of proof are, as explicated above, categories of facts, facts, and concrete factual examples respectively. While moving from elements (Tier 1) to subsidiary means of proof (Tier 5), users' perceptual understanding progresses *gradually* from the abstract to the concrete. The reason why the word 'gradually' should be emphasised is because it helps demonstrate that the MPD is trying to fill users' conceptual gaps by constructing a cognitive bridge starting from abstract legal provisions to specific factual descriptions. Thus, the MPD permits users to have an easy overview of relevant types or examples of facts in relation to each element and/or legal component, which accompanies the authority of legal and factual scrutiny attached by the judges of the *ad hoc* tribunals. The possibility of this instant legal and factual overview – where the law and facts are linked with the required degree of relevance pursuant to the applicable standard of proof – significantly contributes to efficient and focused investigation and prosecution of core international crimes.

10.3.2. Practical Reference Function for Investigation

The first specific element of the crime of rape as a crime against humanity in the ICC Elements of Crimes document provides that,

> [t]he perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.

With regard to this element, for example, the Judges of the *Čelebići* Trial Chamber of the ICTY considered the following facts or categories of facts when they found that the relevant acts constitute rape: (i) invasion of vagina with penis;[7] (ii) invasion of anus with penis;[8] (iii) the victim's anus bleeding;[9] (iv) the victim's wound on anus treated with a compress, and provision of tranquillisers to the victim;[10] (v) the perpetrator ejaculating on a part of the victim's body;[11] (vi) existence of big trace of sperm left on the bed.[12] Reference to these facts or categories of facts that constitute potential evidence is important particularly as the precedents found in the jurisprudence of the *ad hoc* tribunals can provide trustworthy guidance for efficient investigation and case preparation. For instance, investigators preparing questions to be asked to a rape victim can ensure the prospective usefulness and relevance of the outcome of their investigative activities by consulting the means of proof already set out in the MPD. The MPD can in the same way assist anyone who works on the issue of the relationship/relevance between elements and facts in the area of international criminal justice, including the judges, prosecutors, defence counsel and victims' representatives.

10.3.3. Legal Platform Function for Law-Driven Judicial Operation

Tier 1 (elements of crimes and modes of liability) and 2 (legal components) form the mandatory backbone of the Case Matrix, and they

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7 *Prosecutor v. Delalić et al.*, Judgement, IT-96-21-T, ICTY Trial Chamber, 16 November 1998, paras. 937 and 940.

8 *Prosecutor v. Delalić et al.*, Judgement, *ibid.*, paras. 960 and 962.

9 *Prosecutor v. Delalić et al.*, Judgement, *ibid.*, para. 960.

10 *Ibid.*

11 *Ibid.*

12 *Ibid.*, paras. 937 and 940.

are the core of the legal reference services that it offers. In other words, by starting from these two categories, the Case Matrix facilitates a law-driven approach to investigation and prosecution. In the context of complex and large-scale cases involving core international crimes, this cannot be taken for granted, especially in the midst of large amounts of evidentiary materials and heavy workloads stemming from, *inter alia*, disclosure obligations and ceaseless procedural motions. Such challenges and operational dysfunctionality have burdened participants in proceedings before international criminal tribunals. It was against this background that the Case Matrix was created. One of its effects has been to *enforce* a law-driven judicial operation especially from the Prosecution's side.[13] In this context, categorising the legal components for

[13] It is interesting to see that the silent consensus amongst practitioners in the area of international criminal justice on the importance of a law-driven case preparation has culminated in the issuance of several decisions and orders by the ICC judges. All of those decisions order the Prosecution to prepare an evidence analysis chart *vis-à-vis* each element of crimes and modes of liability for the benefit of the chamber and defence counsel. Some excerpts from those decisions are as follows: *Prosecutor v. Katanga and Ngudjolo*, "Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol", ICC-01/04-01/07-956, Trial Chamber II, 13 March 2009, paras. 11 and 13 ("11. In order to better assist the Chamber and to enable each Defence Counsel to prepare their case effectively, the Prosecution is hereby ordered to submit an analytical table of all the evidence it intends to use during the trial. The table shall be based on the charges confirmed and follow the structure of the *Elements of crimes*. An example is attached in Annex A to this decision. This table will be referred to as the "Table of Incriminating Evidence" […] As far as format is concerned, the Table of Incriminating Evidence breaks down each confirmed charge into its constituent elements – contextual circumstances as well as material and mental elements – as prescribed by the *Elements of crimes*". For each element, the Prosecution shall set out the precise factual allegations which it intends to prove at trial in order to establish the constituent element in question. For each factual allegation, the Prosecution shall specify which item(s) of evidence it intends to rely on at trial in order to prove the allegation. Within each item of evidence, the Prosecution shall identify the pertinent passage(s), which are directly relevant to the specific factual allegation" (emphasis in original)); *Prosecutor v. Bemba*, "Decision on the Submission of an Updated, Consolidated Version of the In-depth Analysis Chart of Incriminatory Evidence", ICC-01/05-01/08-232, Pre-Trial Chamber III, 10 November 2008 (this decision further requests the Prosecution to "submit an updated, consolidated version of the in-depth analysis chart of incriminating evidence disclosed, following the analysis structure of the model chart annexed to the present decision […]"); *Prosecutor v. Bemba*, "Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties", ICC-01/05-01/08-55, Pre-Trial Chamber III, 31 July 2008, paras. 69–70 ("69. I do not understand the last number 69. This analysis con-

each element in the MPD was an important task setting the functional cornerstones of such a law-driven approach via the Case Matrix methodology for the benefit of the judges and all parties and participants in international criminal proceedings.

10.4. How Was the Means of Proof Digest Developed?

At the initiative of then-Chief of the Section, the LAS of the ICC Office of the Prosecutor started to develop a pioneer version of the MPD in May 2004. At that time, the MPD had only two legal reference items of Tier 1 (Elements of Crimes and Elements of Modes of Liability) on the one hand, and Tier 2 (Means of Proof) on the other. Legal advisers and interns of the LAS made an enormous efforts and significant contributions to the production of the pioneer version of the MPD.

In early 2005, however, the LAS came to recognize a need to incorporate an elaborated classification scheme as the conceptual move from the elements and the means of proof was considered to be too drastic. Consequently, it decided to construct a cognitive bridge that would help smooth the process of users' legal and factual understanding. Thus, three new legal reference items were introduced: (i) legal components; (ii) clusters of means of proof; and (iii) subsidiary means of proof. A number of very competent interns came to the LAS from around the world, contributing to the implementation of the new classification scheme to the comprehensive MPD, covering all the crimes and modes of liability under the Rome Statute. This task was challenging in view of the sheer number of offences and modes of criminal participation set out in

sists of presenting each piece of evidence according to its relevance in relation to the constituent elements of the crimes presented by the Prosecutor […] Each piece of evidence must be analysed […] by relating each piece of information contained in that page or paragraph with one or more of the constituent elements of one or more of the crimes with which the person is charged, including the contextual elements of those crimes, as well as the constituent elements of the modes of participation in the offence […]. 70. The Chamber considers that this analysis should be presented in the form of a summary table which shows the relevance of the evidence presented in relation to the constituent elements of the crimes with which the person is charged. It should enable the Chamber to verify that for each constituent element of any crime with which the person is charged, including their contextual elements, as well as for each constituent element of the mode of participation in the offence […], there are one or more corresponding pieces of evidence, either incriminating or exculpatory, which the Chamber must assess […]").

the Statute, the limited resources of the LAS, and the substantial legal research and advisory role played by the Section at the same time.[14]

The process of developing the MPD had several steps. Firstly, the drafts by interns were submitted to legal advisers for review; and secondly, those drafts that passed the first review were submitted to the Section Chief for final review and approval. For some important parts (such as the contextual elements, and key offences and modes of liability), the first step was skipped and first drafts were prepared by legal advisers themselves. Some of these drafts also went through external review processes performed by legal experts outside the LAS. By the end of 2005, the LAS had managed to complete the development of the first-generation MPD.

10.5. Revision and Update of the Means of Proof Digest

10.5.1. Revision of Mental Elements Part

It was quite a challenge for the LAS to prepare the mental element part within each MPD covering all the crimes and modes of liability in the Rome Statute. In cases where a specific mental element was already explicitly provided immediately after the affected material element in the Elements of Crimes document, it was not a problem as the members of the LAS just needed to include that specific mental element in the MPD.[15]

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[14] The LAS was also working on several additional parts of the Legal Tools Project, including the Case Matrix database, the Element Digest and the Proceedings Digest project, all of which required extensive time and resources.

[15] While it is correct to regard article 30 ("intent and knowledge") as *lex generalis* in respect of mental element scheme under the ICC law, these instances of presence of a specific mental element in the Elements of Crimes document fall into the *lex specialis* as the "[u]nless otherwise provided" phrase of article 30(1) is to be applied thereto. The second principle as to the structuring of Elements of Crimes document (as provided in paragraph 7 of the General Introduction to the Elements of Crimes) states, "[w]hen required, a particular mental element is listed *after* the affected conduct, consequence or circumstance" (emphasis added). There are many such examples in the Elements of Crimes, *inter alia*:

- Third element of article 7(1)(d) Crimes against humanity of deportation or forced transfer of population: "3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence";
- Sixth element of article 7(1)(i) Crimes against humanity of enforced disappearance: "6. The perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time";

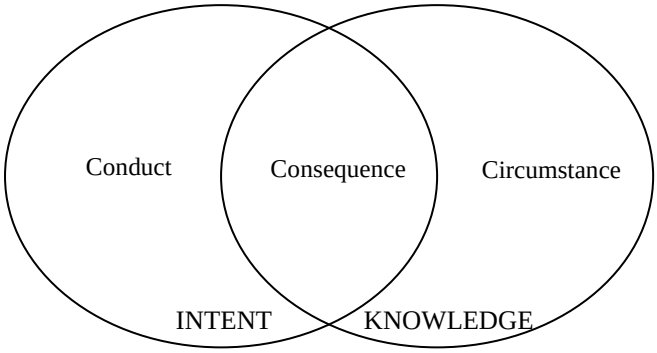
However, for those instances where no specific mental element was explicitly provided for a material element and, consequently, the general mental element rule under article 30 would be applied,[16] careful legal consideration was needed to figure out the exact mental element(s) derived from the article 30 rule. On the basis of its reading and interpretation of article 30 of the Rome Statue, and the paragraphs 2 and 7 of the General Introduction to the Elements of Crimes, the LAS' work on the "article 30 mental elements" or "*implicit* mental elements"[17] part of the MPD was commenced from a legal understanding that (i) there are three material elements under the ICC law – "conduct", "consequence" and "circumstance"; and (ii) each material element is supposed to be covered by "intent, knowledge or both".[18] This understanding can be described by a diagram as follows:

- Second element of article 8(2)(a)(ii)-1 Crimes against humanity of torture: "The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind";
- Third element of article 8(2)(b)(1) War crime of attacking civilians: "3. The perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack";
- Second, third and fifth element of article 8(2)(b)(vii)-1 War crime of improper use of a flag of truce: "2. The perpetrator made such use in order to feign an intention to negotiate when there was no such intention on the part of the perpetrator.; 3. The perpetrator knew or should have known of the prohibited nature of such use.; 5. The perpetrator knew that the conduct could result in death or serious personal injury";
- Second element of article 8(2)(b)(xii) War crime of denying quarter: "2. Such declaration or order was given in order to threaten an adversary or to conduct hostilities on the basis that there shall be no survivors"; and
- Third element of article 8(2)(b)(xxvi) War crime of using, conscripting or enlisting children: "The perpetrator knew or should have known that such person or persons were under the age of 15 years".

[16] Paragraph 2 of the General Introduction to the Elements of Crimes provides, "[w]here *no reference is made* in the Elements of Crimes to a mental element for any particular conduct, consequence or circumstance listed, it is understood that the relevant mental element, that is, intent, knowledge or both, set out in article 30 applies" (emphasis added).

[17] In this context, "implicit" means not being provided explicitly *in the Elements of Crimes*.

[18] This wording "intent, knowledge or both" is taken from the second sentence of paragraph 2 of the General Introduction to the Elements of Crimes.



As this diagram shows, what article 30 provides is the possible legal combinations between material elements and mental elements: (i) as for the material element of "conduct", only the mental element of "intent" is applicable; (ii) as for the material element of "consequence", both mental elements of "intent" and "knowledge" are applicable;[19] and (iii) as for the material element of "circumstance", only the mental element of "knowledge" is applicable. From a different standpoint, we can also state that: (i) the mental element of "intent" is only applicable to the material elements of "conduct" and "consequence", but not to "circumstance"; and (ii) the mental element of "knowledge" is only applicable to the material elements of "consequence" and "circumstance", but not to "conduct".

With this undertanding of the law, the members of the LAS first cautiously reviewed and classified each material element set out in the Elements of Crimes document into one of the three categories of "conduct", "consequence" and/or "circumstance". Some examples are:

- [Article 7(1)(a) Murder]
  "1. The perpetrator killed one or more persons" – "conduct" and "consequences";
- [Article 8(2)(a)(ii)-2 Inhuman treatment]
  "1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons" – "conduct" and "consequences";

[19] The literal interpretation of article 30 suggests that "awareness that a consequence will occur in the ordinary course of events" can constitute both the "intent" and "knowledge".

- [Article 8(2)(b)(i) Attacking civilians]
  "1. The perpetrator directed an attack" – "conduct" only;[20]
- [Article 8(2)(b)(xxvi) Using, conscripting or enlisting children]
  "1. The perpetrator conscripted or enlisted one or more persons into the national armed forces or used one or more persons to participate actively in hostilities" – "conduct" only;
- [Article 8(2)(b)(x)-1]
  "2. The conduct caused death or seriously endangered the physical or mental health of such person or persons" – "consequence" only;
- [Article 7(1)(f) Torture]
  "2. Such person or persons were in the custody or under the control of the perpetrator" – "circumstance" only.

While classifying the material elements into one or more of the three categories of "conduct", "consequence" and "circumstance" – in particular, to determine whether *an individual provision of an element of a crime*[21] describing the "conduct" also contains the material element of "consequence" in itself – the LAS was confronted with another challenge. For instance, does the first element of article 6(d) genocide by imposing

[20] As regards the constituent elements of this crime, it is noteworthy that the jurisprudence of the ICTY and the ICC Elements of Crimes document provide different sets of elements. That is, while the ICTY case law sees the result of the attack (causing death and/or serious bodily injury) as an element, the Elements of Crimes document does not. Instead, the Elements of Crimes document strengthened the required level of mental element to be proven by the prosecution as it provides intent *vis-à-vis* the object of the attack ("The perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack"). For more details, see K. Dörmann, "Article 8, para. 2(b)(i)" in Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Second edition, Verlag C.H. Beck/Hart Publishing/Nomos, 2008, p. 325.

[21] It seems it would help our understanding if we distinguish the two different definitions of the term "element" in the context of the ICC law: Firstly, the term "element" can mean a "material element (objective element; *actus reus*)" or a "mental element (subjective element, *mens rea*)". In this sense, the concepts of "conduct", "consequence", "circumstance", "intent" and "knowledge" can each be called "element". On the other hand, the term "element" can also mean each individual provision in the ICC Elements of Crimes document. For example, the provision "[t]he perpetrator inflicted severe physical or mental pain or suffering upon one or more persons" (first element of torture as a crime against humanity) in the Elements of Crimes document can be also called "element" despite the fact that this *element* contains both the material *elements* of "conduct ("inflicted")" and "consequence ("severe pain or suffering")". In this respect, the author would like to suggest the introduction a concept of "component of material (or mental) element" indicating each of the concepts "conduct", "consequence", "circumstance", "intent" or "knowledge".

measures intended to prevent births ("[t]he perpetrator imposed certain measures upon one or more persons") include "consequence" in addition to "conduct"? Facing questions of this kind, the LAS realised a need to classify a crime into one of the following categories: either (i) "conduct crime" in respect of which the result of the conduct is not a legal requirement; or (ii) "result crime" in respect of which the conduct by itself is not sufficient and a showing of "consequence" thereof is required to constitute a crime.

The main purpose of this classification was to attach the precise mental element(s) to a material element. Another practical benefit was guidance to the establishment of the investigative strategy of the Office of the Prosecutor. That is, when a crime under consideration for a specific case is a "conduct crime", collecting evidence related to the result, factual effects or events that follow the "conduct" becomes unnecessary from a purely legal viewpoint. The following examples from domestic jurisdictions can help to illustrate this point. With regard to the crime of burglary, it is commonly said that prosecutor is not required to prove what happened after the offender entered another person's house without her consent. By the same token, as to the crime of perjury, securing a conviction is still possible without a showing of how the false testimony affected the cognitive process of a judge in reaching a judgement.

In such cases as article 8(2)(b)(vii)-1 (war crime of improper use of a flag of truce) or 8(2)(b)(x)-1 (war crime of mutilation) there was no difficulty in deciding whether the individual provision of the element of "conduct" also include the "consequence" element. There were separate explicit provisions of the "consequence" element in the Elements of Crimes document.[22] For these crimes, the first element that describes the

[22] In article 8(2)(b)(vii)-1, the fourth element provides, "4. The conduct resulted in death or serious personal injury"; in article 8(2)(b)(x)-1, the second element provides, "2. The conduct caused death or seriously endangered the physical or mental health of such person or persons". Other crimes under the Rome Statute for which the Elements of Crimes document explicitly provides a "consequence" of "conduct" as a separate element are: article 8(2)(b)(vii)-2 (war crime of improper use of a flag, insignia or uniform of the hostile party); article 8(2)(b)(vii)-3 (war crime of improper use of a flag, insignia or uniform of the United Nations); article 8(2)(b)(vii)-4 (war crime of improper use of the distinctive emblems of the Geneva Conventions); article 8(2)(b)(x)-2 (war crime of medical or scientific experiments); article 8(2)(e)(xi)-1 (war crime of mutilation); and article 8(2)(e)(xi)-2 (war crime of medical or scientific experiments).

relevant "conduct" does not contain the "consequence" feature, and therefore, only the mental element of "intent" for the material element of "conduct" had to be attached.

However, for other element provisions stipulating "conduct" without the separate element provision of "consequence", answering the same question was challenging and still requires further review. A clear-cut line between the two categories of "conduct crime" and "result crime" had not been readily available. This aspect of the MPD will be addressed during the further revision and update process. For that purpose, it seems to be necessary to establish a standard for distinguishing "conduct crime" and "result crime". For instance, if we define the concept of "consequence" broadly, encompassing "physical effects [of the conduct] and any other detrimental results [thereof]" as is the view of Albin Eser,[23] the number of crimes classified into the category of "result crime" would increase. Another parameter in this respect was suggested by Eugen Milhizer. Emphasizing the legislator's purpose, he states, "[w]hen a criminal statute's purpose is to prevent a harmful result, the crime is said to be a result crime; when its intent is to prevent potentially harmful conduct, the crime is said to be a conduct crime".[24] In this context, som

[23] A. Eser, in Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court*, Oxford University Press, 2002, vol. 1, p. 911. Eser further states, "in transgressing the borderline between result and conduct crimes, "consequence" must be understood in the broad sense of all definitional effects which may ensue from the prohibited conduct", *ibid.*, p. 914. In this connection, while acknowledging that the only reference of the material element of "consequence" in the Rome Statute (that is, article 30 and especially its sub-paragraph 2(b)) is primarily designed for "result crime", Eser further opines that the material element of "consequence" "can also concern "conduct crimes" at least insofar as the perpetrator must *intend* to procure the prohibited effect" (emphasis added). He then provides an example of the war crime of denying quarter (article 8(2)(b)(xii). It is considered, however, that this crime is classified as "conduct crime", *not involving any "consequence"*. The difficulty lies in the interpretation of the second element that provides, "[s]uch declaration or order was given *in order to* threaten an adversary or to conduct hostilities on the basis that there shall be no survivors" (emphasis added). In the author's view, this crime does not include any material element of "consequence" as what the second element entails is an *additional mental element* concerning a "purpose" or "aim" of the conduct. To sum up, the authors would suggest that the additional mental element of "purpose" or "aim" does not change the classification of a crime from "conduct crime" to "result crime".

[24] E. Milhizer, "Justification and Excuse: What They Were, What They Are, and What They Ought To Be", in *Saint John's Law Review*, 2004, vol. 78, p. 805.

criteria put forward by George Fletcher (with a proposition that "causation [that is, result crime] is a problem only where accidental harm is possible") are illuminating and can be summarised as follows:[25]

"Crimes of harmful consequences" (Result crime)	**"Crimes of harmful actions" (Conduct crime)**
Harm may occur as a result of a human action (for example, a person killed) or a natural event (for example, a person dies).	Harm may occur only as a result of a human action; and the harm may not occur as a result of a natural event (for example, sexual penetration, in the sense of rape, cannot occur as a natural event; entering another person's house, in the sense of burglary, cannot occur as a natural event).
Occurrence of the harm is still possible without a human being as a causal agent.	Occurrence of the harm is not possible without a human being as a causal agent.
Spatial and temporal gap is possible between a human action and the relevant harm (for example, pushing a button can result in the death of someone on the other side of the planet).	Immediate connection between a human action and the relevant harm (for example, forcing intercourse implies rape here and now; taking away the belongings of another entails dispossession on the spot).
The actor may cause the harm by accident; he or she may not foresee that his or her actions will produce the harm (for example, a hunter might not realize that his well-aimed shot would ricochet in a particular way and hit an innocent bystander. The death of the bystander is due to an accident).	The actor cannot generate the harm by accident, but can generate the harm by mistake (for example, a person cannot rape by accident; however, a man can be mistaken about a woman's consenting to intercourse).

[25] G.P. Fletcher, *Basic Concept of Criminal Law*, Oxford University Press, 1998, pp. 59–62. Note that the examples in the chart are also taken from this book almost in *verbatim*. As regards the crime of rape, despite the wording "invaded the body of a person by conduct *resulting in* penetration" (emphasis added) in the Elements of Crimes document, it is generally considered in both civil law and common law traditions to be a "conduct crime", especially given its "peculiarly immediate and face-to-face" nature. See H. Power, "Towards a Redefinition of the Means Rea of Rape" in *Oxford Journal of Legal Studies*, 2003, vol. 23, pp. 393–4. Furthermore, to the knowledge of author, there is no jurisprudence from the *ad hoc* international criminal tribunals that discuss the causal relationship between the act of invasion and the result of penetration.

The actor may generate the harm by mistake, but the consideration thereof is legally of lesser significance.	The actor may generate the harm by mistake, and the consideration thereof is legally of greater significance.

In addition, another classification standard can be drawn from Eser.[26] Taking the examples of perjury and rape, he makes an observation that "harm" in the sense of "conduct crimes" is intangible, and to be presumed. He further advances, regarding "conduct crimes", that, while the criminal conduct is committed in natural world, the protected interest harmed by the conduct is not visible and only conceptually exists as is the case in respect of the "integrity of judicial process of justice" (perjury) or "ability to make voluntary sexual choice" (rape). Eser's view can be summarised as follows:

Result crime	**Conduct crime**
After the conduct, harm of tangible nature is caused and causal relation must exist between the conduct and the harm.	After the conduct, harm of intangible nature is presumed without any showing of causal relation (for example, perjury, rape and forgery).

Returning back to the question asked above as to the first element of article 6(d) (genocide by imposing measures intended to prevent births), we can formulate the answer applying the criteria of distinction drawn from Fletcher, Eser and Milhizer. It appears difficult to say that imposing certain measures intended to prevent births within a particular national, ethnical, racial or religious group can occur as a result of a natural event without the involvement of a human being as a causal agent. The conduct of *imposing* certain measures like forced abortion,

[26] A. Eser, "The Principle of Harm in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests", in *Duquesne University Law Review*, 1965, vol. 4, pp. 389–90:

> […] simple conduct crimes, such as perjury or rape, are directed against legal interests of an immaterial nature. While the harm affects legal interests which are of an ideal nature, the commission of these crimes must take place in external reality in order to produce an overt act. Therefore, in these crimes, the act and the harm occur at different levels. The act is a phenomenon of the natural world while the interests, when of an immaterial nature, are harmed in a manner which is intelligible and [not] evident. For this reason, it seems rather logically and ontologically untenable that the connection between act and harm can be called a truly causal one in conduct crimes. […] The principle of legality demands that an overt act be present, once the act is proven, the harm is assumed. We can conclude, therefore, that in simple conduct crimes the causal relation between act and harm is replaced by a legal presumption of harm, provided all other definitional requirements are met.

segregation of the sexes or prohibition of marriage happens on the spot regardless of what happens afterwards. A person cannot force an abortion or prohibit marriage by accident. Moreover, prevention of births in the context of article 6(c) is considered not to be an issue of material element in "harm", but of mental elements in an aim or goal of the conduct of imposing certain measures. Lastly, it seems that the intangible harm of "no birth any more" is presumed if relevant conduct exists, and does not have to be causally linked to the conduct of imposing certain measures. It is reasonable to assume that the purpose of this offence is to prevent any conduct that can potentially endanger the biological continuance of a group even when the conduct did not succeed in the abortion or segregation of the sexes. Therefore, this crime of imposing certain measures to prevent births is to be classified as a "conduct crime".

To sum up, application of the criteria in distinguishing "conduct crime" and "result crime" as addressed above would not only facilitate the future revision and updates of the article 30 mental elements part of the MPD, but also provide significant legal guidance for investigative and prosecutorial activities for the purpose of clarifying the area of evidence that is necessary to secure conviction, which would ultimately assist in achieving the goal of efficiency in administering international criminal justice.

10.5.2. Revision of Contextual Elements Part

The MPD uses the term "common elements" instead of "contextual elements". "Common elements" means the elements that are provided in *verbatim* for all the offences in the six categories of crimes under the Rome Statute as follows:

- Article 6, Genocide:
  1. Such person or persons belonged to a particular national, ethnical, racial or religious group.
  2. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
  3. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.
- Article 7, Crimes against humanity:
  1. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

2. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

– Article 8(2)(a), War crimes (Grave breaches of the Geneva Convention of 12 August 1949):[27]
  1. Such person or persons were protected under one or more of the Geneva Conventions of 1949.
  2. The perpetrator was aware of the factual circumstances that established that protected status.
  3. The conduct took place in the context of and was associated with an international armed conflict.
  4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.
– Article 8(2)(b) War crimes (Other serious violations of the laws and customs applicable in international armed conflict):
  1. The conduct took place in the context of and was associated with an international armed conflict.
  2. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.
– Article 8(2)(c) War crimes (Serious violations of article 3 common to the four Geneva Conventions of 12 August 1949 in an armed conflict not of an international character):
  1. Such person or persons were either *hors de combat*, or were civilians, medical personnel or religious personnel taking no active part in the hostilities.
  2. The perpetrator was aware of the factual circumstances that established this status.
  3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
  4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.
– Article 8(2)(e) War crimes (Other serious violations of the laws and customs applicable in armed conflict not of an international character):
  1. The conduct took place in the context of and was associated with an armed conflict not of an international character.
  2. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

Here, it should be noted that the definitional scope of the term "common elements" that has been employed by the LAS is broader than

[27] An exception should be noted: article 8(2)(a)(iv) provides for the protective status of "property", not of "person or persons".

that of "contextual elements".[28] Given the purpose and nature of the contextual elements, which bring individual conduct inside the domain of criminal jurisdiction of core international crimes,[29] only the following should be called the "contextual elements":

- Article 6, Genocide:

  The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.[30]

- Article 7, Crimes against humanity:

  The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

  The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

- Article 8(2), War crimes:

  The conduct took place in the context of and was associated with an international armed conflict [or an armed conflict not of an international character].

  The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

[28] Instead of the term "contextual elements", the Elements of Crimes document uses the terms of "context elements" (paragraph 3, Introduction to Article 7, Crimes against humanity) and "contextual circumstances" (paragraph 7, General Introduction to the Elements of Crimes). To date, the judges of the ICC almost consistently use the term "contextual elements" in their decisions.

[29] In other words, without satisfying the so-called "nexus requirement", no national or international courts can have jurisdiction over core international crimes. An individual conduct can enter the domain of the said jurisdiction only if it is committed (i) "in the context of manifest pattern of similar conduct" (genocide), (ii) "as part of a widespread or systematic attack directed against a civilian population" (crimes against humanity), or (iii) "in the context of and was associated with" an armed conflict" (war crimes).

[30] Note that the Elements of Crimes document refrains from providing a mental element for this circumstance. Instead, the Introduction to Article 6 Genocide in the Elements of Crimes document states, "[n]otwithstanding the normal requirement for a mental element provided for in article 30, and recognizing that knowledge of the circumstances will usually be addressed in proving genocidal intent, the appropriate requirement, if any, for a mental element regarding this circumstance will need to be decided by the Court on a case-by-case basis".

This classification is further supported by the structure of the Elements of Crimes document (as stated in the paragraph 7 of the General Introduction thereto): "[c]ontextual circumstances are listed last". That is to say, there are occasions where the elements concerning the membership of the victims ("belonged to a group") and the protected status the victims ("protected under Geneva Convention" or "being *hors de combat*, civilians, medical personnel or religious personnel") are *not* listed last. Such examples can be found in articles 6(c), 6(d) and 6(e) for genocide and article 8(2)(c)(iv) for war crimes. It implies that the material elements in relation to membership or protected status of the victims and the mental elements thereof were not considered as contextual elements by the drafters.[31] In other words, one might argue that the drafters regarded the membership and the protected status of the victims as issues to be addressed in relation to each specific criminal conduct, and not to the general contextual circumstances. This logic appears to be consistent with the reasonable sequence of legal thinking of prosecutors and judges. Taking a specific example from the ICTR jurisprudence: the court found that the issue of whether the refugees inside the *Musha* Church in Rwanda belonged to the ethnic group of "Tutch" should be verified at the stage of judicial scrutiny of the specific conduct of killing that occurred in the church, rather than during the phase of judicial examination of the general contextual circumstances to determine if there was a "manifest pattern of similar conduct".[32]

In conclusion, since there seems to be no obvious practical benefit to maintain the definition of "common elements" within the MPD, it is recommended that the future revision should take into account the list of "contextual elements" above, particularly in structuring the MPD.[33]

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[31] For example, with respect to article 6(c), the elements "[s]uch person or persons belonged to a particular national, ethnical, racial or religious group" and the element of genocidal intent are followed by a specific element that "[t]he measures imposed were intended to prevent births within that group". Thus, the membership element and the genocidal intent elements are not contextual elements since they are not listed last.

[32] *Prosecutor v. Semanza*, Judgement and Sentence, ICTR-97-20-T, ICTR Trial Chamber, 15 May 2003, paras. 167–9, 176 and 191.

[33] Currently, the common elements are listed first in the MPD. If we revise the MPD following the suggestion made herein, the elements regarding membership and the protected status of victims should be listed immediately after the specific elements of "conduct" (usually the first element).

10.6. Conclusion

The unique quality of the MPD lies in its function of linking law and facts. Through the MPD, facts are sorted out according to their legal relevance. Though this sorting process sounds quite simple, in reality all variety of legal treatments have been administered for the purpose of the interpreting law, analysing facts, and building a nexus between them. Those treatments require, *inter alia*, an understanding of the definition of core international crimes and classification thereof into "conduct crimes" and "result crimes", the interpretation and classification of material elements, a grasp of the issues and impacts of mental elements, classification of international armed conflict, drawing the borderline between the armed conflict and the internal disturbance, and so forth. Facts placed in accordance with their legal relevance, as reflected in the MPD are on a soil that is legally solid by virtue of the legal analysis done by members of the LAS. In the MPD, the story of law is told in the language called "evidence".

The author understands that the Legal Tools Project will continue to revise and update the MPD. It is hoped that future MPDs will further assist practitioners working on core international crimes both on the national and international levels in a significant way.

11

Improving Legal Information Retrieval by the Online Legal Tools Database

Aleksandra Sidorenko[*]

11.1. Introduction

With the emergence of the Internet, various institutions started making available important legal materials using centralized online databases. Depending on the previous classification of data, available resources and degree of disclosure, each organization adopts its own method of presenting materials online. Oftentimes institutions provide access to similar data but organize it in different ways. For example, they may use different titles, categories, search criteria, search engines, and websites. Additionally, some may present data differently due to budgetary restrictions or the profitability/non-profitability of the project. As a result, a user accessing these various databases will need to adjust to the interface and retrieval mechanisms of each online database.

In the present chapter, I illustrate the state of art in the retrieval of legal sources online from the user's perspective as employed by the Legal Tools Database run under the auspices of the International Criminal Court (ICC).

Features immediately distinguishing this Database from other international criminal law libraries are as follows:

[*] **Aleksandra Sidorenko** holds a law degree from the American University of Central Asia (Kyrgyzstan), and master degrees in Information and Communication Technologies Law and in Public International Law (University of Oslo). She has working experience as a lawyer in the commercial law firm "Consultant" and as a research assistant in several development projects in Kyrgyzstan. While studying in Norway, she has done research in legal information retrieval and legal empowerment in international criminal justice. She currently works as a research assistant at the Norwegian Centre for Human Rights of the University of Oslo, co-ordinating its contribution to the population of the Core International Crimes Database and developing a research project in the area.

- The Database incorporates legal acts and case law from different jurisdictions, both national and international, related to international crimes.
- It allows the analysis of certain issues across national and international jurisdictions in various languages, enabling its users to distinguish and compare judicial practice and situations unlike the majority of legal databases which focus on specific jurisdictions.
- It is made available free of charge to the public and is organized with the aim to reduce the costs of the ICC by distributing work among several research institutions.

In the following sections, I will describe the interface of the Legal Tools Website, the retrieval of data, the presentation of results and the organization of documents. I will also make comparisons with how materials are organized by other websites and online databases, such as legal libraries, and human rights advocacy websites.

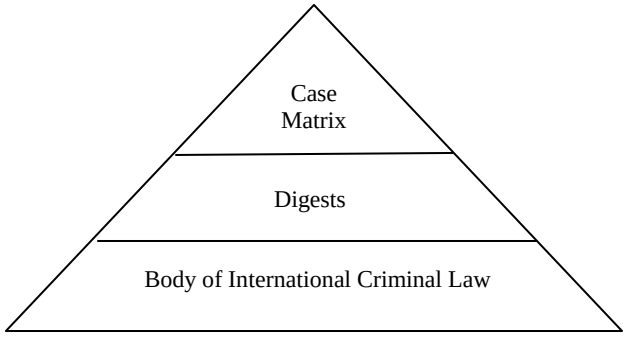
11.2. What is the Legal Tools Project?

The Legal Tools Project is a centrally co-ordinated project of the ICC, centrally co-ordinated, where some external partners provide legal data about the prosecution of international crimes in the following forms:

- "[…] International criminal law organized in more than ten collections and databases of legal resources such as court decisions, treaties, preparatory works and publications;
- [Digests] of such raw data in three comprehensive commentaries on substantive and procedural international criminal law, as well as means of proof for the legal requirements of core international crimes and modes of liability;
- An application tailor-made for the investigation, prosecution, defence and adjudication of serious human rights

violations which may amount to core international crimes (the Case Matrix)".[1]

The following is the graphical representation of the way these three components correlate.



Scheme 1: Correlation between the three components.

11.2.1. Body of International Criminal Law[2]

The body of international criminal legal materials held in the Legal Tools Project is organized in the following collections comprising more than 52,000 documents on by November 2011:

– ICC Documents

This tool incorporates two thematic folders:

1. Basic documents

This incorporates foundational documents of the ICC, for example, Rules of Procedure and Evidence and Elements of Crimes, as well as key documents regulating the internal activity of the Court as adopted by the judges, such as the Code of Professional Conduct for Counsel, the Code of Judicial Ethics and the Regulations of the Registry.

2. ICC situations and cases

[1] The ICC Legal Tools Program of the Norwegian Center for Human Rights and the broader ICC Legal Tools Project available at http://www.fichl.org/fileadmin/fichl/activities/070927_Seminar_on_Legal_Tools_Project__070912___PRIO_.pdf, last accessed on 27 August 2011.

[2] Further description of the project and the website is based on the information available at www.legal-tools.org, last accessed on 6 September 2011.

This incorporates the seven situations before the ICC for adjudication.

– ICC 'Preparatory Works' and Rome Statute Amendments

This tool incorporates documents related to the creation of the ICC. In other words, documents dealing with thenegotiation and drafting of the Rome Statute, the Rules of Procedure and Evidence, the Elements of Crimes and amendments to the Rome Statute.

– International Legal Instruments

This tool stores important international treaties in four areas: public international law, international human rights law, international humanitarian law, and international criminal law.

– "International(ised) Criminal Jurisdictions"

This tool keeps basic legal data about the International Military Tribunals in Nuremberg (1945–1946) and Tokyo (1946–1948), the International Criminal Tribunal for the former Yugoslavia (established in 1993), the International Criminal Tribunal for Rwanda (established in 1994), United Nations Mission in Kosovo courts and tribunals (authorized in 1999), the Special Court for Sierra Leone (established in 2002), the East Timor Panels for Serious Crimes (established in 2000), the Iraqi High Tribunal (established in 2003), and the Extraordinary Chambers in the Courts of Cambodia (established in 2003). These include statutes, rules of procedure and evidence, codes of professional conduct, and headquarter agreements.

– "International(ised) Criminal Judgments"

This tool provides comprehensive case law from the aforementioned tribunals in the form of indictments and decisions. The jurisprudence of each tribunal is organized alphabetically based on the names of the defendants or the State where the tribunal was located. Some cases are subdivided into "indictments" and/or "decisions" and "other documents".

– National Jurisdictions

The purpose of this tool is to provide access to essential national legal instruments necessary for the conducting of comparative research on criminal law and procedure, and the analysis of the legal status of core international crimes in each system. Fundamental information about the legal system of each state is provided, such as its constitution, criminal laws, laws regulating the activity of the judiciary, laws implementing

international human rights obligations of the State, and professional commentaries.

– National Implementing Legislation

This tool stores national legislation implementing the Rome Statute. For example, a user may find agreements on co-operation between the ICC and the particular State; relevant criminal codes, both substantive and procedural; and laws on the protection of witnesses.

– National Cases Involving Core International Crimes

This tool collects the most relevant decisions issued by national courts and tribunals concerning genocide, crimes against humanity, and war crimes, in both civil and criminal matters.

– Other International Legal Decisions

This tool presents the decisions of the International Court of Justice on a number of issues, such as compensation for injuries suffered during service for the United Nations, armed activities, the legality of the use of force, and the application of the Convention on the Prevention and Punishment of Crimes of Genocide. Documents provided on each case include the judgment, dissenting opinions, separate opinions, and orders. This ensures a full coverage of the procedural history regarding each case.

11.2.2. Digests of International Criminal Law

In order to enhance the usability of collected data, the body of international criminal law held is further analyzed and classified in the following tools:

– Elements Digest

This provides doctrinal explanations of elements of crimes and modes of liability in accordance with the Rome Statute. This tool is only available through the Case Matrix.

– Means of Proof Digest

As described on the Legal Tools Website, "This tool provides practical examples of the types or categories of evidence used in national and international criminal jurisdictions to satisfy the legal requirements of the

crimes and modes of liability contained in the Rome Statute […] This tool is only available through the Case Matrix".[3]

11.2.3. Case Matrix: Electronic Application of the Resultant Body of Information

The Case Matrix is a case management system which allows its users – judges, prosecutors, defense counsels, victim's representatives, and NGOs – to trace each case and easily access the supplementary resources necessary for the furtherance of their work. It serves several functions:

- Provides an electronic library of the key resources selected from the aforementioned tools;
- Links users to the Elements Digest through a general table of contents and at the level of specific legal requirements for each crime;
- Links users to the Means of Proof Digest;
- Provides a tool for the structuring of information and evidence in each concrete case.

The Case Matrix may only be accessed upon approval of the ICC and upon signing a standard Case Matrix Understanding.

The Case Matrix has been introduced in several jurisdictions on the basis of such standard Case Matrix Understandings, such as:

- The War Crimes Chamber of Bosnia and Herzegovina;
- The Extraordinary Chambers in the Courts of Cambodia;
- The Crimes Against Humanity and War Crimes Section of the Canadian Department of Justice;
- The Dutch National Prosecutor's Office and War Crimes Unit;
- The Danish Special International Crimes Office;
- The Norwegian National Authority for Prosecution of Organized and Other Serious Crime;
- The Attorney General's Office of Indonesia;

[3] "Overview of the Legal Tools", available at http://www.legal-tools.org/en/overview-of-the-tools/, accessed on 27 August 2011.

- The Office of the Defense of the Iraqi High Tribunal;
- Human Rights Watch; and
- Several defense counsel.

It has been partially translated from English into French, Bahasa Indonesian and Khmer.[4]

11.2.4. History and Purpose of the Legal Tools Project

The development of the Legal Tools Project was preceded by consultations with more than 120 experts from international and national criminal justice systems and study visits to large national serious fraud agencies, such as the Serious Fraud Office in London, and the *Oberlandesgericht* in Cologne.[5] The work commenced with preparing collections of the basic documents of the ICC, international legal instruments and relevant publications. The Elements Digest, the Proceedings Digest and the Case Matrix then followed. The next stage encompassed the collection of documents from national and international jurisdictions regarding core international crimes.

The first version of these electronic collections was completed in 2005. The effectiveness of this project stimulated its extension to other offices and the general public under the guidance of the ICC's court-wide Legal Tools Advisory Committee. The Legal Tools Database and the Case Matrix were published on the separate Legal Tools Website – www.legal-tools.org – in 2008, and were linked to the regular website of the ICC – www.icc-cpi.int – in 2009, thereby communicating the Project to the public at large. Both are ICC websites.

Assembling an electronic collection of international criminal law was considered necessary for the ICC to efficiently access information. It was recognized, however, that the Legal Tools was a more powerful tool than expected because it can empower any professional working with international crimes, anywhere in the world.

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4 "The Case Matrix", available at http://www.icc-cpi.int/NR/rdonlyres/58958352-4379-46AB-81E8-61A7D85418D2/0/ICCCaseMatrix_ENG.pdf, last accessed on 5 September 2011.

5 See http://www.legal-tools.org/en/what-are-the-icc-legal-tools/2003-2005/, last accessed on 5 September 2011.

Pursuant to article 17 of the Rome Statute, the role of the ICC is to be "complementary" to national jurisdictions. The Court may take on a case if the State itself is unable or unwilling to genuinely do so. As observed by the Co-ordinartor of the Legal Tools Project, Mr. Morten Bergsmo,

> [p]utting an end to impunity of perpetrators consequently largely depends on legislative and institutional preparedness of national courts to prosecute core international crimes. The state of such national preparedness is therefore in many ways a new frontline issue in the discourse on criminal justice for atrocities.[6]

Therefore, the mission of the Legal Tools Project is to ultimately bring a comprehensive and updated corpus of international criminal law in a user-friendly way to professionals conducting work at the national level. The Project's user-focus and user-friendliness is achieved through the careful selection, organization and presentation of international criminal law materials through the construction of collections, structured doctrinal analysis, and the creation of an electronic toolbox of international criminal law.

11.2.5. Organization of Work

Work on the Legal Tools Database consists, *inter alia*, of:

- Editorial selection of materials;
- Registration of metadata and keywords for each document; and
- Uploading of documents.

The further development of the content of the Legal Tools is formally entrusted to the ICC Office of the Prosecutor, but due to limited human resources and the Project's labor intensiveness, the content updating work was outsourced to several expert research institutionswhichconcluded co-operation agreements with the Court.

Because the project is made *pro bono publico*, it is essential that the processing of information and the development of tools is entrusted to non-commercial organizations which would independently secure funding

[6] Presentation by Morten Bergsmo "The ICC Legal Tools Project: its services, goals, status and further development" at HURIDOCS conference in Geneva.

for their work. The outsourcing of work to external research institutions also ensures the sustainability of the Legal Tools Project.

By October 2011, there were 15 outsourcing partners.[7]

Each of these research institutions is assigned to work on one or more particular tools of the Legal Tools.[8]

11.2.6. Project Guidelines

Two main instruments regulate the way the external partners process the documents for the Legal Tools Database: the ICC Metadata Manual adopted by the Legal Tools Advisory Committee on 17 October 2008 (hereinafter Manual) and the ICC Keywords list of February 2008 (hereinafter Keywords list). The two documents are described in the chapters by Dr. Volker Nerlich and Franziska Eckelmans below.

The purpose of the Metadata Manual is to regulate the metadata collected for each resource in the Legal Tools Database. As stated in the Manual,

> "[a] definition is provided for each metadata field. Furthermore, specific information is provided regarding the field type, the scope of application of the piece of metadata, and whether multiple entries are possible […] Additionally, based on the practical experience with the collection of metadata thus far, the Manual contains tips and examples for the collection of some of the metadata".[9]

The Keywords list is based on the thesaurus of the Legal Tools Database. As stated,

> [n]early all of the keywords are related to the provisions of the Rome Statute, Rules of Procedure and Evidence, Regulations of the Court, and the Code of Professional Conduct for Counsel.[10]

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7 The outsourcing partners are listed at http://www.legal-tools.org/work-on-the-tools/co-operation-agreements/, last accessed on 11 November 2011.

8 A detailed table showing the distribution of tasks is available on the Legal Tools Website at http://www.legal-tools.org/en/work-on-the-tools/table-of-responsibilities/ last accessed on 5 September 2009.

9 For the Metadata Manual, see Annex I to this book.

10 For the Keywords list, see Annex II to this book.

The Keywords list indicates the hierarchical relationship between these terms. For instance, it sets out the following hierarchical relationship for the following terms:

amicus curiae
granting leave to *amicus curiae*
invitation by Chamber to *amicus curiae*
observations by *amicus curiae*
responses to observations of *amicus curiae*
time limit for observations by *amicus curiae*

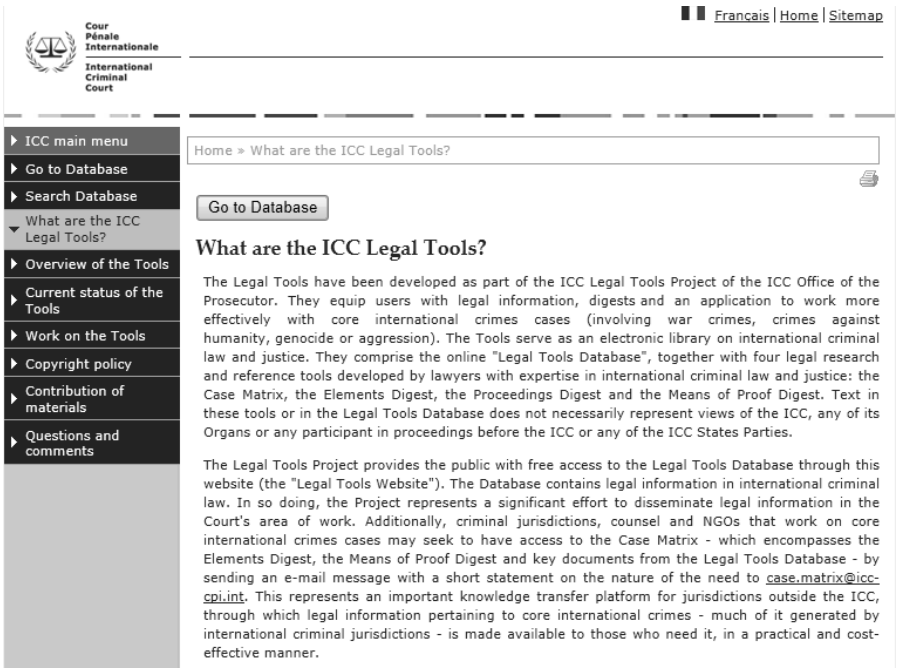
The Keywords list does not display keywords related to the terms, however, that option is available in the thesaurus. An example is the term "*burden of proof*". The thesaurus indicates that the following key-words are related among others: "conviction of guilt beyond reasonable doubt", "evidence", "no reversal of burden of proof". Displaying this relationship would have made the list too complex".[11]

11.3. What is the Legal Tools Website?

11.3.1. Description of the Legal Tools Website

The Legal Tools Website has the following URL address: www.legal-tools.org. Its homepage answers the question: "What are the ICC Legal Tools?" All webpages bear the logo of the ICC on the top and are equipped with a vertical navigation panel located on the left of the webpage. Most of the webpages, with the exception of "Search Database" and "Go to Database", display continuous text. Most webpages have a link that directs the user to the Legal Tools Database: "Go to database".

[11] *Ibid.*



Screenshot 1: Homepage of the Legal Tools Website.

The navigation panel on the left of the webpage consists of the following sections and subsections:

- "ICC main menu": This refers to the main website of the ICC.
- "Go to Database": This is the browser of the entire Legal Tools Database (see Scheme 2). Access to the browser is permitted once the user agrees to the terms and conditions of use of the Legal Tools Database by clicking a button. The browser takes up one screen, while the terms and conditions take up seven screens.
- "Search Database": This leads to the data entry field for a user to search the Legal Tools Database. This section takes up two screens.
- "What are the ICC Legal Tools?": This provides a description of the Legal Tools Project, its background information, its goals, and the names of those in charge of the Legal Tools Project, set out in 1.5 screens.

- "Overview of the Tools": A table detailing the contents of the Legal Tools Project, set out in six screens.
- "Current status of the Tools": This sets out the current technical state of the Legal Tools Database and the specific status of each tool in three screens.
- "Work on the Tools": This gives an overview of the way the work on the Legal Tools is organized among outsourcing partners, set out in 1.5 screens.

  "Table of responsibilities": A table detailing distribution of responsibilities over each section of the Legal Tools Database among outsourcing partners, taking up three screens.

  "Cooperation agreements": This provides links that initiati the download of co-operation agreements between outsourcing institutions and the ICC, taking up one screen.)

  "2003-2005": A timeline of the work on the Legal Tools Project 2002–05, set out in 1,5 screens.
- "Copyright policy": This states the Legal Tools Database's compliance with copyright legislation, its copyright policy, and invites copyright owners to send any complaints to the Legal Tools Project, set out in 1.5 screens.
- "Contribution of materials": This invites users to contribute relevant materials to the Legal Tools Database, set out in one screen.
- "Questions and comments": This invites users to send queries and comments to the Legal Tools Project, set out in one screen.

The horizontal navigation line is represented by 'breadcrumbs', which allow users to identify its location on the Website as well as to change it by clicking one of the links. The continuous text in these web pages contains embedded links with small pop-up windows that appear once a user points at them. These windows provide a summary of information on where a link will take a user prior to the user clicking on the link (so-called 'gloss').

Scheme 2, the sitemap of the Legal Tools Website, illustrates external references from the Legal Tools Website to other websites as well as internal references between the different webpages of the website.

11.3.2. Retrieval of Data on the Legal Tools Website

To retrieve data on the Legal Tools Website, a user may use the sections "Go to Database" or "Search Database" on the navigation panel. If the user opens the Website for the first time, he or she will need to accept the "Terms and conditions of use" by clicking the button "Yes, I accept" prior to accessing or searching the database.

The "Go to Database" option allows a user to conduct an overview of the contents of the entire Legal Tools Database through the browser. All the documents concerned are distributed among folders.[12] The "Search the Database" index link leads a user to a data entry field which can interpret 'Boolean' operators, and perform 'wildcard' or 'fuzzy' searches when processing queries.[13]

11.3.3. Legal Relationships between the Legal Tools Project and its Users

The use of the Legal Tools Website is conditioned on specific regulations. Currently, there are three policies located on the Website regulating the legal relationships between the user and the ICC:

- The "Terms and Conditions of use" of Legal Tools (LTP Regulation);
- The "General disclaimer", which sets out the terms and conditions of use of this site (General Disclaimer); and
- The "Privacy Policy", which is set out in a separate webpage.

11.3.3.1. Delimitation of Regulatory Spheres

As their titles suggest, each document regulates different legal relationships existing between a user and a website owner. While the General Disclaimer represents the general policy of the ICC with respect to any

[12] See Screenshot 2: Browser of the Legal Tools Database in the annex to this chapter

[13] See commentary to Legal Tools Database – Search Database function.

website that it endorses[14], the LTP Regulation is designed specifically for the Legal Tools Project. However, as it can be inferred from the text of these documents, the regulatory spheres of these documents overlap at several points:

– Scope of rights

Paragraph 1 of the LTP Regulation stipulates the scope of rights granted to the user, which includes consultation, downloading, and copying of material for the user's personal non-commercial use. Similar norms are provided for by the General Disclaimer in paragraph a.

– Disclaimer of liability

Paragraph 6(a) of the LTP Regulation states that the opinion of parties participating in the Legal Tools Project does not necessarily represent the opinion of the ICC. Moreover, the user shall indemnify the ICC against any liability arising out of the user's use of the Legal Tools. A similar norm is provided for in paragraph c and under the "Disclaimers" title of the General Disclaimer. Both documents stipulate that the user's sole and exclusive remedy is to discontinue using the site or the Legal Tools.

– Both documents set out the privacy policy regulating the use of the site or Legal Tools.
– Both documents enable the ICC to alter, limit or discontinue access to in materials in paragraph 8 of the LTP regulation and in the paragraph under the title "General" in the General Disclaimer.
– The privacy policy of the General Disclaimer is repeated on a separate webpage, as is shown in the Sitemap of the Legal Tools Website, Scheme 2.
– The section entitled "Copyright policy" repeats paragraph 5 of the LTP Regulation.
– Paragraph 1(b) of the LTP Regulation states that the ICC may authorize a user in writing to, among others, redistribute, compile or create derivative works. The General Disclaimer not only provides for the same norm, but also cites the contact which may be used to communicate with

[14] An identical disclaimer is located on the main website of the ICC (www.icc-cpi.int).

> the ICC on this matter. This is an example of documents supplementing one another.

11.3.3.2. Contradiction between the Regulating Documents

The major discrepancy between the LTP Regulation and the General Disclaimer was found in their privacy policies. Such privacy policies regulates the use by the ICC of generic data obtained from a user, such as Internet protocol (IP) addresses, navigation through the Website, the software used and the time spent, along with other similar data, and of personal data provided by the user, such as the name and title, the address, contact details and other data that could be used to identify the user.

According to the privacy policy of the General Disclaimer, the ICC may use generic non-identifying data internally only for web site traffic analysis. However, according to the privacy policy of the LTP Regulation, the ICC may use, process and disclose it without any restriction.

The ICC assumes no responsibility for the security of personal data, according to the privacy policy of the General Disclaimer, and undertakes to only use it for statistical purposes and will not publish it for general access. However, the privacy policy of the LTP Regulation adds that personal data may be used for periodical communication of information about the Legal Tools Project and may be shared between external partners in charge of the development of the Legal Tools. Moreover, it provides for cases when personal data may be disclosed. A further reading of the paragraph suggests that personal data is in fact subject to an obligation of confidence on the part of the ICC:

> Any information *other than Personal Data* the User communicates to the Court pursuant to or by reason of the Legal Tools Project *will be considered non-confidential and will not be subject to any obligation of confidence* on the part of the International Criminal Court.[15]

The Legal Tools Database exists online, and therefore is perceived as an integral part of the Legal Tools Website by a user. The user accessing the Legal Tools Website will most likely need to access the Database. Moreover, as it is stated in paragraph a of the General Disclaimer, the latter document regulates the use of Website and materials stored on the

[15] Terms and conditions of use of Legal Tools, para. 2.2, emphasis added.

Website. Therefore, it seems more convenient from the user's perspective to unite the LTP regulation and the General Disclaimer in a single document and to connect embedded links of the Legal Tools Website to a single document, as opposed to the singled out sections, in order to avoid repetitions.

11.3.3.3. Certain Shortcomings of the LTP Regulation

– Acceptance of the LTP Regulation by Website users

According to the introduction of the LTP Regulation, access by a user to the Website constitutes the user's agreement with the relevant terms and conditions. The moment at which the a user becomes bound by the terms of use of the Website is debated. Some argue that the mere fact of accessing a website does not constitute agreement with its terms, and the threshold for communicating one's acceptance of such terms should be higher. In the case of the Legal Tools Website, this moment is unambiguously determined at the moment when a user clicks the button "Yes, I agree" located under the LTP Regulation when accessing the Legal Tools Database.

This is also important when assessing the following part of the introduction to the LTP Regulation: "By exercising any rights to the Legal Tools under these Terms and Conditions, the User agrees to be bound by these Terms and Conditions". This norm redefines the moment a user accepts the LTP regulation by linking it to an ambiguous "exercise of any rights to the Legal Tools".

Thus, it is recommended to link the moment the user is bound by the LTP regulation to the moment of clicking the button at the end of the document, since an earlier acceptance of the Website's terms has not been widely approved by legal doctrine.[16]

– Scope of rights granted to the user

According to paragraph 1 of the LTP Regulation, a user is authorized to consult, download and copy the information, documents, materials

[16] See generally, C.L. Kunz, J.E. Ottaviani, E.D. Ziff, J.M. Moringiello, K.M. Porter, and J.C. Debrow, "Browse wrap agreements: validity of implied assent in electronic form agreements", in *Business Lawyer*, 2003, no. 59, available at http://meetings.abanet.org/webupload/commupload/CL320004/newsletterpubs/Browse-Wrap_Big.pdf, last accessed on 6 September 2011.

contained in the Legal Tools Database subject to the following limitations:

1. The information must serve the user's personal needs.
2. The information must be intended for non-commercial use and not primarily intended for or directed towards commercial advantage or private monetary compensation.
3. The user is not authorized to transmit, resell or redistribute the Legal Tools or the information, documents and materials contained therein unless authorized to do so in writing.

The first requirement unnecessarily excludes all the users of the Legal Tools Database from performing work for third persons. While a student conducting research in international criminal law, or a victim collecting information about possible charges against the perpetrator, uses the Legal Tools Database for their "personal needs", in other cases this does not seem to be so. Defence attorneys and human rights activists search the Database for their client's needs and for the needs of the community. It is recommended to clarify the term "personal need". Does it encompass "professional needs", "research need", and "academic need"?

Similarly, the second requirement also narrows the audience of potential users. Consider, for example, a defence attorney serving his or her client under a contract of rendering a service. His or her research in the Legal Tools Database is directed towards performing work for the client concerned and receiving monetary compensation for such work. Does it mean that the LTP Regulation prevents him or her from using resources of the Legal Tools Database? A possible solution to the aforementioned problem is to unite requirements 2 and 3, that is, to restrict "transmittance, reselling or redistribution of Legal Tools or the information, documents and materials contained therein for commercial purposes, primarily intended for or directed toward commercial advantage or private monetary compensation". Therefore, it is essential to reformulate the second limitation.

Finally, the third requirement significantly affects the functioning of the Legal Tools Database on the web on an overall basis, undermining its essential purpose – the distribution of information on international criminal law. Pursuant to article 2 of the Berne Convention for the Protection of Literary and Artistic Works, it shall be a matter for legislation of

the Member States to determine the protection to be granted to official texts of a legislative and legal nature. Subject to applicable law, most of the legal material is likely to be excluded from copyright and should therefore be permitted to freely circulate, with the exception of material copyrighted by the Crown.

Users conducting research in the Database should be able to send information and documents contained in the Legal Tools Database to their colleagues, the general public or governmental authorities. Moreover, the Legal Tools Website should encourage the spread of this information. That seems to be the purpose of the Legal Tools Database. It is advisable to reformulate the provision concerned by informing users about which material is restricted from circulation and the conditions of circulation or restriction.

– Length of the LTP Regulation

Taking into account that the LTP Regulation takes up seven screens which impedes prompt and effective understanding of it by the user, it is advisable to reduce its length by eliminating the repetition of provisions within the document. The following provisions may be united in a single provision.

– Endorsement by the International Criminal Court

Subparagraph a of paragraph 6 of the LTP Regulation:

> The findings, interpretations and conclusions expressed in the Legal Tools or in information, documents and materials contained therein produced by the International Criminal Court are those of the various staff members, consultants and advisers of the International Criminal Court who prepared the Legal Tools and do not necessarily represent the views of the International Criminal Court or its States Parties.

Subparagraph e of paragraph 6 of the LTP Regulation:

> The inclusion of a link or reference does not imply the endorsement of the linked site by the International Criminal Court.

Subparagraph c of paragraph 6 of the LTP Regulation:

> The International Criminal Court does not represent or endorse the accuracy or reliability of any advice, opinion, statement or other information provided by any information

provider, any User of the Legal Tools or any other person or entity.

– Disclaimer of liability

Subparagraph b of paragraph 6 of the LTP Regulation:

> The International Criminal Court, members of its staff, its contractors and its employees disclaim any liability or responsibility for any financial or other consequences whatsoever arising from the use of the Legal Tools or of the information, documents and materials contained therein, including any inappropriate, improper or fraudulent use thereof. The use of the Legal Tools is at the User's sole risk. Under no circumstances, including but not limited to negligence, shall the International Criminal Court, its staff, contractors or employees be liable for any direct, indirect, incidental, special or consequential damages, even if the International Criminal Court has been advised of the possibility of such damages.

Subparagraph d of paragraph 6 of the LTP Regulation:

> As a condition of use of the Legal Tools, the User agrees to indemnify the International Criminal Court, members of its staff, its contractors and its employees from and against any and all actions, claims, losses, damages, liabilities and expenses (including reasonable attorneys' fees) arising out of the User's use of the Legal Tools.

Subparagraph c of paragraph 2 and subparagraph b of paragraph 5 of the LTP Regulation can be united in a single provision. Both paragraphs refer to the same mailing address. Paragraph 2 invites contributions from users, while paragraph 5 describes the way to send copyright claims to the ICC.

11.4. User Experience on the Legal Tools Website

Proponents of what is often referred to as 'Web 2.0' call for simple and focused content and pixel saving layouts. Since the Legal Tools Database is published online, the design of its webpages should conform to these requirements.

Due to loosely formulated rules of Internet design, most tips on web development are set out in articles by web developers and usability guidelines that are of an advisory nature. However, the majority of these

recommendations can be summarized in the form of the following principles of web-design:

- Balance: The visual weigh of the elements is balanced in the webpage.
- Harmony and unity: Elements and pages are organized in order to give a feeling of totality.
- Simplicity: Only the necessary elements are used to reach the purposes.
- Consistency: The similarity and repetition allows presenting page/site with uniformity.
- Design clarity: Readability of graphical elements in a page.[17]

A usability test[18] conducted of the website revealed perspectives for improvement of the Legal Tools Website and Database.

11.4.1. Purposing the Legal Tools Website

According to the interviewees, they do not tend to spend much time examining the Database in itself. The fact that it is administered by a renowned institution meets their credibility requirements. They might look through information about the content of the Database, but they do not focus on it primarily. One of the interviewees noted that it is important for her to know the structure of a particular institution before researching a legal database. For example, in order to work with the legal library of International Criminal Tribunal for Former Yugoslavia (ICTY), it is necessary to know the rules of procedure and structure of the Tribunal.

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[17] P. Costa, "Evaluating website design", in *Proceedings of the 26th annual ACM international conference on Design of communication*, 2008, pp. 265–266 available at http://portal.acm.org/citation.cfm?id=1456591, last accessed on 6 September 2011.

[18] To substantiate my discussion of the Legal Tools Website, I invited four potential users of the Legal Tools Database (three students of the LL.M. programmes "Public International Law" and "Theory and Practice of Human Rights" of the University of Oslo, one employee of the Norwegian Organization for Asylum Seekers) for an informal usability test which took the form of a structured interview. All of the interviewees conduct regular research on such databases as International Court of Justice, International Criminal Tribunal for Former Yugoslavia, Council of Europe, Westlaw, and Refworld. A reflection of the interviewees about the Legal Tools Website help to determine the problems associated with use of the Legal Tools Database.

As exemplified by the ICTY website, first-time users are provided explanations to unfamiliar terms such as "Transferred cases", "Accused at large", "Guilty pleas", "Contempt cases", and so on.

In the opinion of interviewees, the Legal Tools Website provides much background information about the Project. Out of 10 navigation bars there are only two bars which provide actual access to the Database, namely "Go to database" and "Search the database", while eight navigation panels lead the user to detailed information about the project, such as co-operation agreements between institutions, table of responsibilities, and timeline. Interviewees spent much time skipping through web pages before they actually found the search menu. In their opinion, background information about the Project was not related to their search request and was not easy to comprehend.

Most interviewees suppose that the search menu is located under the heading "Overview of the Tools" which actually contains commentary about each tool but does not provide access to the Database. The presentation of information on this page leads users to conclude that the Database might be located on the website of the Norwegian Center for Human Rights as shown on Screenshot 4 below. In the opinion of one of the interviewees, there is no need to mention the outsourcing partner responsible for each tool, as it takes up much space on the webpage and confuses the user. Interviewees also tended to click on the title of each tool where they expected there to be a link. This appeared to be a simple text.

Interviewees did not tend to read a webpage for more than 20 seconds. This is time consuming taking into account that the text is written in Verdana size 8.5 and usually takes up more than one screen. As a result, they had difficulty fully understanding what the concept of the Legal Tools is. For example, one of the interviewees noted that "Tools" might mean the navigation bars "Go to Database" and "Search Database", that is, each bar represents each tool. When the interviewee was asked whether she could find national criminal law in the Database, she replied that probably not because the database is focused on international criminal law based on the common use of the term "international" on the homepage. Another interviewee having browsed through the webpages of the Legal Tools Website concluded that the database is unlikely to provide any information about International Criminal Tribunal for former Yugoslavia, due to the use of the term "ICC" on the homepage.

None of the interviewees were able to delineate the difference between the Legal Tools Project and Legal Tools Database. Interviewees did not tend to scroll down the "Overview of Tools" webpage. If they did, they noted a paragraph on the Case Matrix and Digests and supposed that they were located on the Website, while in reality they are not open to the public through the Legal Tools Website.

11.4.2. Organization of the Legal Tools Website

Interviewees experienced problems trying to determine the purpose of each navigation bar. All of the interviewees noted that according to their perception of the Database, navigation bars entitled "Go to Database", "Work on the Tools", and "Search the Database" describe the same function of accessing the Database. Interviewees also assumed that the "Overview of the Tools" webpage might bring them to the interface of the Database. In the opinion of one of the interviewees, the bars "Overview of the Tools" and "Go to Database" serve the same function of presenting contents of the Database. One does it by means of text; the other does it by means of a browser with folders.

Another interviewee tried to find the interface of the Database under the "Contribution of materials" navigation bar explaining that she noticed the word "materials", which is what she is looking for. The second attempt was to find the database under the "Questions and comments" navigation bar because this phrase suggests that comments about the way to search the Database might be located there.

When I asked the users where the Legal Tools Website is likely to provide information about its last update, only one interviewee found it under the "Current status of the Tools" navigation bar. Most of the interviewees guessed that it might be located in the corner of the homepage or under the bars entitled "Contribution of materials", "Work on the tools", and even "Legal Tools History". The last misconception led the interviewee to believe that the last update of the Website took place in 2005 which discredited the Database in the person's eyes.

Users tend to click wrong navigation bars and are oftentimes confused by links embedded in the text. The sitemap of the Website illustrates that the titles of navigation bars are not clearly differentiated and may appear to be overlapping for some users. For instance, links to brochures about the Project and the Case Matrix are located on the homepage

instead of the webpage entitled "Overview of the Tools". This raises the question of whether the Website needs this web page since similar information may well fit into other webpages.

The Website invites users to contact it on the webpages entitled "What are the ICC Legal Tools?", "Overview of the Tools", "Current status of the tools", "Work on the Tools", "Copyright policy", "Questions and comments", and "Contribution of materials", while users expect to find such information on a single spot "Contact Us". The text of the Website contains a number of embedded links leading users to the webpages that are already listed on the vertical navigation bar. Although there is no distinct restriction on such design of the webpage, it increases the probability of confusing the user.

11.4.3. Search of Documents through Browsing

All interviewees had common problems when searching for a document in the Database. Users had difficulty grasping the difference between particular tools. For instance, some users clicked on the "International Legal Instruments" folder instead of "ICC documents – Basic Documents" when searching for the Rome Statute. The collection "International(ised) Criminal Jurisdictions" was often confused with the collection "International(ised) Criminal Judgments". For example, when looking for the sentencing judgment of Duško Tadić, some users guessed that it might be located under the folder "ICTY" of "International(ised) Criminal Jurisdictions", while the database stores this document in the collection "International(ised) Criminal Judgements".

Many interviewees could not distinguish folders from subfolders and therefore had an impression that certain folders were empty (main folders). Having opened several folders and subfolders, users did not know how to roll them back because they were not used to databases with such a browsing interface. One of the users guessed that a minus symbol located next to the opened folder in the browsing interface might mean that the folder is empty and stopped further use of the Database, while another user tried to push the button "back" in the Internet browser in order to roll back all the subfolders, while the interface requires one to click on the main folder in order to roll back all the subfolders.

When trying to locate the Rome Statute in the list of documents under the "ICC Documents" – "Basic Documents" folder, some users did

not notice the document, which was in the end of the list, and gave up searching for it in the Database. Some users noted that searching the database is a difficult task because the result list includes a lot of documents in French although the user communicates with the English version of the Database. This is also a significant factor discouraging further use of the Database.

Problems were also encountered by users when searching the documents on situation in Darfur. One of the interviewees supposed that the Database does not have any documents on Darfur because the "Situation in Sudan, Darfur (ICC-02/05)" folder was empty. That is, it did not list any documents at the end of the webpage because this folder contains subfolders. Those who were not familiar with the situation in Darfur did not recognize that the "Harun A. et al." folder is a part of the situation on Darfur. Similar problems may be encountered by users dealing with the "Situation in Uganda" folder and its subfolder "Kony J. et al." subfolder. Users noted that it was difficult for them to comprehend numerous abbreviations used in the browser interface, especially in the folder "International(ised) Criminal Jurisdictions" folder.

These aforementioned difficulties of user's search are partly caused by the architecture of the browser itself and partly by the overlapping titles of collections.

11.5. Improving the "Look and Feel" of the Legal Tools Website

In order to improve the Legal Tools Website it is useful to look at what has already been achieved by other online legal databases. Online databases may be classified into those that develop, to a greater extent either search or browsing options. The ideal online database must perform well in both searching and browsing its material.

11.5.1. Website Design

See the following interesting examples of legal data retrieval mechanisms online starting from the very simple and informative website of Human Rights Watch.[19]

[19] Human Rights Watch, available at http://www.hrw.org, last accessed on 7 September 2011. See Screenshot 5: Webpage of Human Rights Watch in the annex to this chapter.

The website of the Human Rights Watch exemplifies simplicity in communicating information on a wide variety of topics. Note the ease of the titles such as "About us" and "Our Work". Note also the short and nearly one-paragraph texts.

Each section in the horizontal navigation bar leads to a subsection which in turn may lead to sub-sub-sections. This fairly simple model may well be applied to the Legal Tools Website's browser and its collections. Simplified titles of collections, perhaps by way of their unification into larger units of data, of the Legal Tools Database may be represented on the horizontal bar of the Website, while their subfolders, where possible, may be represented as subsections of each section. Thus, the Website in itself may become a large browser of the Legal Tools Database. Search fields should be present on all of the web pages. Information about the Legal Tools Project may be provided at the very top of the webpage.

In order to draw the attention of all interested visitors to the Case Matrix and its applications, and not overload the webpage with all aspects of the Legal Tools Project, it is advisable to present the Case Matrix as a banner advertisement on the Website. Just as vivid banners draw the attention of visitors to the website of Human Rights Watch to urgent issues, the Legal Tools Website may use banners to inform visitors who potentially can become users of the Case Matrix about the existence of this technology application.

The "look" of the text on the Legal Tools Website should also be reconsidered with respect to its readability. There are many ways to arrange its content in order to ease on-screen reading. General rules state that website designers should avoid fully justified texts and small fonts that are less than 12 points in size. The most important information should be placed towards the top and the left of the screen.[20]

11.5.2. Classification of Case Materials

Lists of cases from the website of the International Court of Justice (ICJ) presenting its contentious and advisory proceedings, despite its simplicity, is noteworthy for its very clear presentation of each case through its

[20] See J. Byrne, "Accessible Web Typography - an introduction for web designers", available at http://www.scotconnect.com/webtypography/index.php, last accessed on 6 September 2011.

browser.[21] First of all, the name of each case suggests the main topic that it deals with. For instance, the title of the case "aerial herbicide spraying (*Ecuador v. Colombia*)" is elucidative of the subject of the case. Although it seems quite burdensome to entitle cases located in the Legal Tools Database anew, there is a need to indicate to a user what the case is about before he or she starts reading it. This subject will be dealt with in more details later. Another noteworthy feature of online database in the ICJ is its structured procedural representation of the case.

All documents related to one case are kept in special folders indicating the procedural stage of the document, and the user is given an opportunity to view all these procedural stages, as shown on the screenshot below. The database allows a user to choose the procedural stage of most interest in each case.[22]

Another example of such a similar approach to the representation of legal data is the main website of the ICC. Before accessing the body of materials on certain cases, the user views basic information about the accused and charges against him. Documents are subdivided based on which body of the Court issued them.[23]

However, none of the presented examples illustrate what actually happened to a particular case procedurally, that is, its key judicial developments. Westlaw administers a graphical application which describes judicial history of the case in an ascending table.[24]

Notably, the ICC publishes detailed "Background information" with respect to each case, describing its procedural story. However, it is represented in a separate file. For the purposes of the Legal Tools Website, it is advisable to represent case documents in their procedural order describing what actually happened to the case. A brief description of the case with the photograph of the accused and charges against him would also significantly help the user browsing the Legal Tools Database. Legal databases of the International Criminal Tribunal for Rwanda, the International Criminal Tribunal for former Yugoslavia and the website of the

[21] See http://www.icj-cij.org.

[22] See Screenshot 6: Division of case materials in the annex to this chapter.

[23] See Screenshot 7: Representation of case by the International Criminal Court in the annex to this chapter.

[24] See Screenshot 8: Direct history of a case administered by Westlaw (US Research) in the annex to this chapter.

ICC when classifying case documentation take the following criteria into account:

- Which chamber or other unit of court issued the document?
- What kind of document is it?
- What is the title of the document?
- Which party to the case submitted the document to the court?

Although all these criteria assist the user in searching for the relevant document, they require a certain level of prior awareness from the user before he or she searches the database. For instance, when all the documents are classified according to their titles, the user will have to guess the title which the ICC uses for the document concerned or which chamber is issuing it. This could mean that a user has to undertake prior research elsewhere to understand the judicial institution concerned.

The ideal browser should facilitate this preliminary understanding. One of the ways to do so is to present a structured and simplified judicial story of the case linking each procedural step to the judicial document as in the following example:

On 10 February 2006, Pre-Trial Chamber I issued a warrant of arrest under seal for Mr. Lubanga.[25]

See:

- Warrant of arrest.
- Request to the Democratic Republic of the Congo for the purpose of obtaining the identification, tracing, freezing and seizure of property and assets belonging to Mr. Thomas Lubango Dyilo.
- Request to the State Parties to the Rome Statute for the identification, tracing, freezing and seizure of property and assets belonging to Mr. Thomas Lubango Dyilo.

[25] Extract of the Case Information Sheet on the ICC case *The Prosecutor v. Thomas Lubango Dyilo* available at http://www.icc-cpi.int/iccdocs/PIDS/publications/LubangaENG.pdf, last accessed on 6 September 2011.

The Legal Tools Database contains the full authentic texts of selected judicial decisions and basic legal sources. It is advisable to distinguish more important procedural documents from those that are less important so that the user does not face a large list of documents of different legal significance. For instance, the interface of the website of the Special Court for Sierra Leone separates the judgments and the minutes of the trial of each particular case from the other decisions of trial and appeals chambers by putting them into different categories.[26]

When determining the priority of a document, account may be taken of rule 40 of the Rules of Procedure and Evidence of the ICC which determines the following decisions that resolve fundamental issues:

- All decisions of the Appeals Chamber.
- Certain decisions on jurisdiction of the Court or on the admissibility of the case.
- Certain decisions on guilt, innocence, sentencing, and reparations to victims.
- Certain decisions authorizing investigative steps without the co-operation of the state concerned.

When prioritizing documents, the Database browser may divide them into those resolving factual issues, procedural issues, and issues of law by analogy with paragraph 1a of article 81 of the Rome Statute.

11.5.3. Abstracting

As it has been noted above, the abstracting of cases would significantly help users of the Website retrieve relevant documents. Automatic text summarization tools provide good summaries of news, but do not process longer texts as well.[27]

Unlike national law, international criminal law is of a more permanent nature, and cases adjudicating individuals accused of international crimes are rarer than regular civil and criminal cases produced in a partic-

[26] See, for example, *The Prosecutor vs. Charles Ghankay Taylor*, available at http://www.sc-sl.org/CASES/ProsecutorvsCharlesTaylor/tabid/107/Default.aspx, last accessed on 6 September 2011.

[27] H. Dalianis, presentation "Human language technology to improve information retrieval", 17–19 November 2008, at *e-Stockholm Legal Conference*, Stockholm University.

ular jurisdiction and dealt with by a regular legal database. For this reason the abstracting of case law stored in the Legal Tools Database seems more realistic than in a regular legal database.

Developers of the Legal Tools Database may choose the mode of generating abstracts. Professor Jon Bing distinguishes informative from descriptive abstracts:

> In informative abstracts the aim is to present all factual information of the original. A descriptive abstract would describe which problems are discussed in the original […] but does not aim […] to be used independently of the original source.[28]

Alternatively, instead of producing natural language abstracts, website developers may generate abstracts of the case as file records, such as charges and stages of proceedings, as is done on the main website of the ICC.[29]

The WTO website offers summaries of agreements describing the issues which each agreement deals with.[30] Additionally, the most important agreements are accompanied by interpretations of each article.[31] While a summary helps the user determine whether he accesses the right document, interpretations help the user understand the document in greater depth.

11.5.4. Classification of Cases

Aside from classifying the documents of each case, it is necessary to present all cases in such a way that a user may easily locate the relevant case. Taking into account the wide coverage of case law by the Legal Tools Website, it seems reasonable to retain the following main criteria for any subdivision of case law:

- Whether the case comes from national or international jurisdiction;

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[28] J. Bing (ed.), *Handbook of Legal Information Retrieval*, Oslo, 1984, p. 81.

[29] See Screenshot 7: Representation of case by the International Criminal Court, in the annex to this chapter.

[30] Legal Texts: The WTO Agreement available at http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#bAgreement, last accessed on 6 September 2011.

[31] See General Agreement on Tariffs and Trade available at *ibid*.

- Which state/international tribunal heard the case;
- Name of accused/indicted. This criterion is especially helpful because names of these individuals may be well-known from media and other sources;
- Year of the case.

Most online databases which present case law online apply similar criteria. However, it is advisable to include other less evident criteria when classifying cases in order to help users select cases according to the issue that is discussed. The browser interface may serve a complementary function to the search engine in this respect. For example, the Database may enable a user to locate a case by the crime committed. Cases that are currently being heard may be classified according to the charges in the indictment, while completed cases can be classified according to the charges in the judgement.

Genocide, crimes against humanity, and war crimes may be listed in a dropdown menu in the order established by the Elements of Crimes document. This classification requires a complex menu for war crimes as there are 71 elements altogether for this category of crimes. It should be also taken into account that the average user of the Legal Tools Website may not know the difference between the war crimes of attacking civilians under article 8(2)(b) and article 8(2)(e) of the Rome Statute. It is possible then to subdivide war crimes into three categories: grave breaches of the Geneva Conventions, according to article 8(2)(a) of the Rome Statute; other serious violations during international conflict, according to article 8(2)(b) of the Rome Statute; and other serious violations during non-international conflicts, according to article 8(2)(e) of the Rome Statute). The database of the WTO "Documents online", for instance, provides users with the opportunity to browse WTO documents by subject.[32] To deal with a large amount of options available to the user, a user is offered a data tree with a number of options which can be contracted or expanded. A similar approach may be taken by the developers when classifying the case law available on the browser of the Legal Tools Database.

[32] WTO Documents by subject and Uruguay Round Documents by subject, available at http://docsonline.wto.org/gen_trade.asp, last accessed on 6 September 2011. See Screenshot 9: Data tree on the browser of the website of WTO, in the annex to this chapter.

Another interesting approach taken by the WTO website developers is to represent all WTO disputes between States on the map.[33] The user may click on the WTO Member State's territory to search for disputes where this State is involved as complainant, as respondent, or as either one of them. Alternatively, the user may achieve similar results by simply choosing the State from the dropdown menu. The advantage of administering the map is its more popular interface and the ability of the user to see which members of the WTO were not involved in any disputes with respect to their WTO obligations, that is, which query returns no results.

The website of the International Criminal Tribunal for Former Yugoslavia goes further in its efforts to structure case law geographically. The user selects a State from the map of former Yugoslavia. The system returns a detailed map of the State marked with the crime scenes.[34]

By clicking on each crime scene, the user accesses a short review and a list of crimes alleged or proven by the tribunal. This feature can be improved if the interactive map would provide a similar review and a list of cases from each State of the former Yugoslavia.

The benefit of legal data retrieval based on geographical criteria is so far under-used. The Legal Tools Website may use this approach to organize more sophisticated interfaces. First of all, having collected case law from all over the world, crime scenes may be spotted on the entire world map. This world map may be adjusted to several modes in its presentation of case law and legislation:

- Place where the crime occurred;
- Place where the court is located;
- State participating in the dispute;
- State where the indicted person or the victim comes from. This criterion is important because forwar crimes committed in the course of international conflict, the place of the

[33] Map of disputes between WTO members, available at http://www.wto.org/english/tratop_e/dispu_e/dispu_maps_e.htm, last accessed on 6 September 2011. See Screenshot 10: Map of disputes between member states of the WTO, in the annex to this chapter.

[34] Interactive map, available at http://www.icty.org, last accessed on 6 September 2011. See Screenshot 11: Map of crime scenes on the website of International Criminal Tribunal for the former Yugoslavia, in the annex to this chapter.

crime does not always indicate the State where aggressor or the victim comes from;

– State where the relevant national legislation was adopted.

A world map display can be elaborated further by visualizing crimes addressed by the criminal tribunals indicated on the map. A user may choose to view the world map that communicates certain statistics about the prosecution of crimes. For example, the Los Angeles Police Department currently administers Crime Map which allows any user to trace crimes reported in a certain area of the city.[35] Such visualization of crimes on a map helps a user determine facts such as the tendency of certain crimes occurring in certain area of the city, the profile the victims, the movement of suspects.

The thought behind crime mapping is community policing, a notion that better interaction and information exchange between the police and the community regarding crime rates can help control crime with community members helping to identify suspects and bringing problems to the attention of police. It is advisable to consider incorporating a similar application on the Legal Tools Website. Although "community policing" does not easily translate into international criminal law, crime mapping enables new methods to be used in the analyzing of information regarding victims of crime, types of crime, intensities of criminological situations, and seriousness of crimes. This may serve as an independent browsing criterion.[36]

Another interesting approach taken by the developers of the WTO website is providing the user with the ability to browse legislation through an index.[37] This classification leads the user to a single provision dealing with a particular index term. The index term may be connected to cases, relevant articles of legislation and even an overview of the term.

[35] L.A. Crime Maps, available at http://projects.latimes.com/mapping-la/crime/, last accessed on 6 September 2011.

[36] See Screenshot 12: Map spotted with different types of crime (burglary, assault, and Screenshot 13: Filtering crime spots according to type or intensity of crime, in the annex to this chapter, both in the annex to this chapter.

[37] See Legal Texts Index available at http://www.wto.org/english/docs_e/legal_e/legal_e.htm#GATT94, last accessed on 6 September 2011.

The same website administers the Trade topics gateway[38] which highlights the most current and actual topics of the WTO. Each topic leads to:

- News on the topic;
- Introduction to a topic in the handbook "Understanding the WTO";
- Official texts of the WTO. Texts and works are classified according to year, subject, *et cetera*.

Index terms assigned to documents may serve as a glossary which leads the user to the most important documents or cases defining the meaning of the index term concerned.

The browse facility of the Legal Tools Website may also incorporate a link to the most frequently consulted documents as done on the website of the WTO.[39] The user is presented with predefined, most frequently conducted searches which are grouped and sub-grouped into various categories by the type of the document, by the year it was issued, by the body that issued it and even alphabetically. This option may be provided based on an analysis of previous search requests made by the users of the Website,by grouping patterns of requests, and by adding the relevant synonyms.

11.5.5. Presentation of Multilingual Content

The majority of the documents stored on the Legal Tools Database are in English and French, and the interface exists in both of these languages. However, the Database contains documents in other languages as well, and the approach to the representation of documents in different languages should be elaborated further.

- Documents in certain languages have their titles in English, while documents in other languages have their titles in authentic languages. For instance, the system keeps titles in French, English, Danish, Dutch, and German of documents in corresponding

[38] See WTO Trade Topics Gateway, available at http://www.wto.org/english/tratop_e/tratop_e.htm, last accessed on 6 September 2011.

[39] Frequently consulted documentation, available at http://docsonline.wto.org/gen_frequently.asp, last accessed on 6 September 2011.

languages, but does not keep the titles of documents in Russian or Chinese.[40] A user needs to access metadata to determine the language of a document which impedes the process of retrieving the relevant document.[41] It would be useful to indicate the language of the document in the title, either by keeping the title in its authentic language or by indicating its language in abbreviation in brackets.

- Metadata of all documents irrespective of their language is in English. Thus, the metadata system is still not fully adapted to search requests in foreign languages in the metadata as such, as opposed to full-text, but for good reasons.
- Even if the user chooses an interface in the English language and inputs a search request in English, the browser presents documents in French language[42] as well and *vice versa*. This significantly increases the list of documents returned for each query.

Creating separate language versions of the Website and of its Database has certain drawbacks, however. For instance, the full versions of the ICJ website and its database are in English and in French. However, once one enters a website in Chinese or Russian language, which are presented as identical alternatives on the homepage,[43] the website presents basic documents of the ICJ and a brief summary of case law from the ICJ in these languages.

A user choosing a limited version of the website cannot estimate the full capacity of the website in its main version. For instance, a Chinese-speaking person is likely to enter the Chinese version of the website, which is very limited. This users cannot estimate the full capacity of the website in English because the system presents English and Chinese versions as identical.

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[40] For example, compare Wetboek van Strafvordering (title and text of the document are in Dutch) with Criminal Code of Greece (text is in Greek while the title is in English) when searching the Database (search query was input on 6 September 2011).

[41] See, for example, the Code of Criminal Pocedure of Ukraine, 28 December 1960 when searching the Database (search query was input on 6 September 2011).

[42] As of 6 September 2011, the search engine lists documents in the French language with titles in French on page 3 of search results when the user inputs "Rome Statute" into an English interface of the Legal Tools Database.

[43] See http://www.icj-cij.org, last accessed on 6 September 2011.

The website of the United Nations, when presenting documents through its browser in the English language, offers documents in English, but makes a note that the same document is available in other languages.[44]

The system should let the user know that he or she might find relevant material in the most developed version, for instance, through banner advertisement. To communicate materials in different languages by a database with multilingual interfaces, it is advisable to implement the following suggestions:

1. The browser and search engine of a legal database which is primarily developed in the English language should present documents in English. If the same documents are available in other languages, it should indicate so by short hyperlinks from the English version, instead of providing its translations in the list of results.
2. If the legal database in English presents documents in other languages and has no reliable translation into English, the title of the document should at least be translated into English. However, the title of the document should unambiguously indicate that this document is in a foreign language.
3. If the legal database has an interface in other languages but these interfaces have limited content, it should not only concentrate on providing this limited data in other languages, but also data in the English language with titles translated into other languages. The title of the document should unambiguously indicate though that the document is available in English only.
4. As for the Legal Tools Database specifically, it is advisable to keep metadata and keywords assigned to the documents in other languages in both the English version and the version of that other language. This suggestion is true if the Legal Tools Database is planned to be developed in that other language.
5. The search interface of the Legal Tools Website should indicate that the English version of the Website can process requests in certain other languages, such as French, German, Portuguese.

These suggestions raise the question of how legal databases in secondary languages should present data in another secondary language and

[44] Landmark General Assembly Documents, available at http://www.un.org/Depts/dhl/landmark/amajor.htm, last accessed on 6 September 2011. See Screenshot 14: Selection of UN documents in different languages, in the annex to this chapter.

whether it should present it. Ideally, the titles, metadata and keywords of all documents in secondary languages should be translated into other secondary languages and each title should indicate that the document is available in a different language only. For example, the browser of the Legal Tools Website in Norwegian, if developed, will retrieve documents in the Norwegian language. If suggestion 3 above is implemented, then documents in the English language with titles in Norwegian should also be browsed. All the titles of documents that are present in languages other than Norwegian and English should also ideally be translated into Norwegian. In order to implement this suggestion, developers may consider automatic translation tools, such as Babel Fish, Promt, Wordfast and Deja Vu.

Because it requires much translation, the browsing interface of the Legal Tools Website might group the result list of documents according to languages. This would help the user realize the depth of the Legal Tools Website and, if necessary, involve a translator in his or her research. At the same time, it will help to avoid the impression of an overloaded list of documents where documents with titles in different languages are mixed and the language of the title does not correspond with the language of the content.

11.6. Improving "Searchability" of the Legal Tools Website

11.6.1. Functioning of Boolean Operators

The Website may provide users with textual representation of Boolean operators, as it is done by the Westlaw database.[45]

11.6.2. Relevancy Assessment

Whenever constructing mechanisms for a relevancy assessment, it needs to be considered what the document unit is, such as if it is a document, article, or paragraph. Large legal texts contain extensive amount of terms which may not necessarily represent the meaning of the document. It is therefore necessary to describe where searched terms should co-occur, such as within one paragraph, one provision, or one document.

[45] See Screenshot 15: Boolean connectors in Westlaw, in the annex to this chapter.

Professor Jon Bing describes several retrieval strategies that can be implemented in order to improve the nearness function of the Legal Tools Database:[46]

> Word frequency based ranking algorithms [...] based on the following ranking criteria:
>
> - The total number of search terms occurring in the document;
> - The number of different search terms occurring in the document;
> - The number of conceptors in the document, a conceptor being defined as a set of terms denoting the same idea.[47]

This seems to be possible if the database runs a thesaurus denoting certain search terms. One may also add one more criterion: whether search terms occur in the title or in the text of the document.

In accordance with vector retrieval mechanisms, different vectors are assigned to each document, consisting of terms mentioned in the document and assigning a weight to each term based on the number of times a certain term is mentioned in the document.

Alternatively,

> conceptor based retrieval [...] takes into consideration the relation between search terms and the ideas they represent [...]. A conceptor is defined as a class of terms representing the same idea.[48]

The purpose of this mechanism is to find the document which is likely to reflect on a particular idea. In order to establish the connection between search requests and ideas provided for in a number of documents, the database operates a range of synonyms or definitions of a particular idea. According to Professor Jon Bing, this mechanism demonstrates the most impressive results.

For example, Westlaw makes use of conceptor retrieval through its thesaurus.[49]

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[46] Bing, 1984, see *supra* note 22, pp. 164–171.

[47] *Ibid.*, p. 164.

[48] *Ibid.*, p. 169.

[49] See Screenshot 16: Conceptor retrieval options offered by Westlaw, in the annex to this chapter.

The European Country of Origin Information Network (ECOI) administers its search facility with the help of a bilingual Country of Origin Information Thesaurus.[50] Once a user inputs a search term which is also found in the thesaurus, the system will automatically include synonyms and near synonyms. A search query for "female genital cutting" will include related terms in English and German, as in this case much data stored in the database is in German language. Therefore the search engine will also find documents containing the terms "FGM", "female genital mutilation" or "female circumcision". [51]

Such thesauruses are costly to maintain and do not necessarily ensure consistency. They attempt to organize complex interrelations between the terms according to three types of relations:

- An hierarchical relation occurs when terms are narrower or broader in relation to one another;
- An equivalent relation occurs when the terms are synonyms or near-synonyms;
- An associative relation occurs in all other cases.

The difficulty of administering a thesaurus may be illustrated with the example of the relation between the terms "love" and "kindness" which is difficult to incorporate into an online thesaurus. However, thesauruses that use references to legal instruments have been used with higher consistency.

11.6.3. Disclosing Keywords List

The Legal Tools Database contains documents which are assigned with metadata and keywords. It is useful to make the list of keywords available to users so that they could choose which keyword describes their search request better.

If the keyword list includes terms that differ from what users are used to searching for, the existing list may be connected to other more customary terms. For instance, the term found on the website of one of the human rights organization – "child soldiers" – has another equivalent in the keywords list, namely, "conscripting, enlisting, or using children

[50] See Screenshot 17: Search interface of ECOI in the annex to this chapter.

[51] COI Thesaurus, available at http://www.ecoi.net/news/58.Thesaurus.htm, last accessed on 6 September 2011.

under 15". "Ethnic cleansing" or "police brutality" are not found in the keywords list. In such a case, the search engine may automatically connect terms if each term is defined through another, more customary term.

11.7. Improving Interaction of Legal Texts

The discussion above deals with retrieving the right document from a database. Once the user finds it, the legal database should assist him or her in comprehending it. Building a system of relations between legal documents is the most effective way to facilitate the comprehension of retrieved documents.

Having embedded 'links' into legal texts, the developers of the Legal Tools Database will be able to construct 'backlinks' and 'fatlinks' described by Trygve Harvold in the following way:

- 'Link': Natural link in document A to document B
- 'Backlink': Constructed link in document B to document A which has a natural link to B
- 'Fatlink': Link to one or more documents, that is, for example all the backlinks in a document.
- 'Links' and 'backlinks' are thus mirror versions of each other, and a fatlink is the collection of all backlinks in a document. A fatlink is represented as a button in the Lovdata system.[52]

This will not only help users to locate documents from other legal texts, but also search the database by querying which documents refer to a certain legal text. This highlight may further be enhanced by allowing users to see which jurisdiction cited the case concerned, when the case was cited, and even the extent and depth at which it was discussed.The depth of treatment of each case in the Westlaw legal database for instance, is expressed by a particular number of stars, while the history of statutes is marked with flags. Westlaw builds on the long editorial experience of West publishing company and their huge editorial staff to assign stars and key numbers.[53]

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[52] T. Harvold, "Is searching the best way to retrieve legal documents?", at *e-Stockholm'08 Legal Conference*, Stockholm, 14–19 November 2008.

[53] See Screenshot 18: KeyCite system of Westlaw indicating related legal texts, in the annex to this chapter.

Examples of such successful search systems are services rendered by LexisNexis and Westlaw's, Shepard's and Keycite respectively. Although this is highly labor-intensive, both systems manage to trace the negative indirect history of each case, such as by finding cases outside the direct appellate line that may have negative impact on the precedential value of the case, and some additional history, such as related non-negative history. Thus, the system shows the user how courts dealt with similar questions of law in other cases even if there is no literal and express mention of the case title in the text. Developers of the Legal Tools Database should consider to what extent they can enhance the interrelation of cases and statutory law.

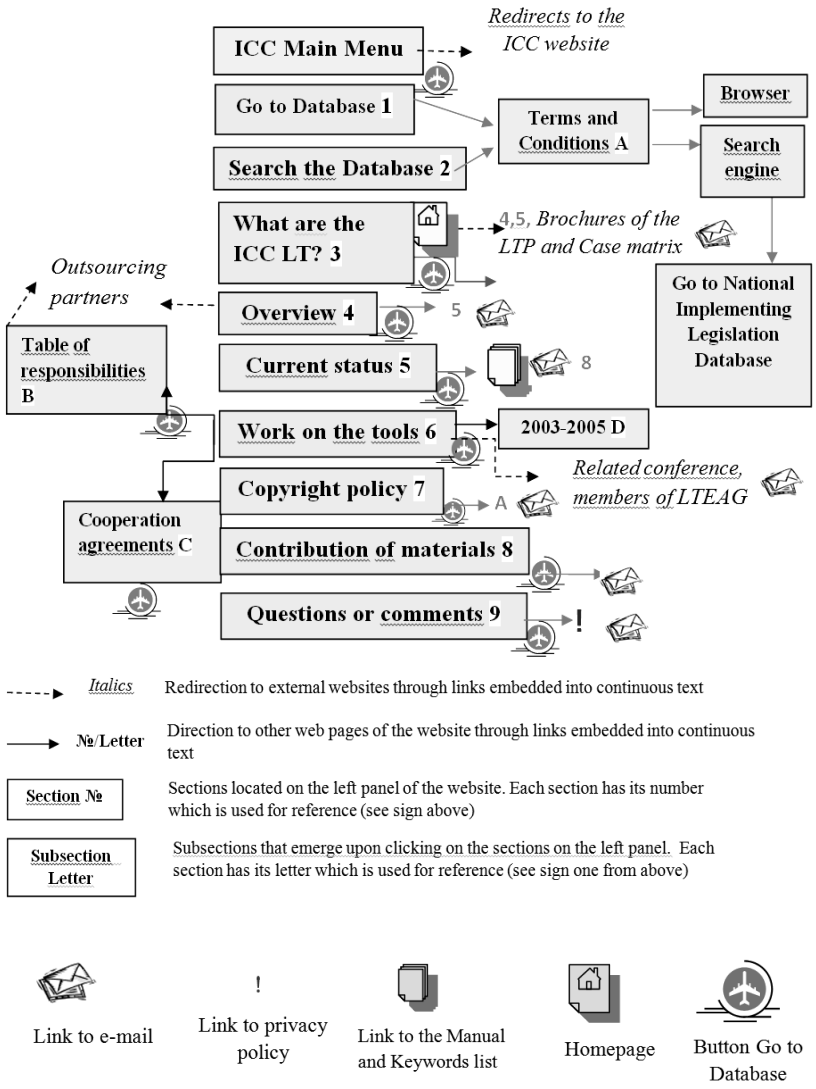
11.8. Improving Networking on the Legal Tools Website

Most of my previous suggestions dealt with improvements in computerised retrieval of documents. However, the Legal Tools Website may communicate data not only via system-to-user, but also via user-to-user. User-generated content, blogging and citizen journalism characterize the idea of 'Web 2.0', denoting that users can produce information.

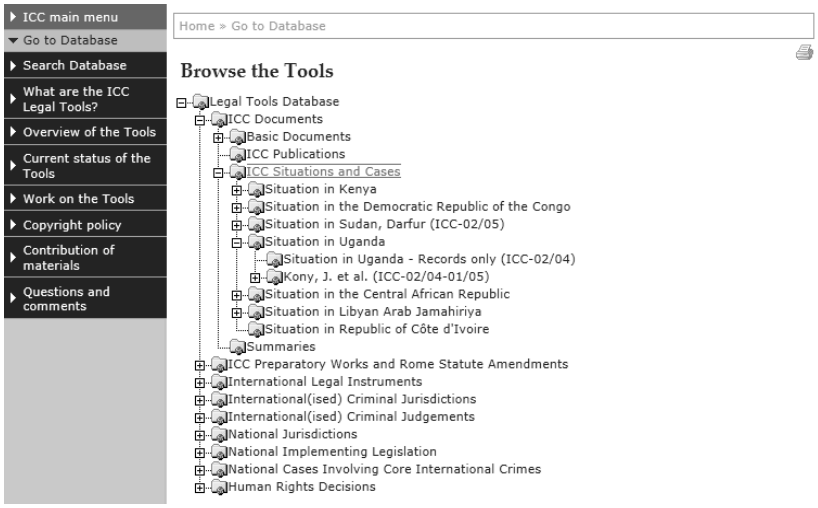
The Legal Tools Website captures a specialized audience of legal professionals working with international criminal law from all over the world. It would be reasonable to deploy the latest online solutions to organize an online community of the Legal Tools Website fostering communication between the Legal Tools Project and its users, as well as between users. Personal interaction online will help satisfy the information needs of the users when their search requests are too narrow or specialized, or when they cannot correctly formulate them.

The Legal Tools Website in its current state stores documents and offers its users the means to search and browse them. A further step can be taken to exercise editorial functions over it. The developers of the Legal Tools Database, owing to their interaction with the material concerned as well as with the institutions and specialists working in the field, are able to trace developments in international criminal law, select news topics, and provide overviews. This form of communication will help the Legal Tools Website satisfy the information needs of those users who are selecting topics for their legal research by introducing new or currently pending issues for discussion.

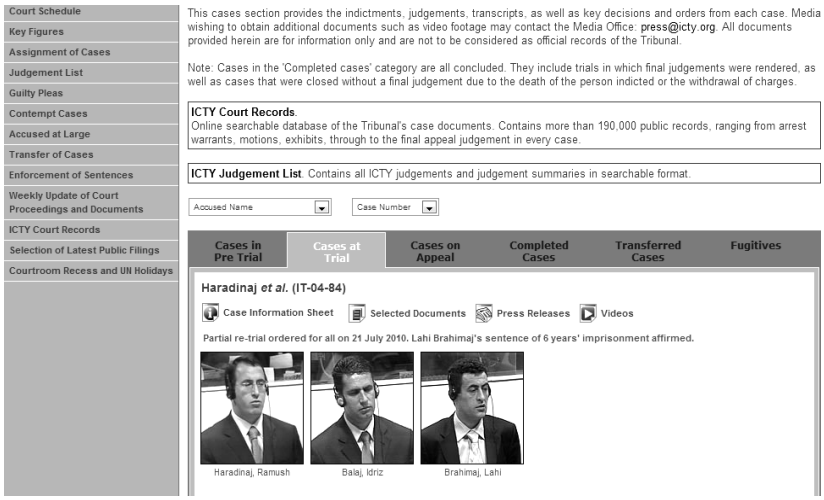
Annex



Scheme 2: Sitemap of the Legal Tools Website.



Screenshot 2: Browser of the Legal Tools Database.



Screenshot 3: Interface of the case documents on the website of the International Criminal Tribunalf for the Former Yugoslavia.

Legal Tools Database:

ICC Documents:

This is a repository of basic legal documents (such as founding instruments) and decisions of the ICC.

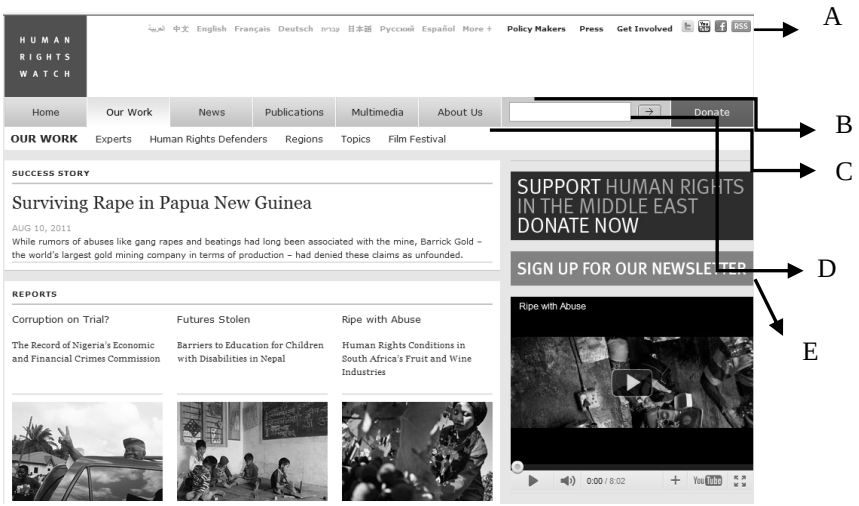
External partner in charge of further development of this tool: Norwegian Centre for Human Rights, University of Oslo (Norway).

ICC 'Preparatory Works' and Rome Statute Amendments:

This database contains more than 16,000 documents related to the negotiation and drafting of the ICC Statute, the Rules of Procedure and Evidence, and the Elements of Crimes document. These documents were produced by States, NGOs, academic institutions, the United Nations and other international organisations between December 1989 and September 2002. It further contains documents related to amendments to the Rome Statute.

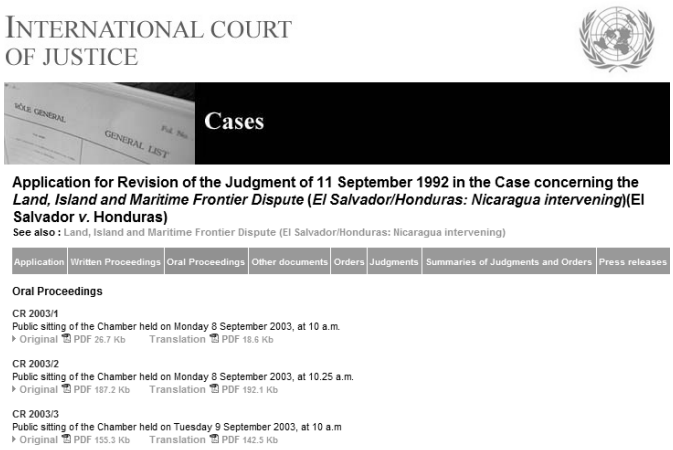
External partner in charge of further development of this tool: Norwegian Centre for Human Rights, University of Oslo (Norway).

Screenshot 4: Webpage "Overview of the Tools".



A - Appears throughout all pages of the website, just as its logo
B - Sections of the website
C - Subsections of each section
D - Search box appears throughout all web pages
E - Banner

Screenshot 5: Webpage of Human Rights Watch.


INTERNATIONAL COURT OF JUSTICE

Cases

Application for Revision of the Judgment of 11 September 1992 in the Case concerning the *Land, Island and Maritime Frontier Dispute* (*El Salvador/Honduras: Nicaragua intervening*)(El Salvador *v.* Honduras)

See also : Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)

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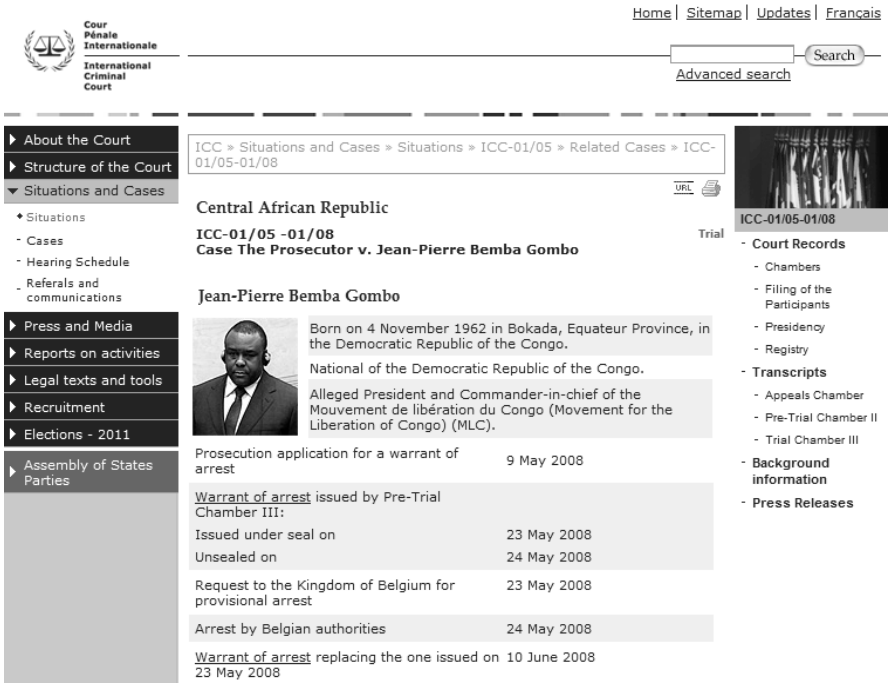
CR 2003/2
Public sitting of the Chamber held on Monday 8 September 2003, at 10.25 a.m.
Original PDF 187.2 Kb Translation PDF 192.1 Kb

CR 2003/3
Public sitting of the Chamber held on Tuesday 9 September 2003, at 10 a.m
Original PDF 155.3 Kb Translation PDF 142.5 Kb

Screenshot 6: Division of case materials.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URL

Central African Republic

ICC-01/05 -01/08 Trial
Case The Prosecutor v. Jean-Pierre Bemba Gombo

Jean-Pierre Bemba Gombo

Born on 4 November 1962 in Bokada, Equateur Province, in the Democratic Republic of the Congo.

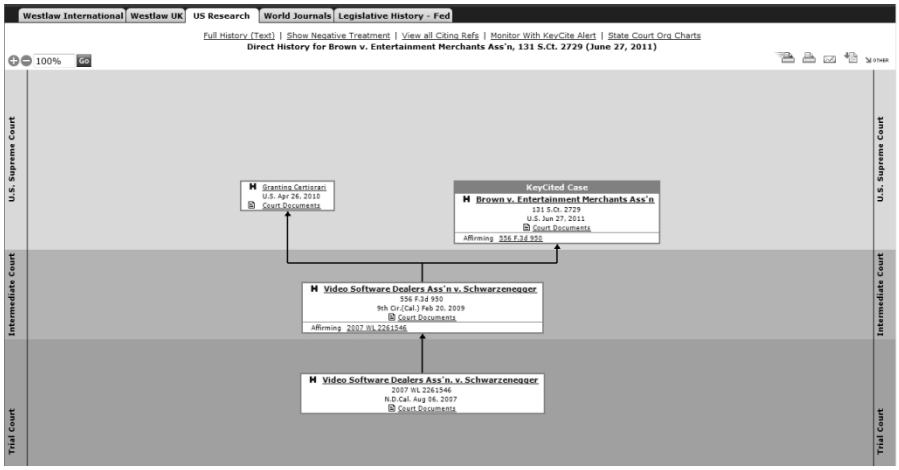
National of the Democratic Republic of the Congo.

Alleged President and Commander-in-chief of the Mouvement de libération du Congo (Movement for the Liberation of Congo) (MLC).

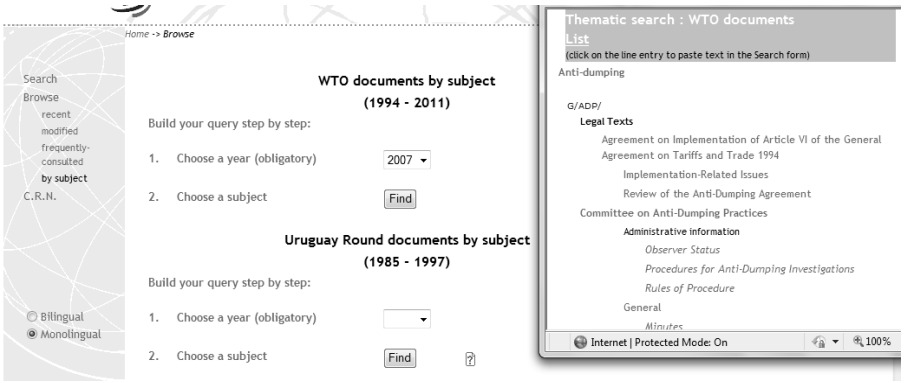
Prosecution application for a warrant of arrest	9 May 2008
Warrant of arrest issued by Pre-Trial Chamber III:	
Issued under seal on	23 May 2008
Unsealed on	24 May 2008
Request to the Kingdom of Belgium for provisional arrest	23 May 2008
Arrest by Belgian authorities	24 May 2008
Warrant of arrest replacing the one issued on 23 May 2008	10 June 2008

ICC-01/05-01/08
- Court Records
  - Chambers
  - Filing of the Participants
  - Presidency
  - Registry
- Transcripts
  - Appeals Chamber
  - Pre-Trial Chamber II
  - Trial Chamber III
- Background information
- Press Releases

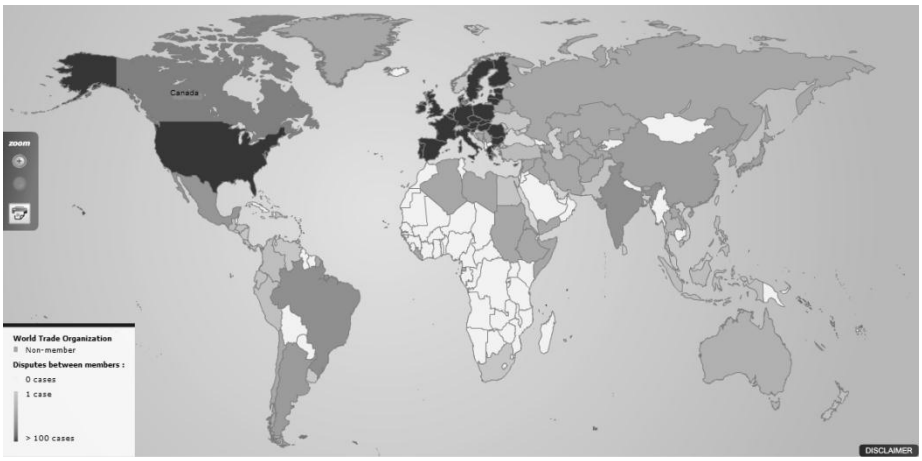
Screenshot 7. Representation of case by the International Criminal Court



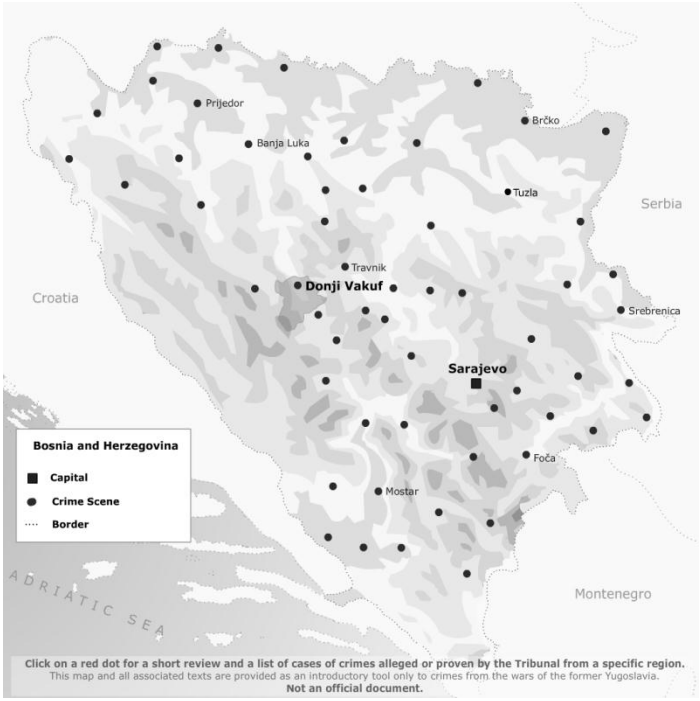
Screenshot 8: Direct History of a case administered by Westlaw (US Research).



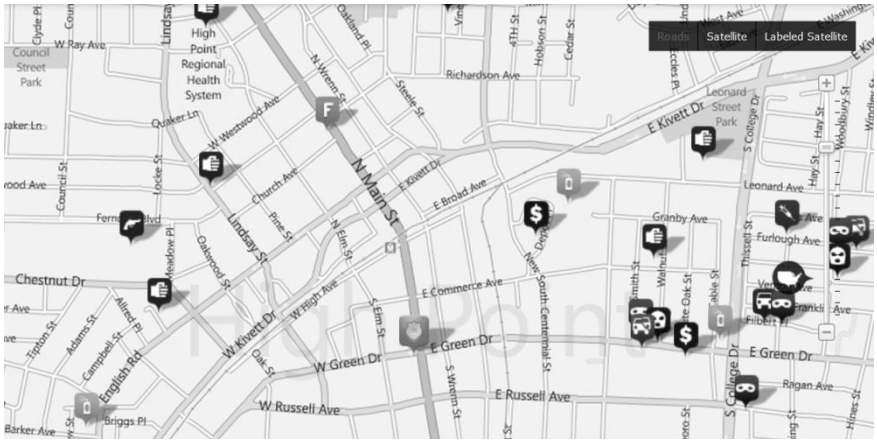
Screenshot 9: Data tree on the browser of the website of WTO.



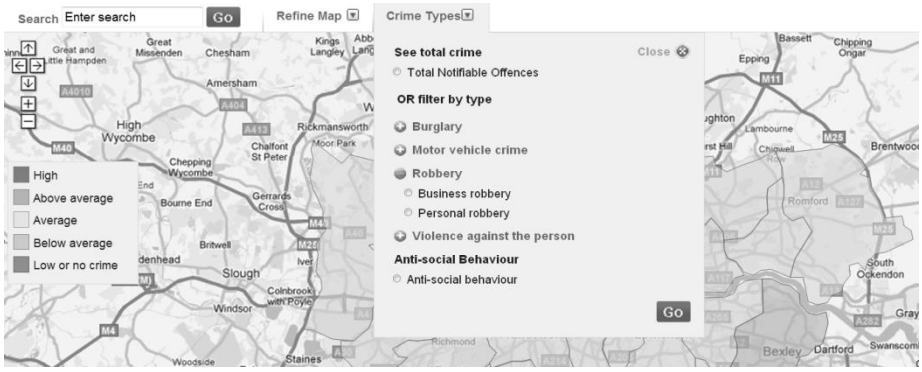
Screenshot 10: Map of disputes between member states of the WTO.



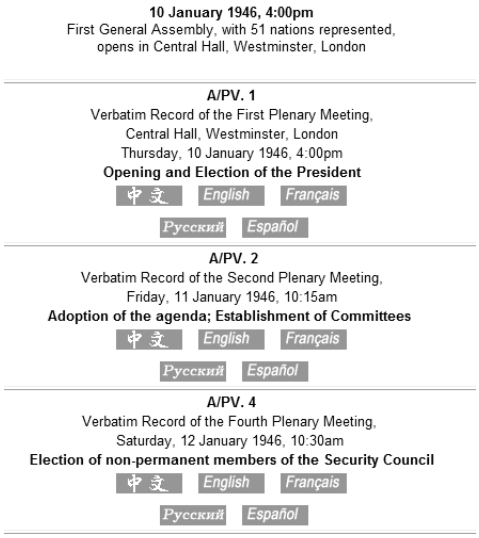
Screenshot 11: Map of crime scenes on the website of International Criminal Tribunal for Former Yugoslavia.



Screenshot 12: Map spotted with different types of crime (burglary, assault)



Screenshot 13: Filtering crime spots according to type or intensity of crime.



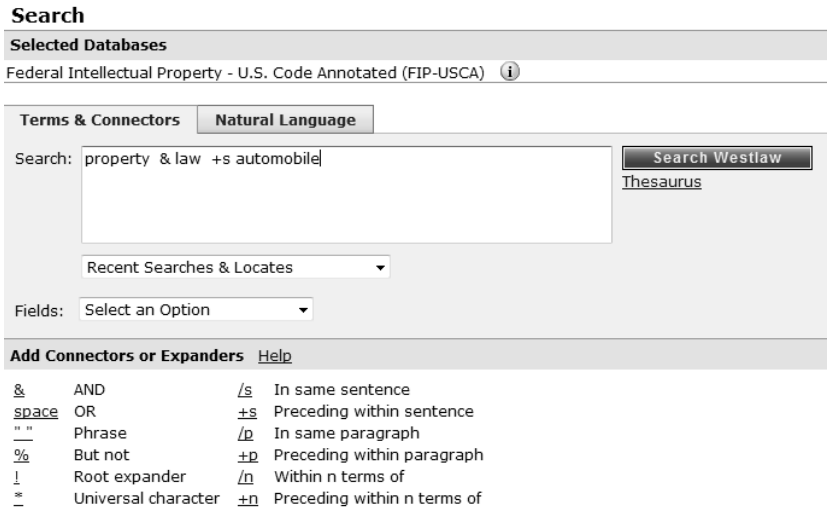
10 January 1946, 4:00pm
First General Assembly, with 51 nations represented,
opens in Central Hall, Westminster, London

A/PV. 1
Verbatim Record of the First Plenary Meeting,
Central Hall, Westminster, London
Thursday, 10 January 1946, 4:00pm
Opening and Election of the President
中文 English Français
Русский Español

A/PV. 2
Verbatim Record of the Second Plenary Meeting,
Friday, 11 January 1946, 10:15am
Adoption of the agenda; Establishment of Committees
中文 English Français
Русский Español

A/PV. 4
Verbatim Record of the Fourth Plenary Meeting,
Saturday, 12 January 1946, 10:30am
Election of non-permanent members of the Security Council
中文 English Français
Русский Español

Screenshot 14: Selection of UN documents in different languages.



Search

Selected Databases

Federal Intellectual Property - U.S. Code Annotated (FIP-USCA)

Terms & Connectors | **Natural Language**

Search: property & law +s automobile

Search Westlaw
Thesaurus

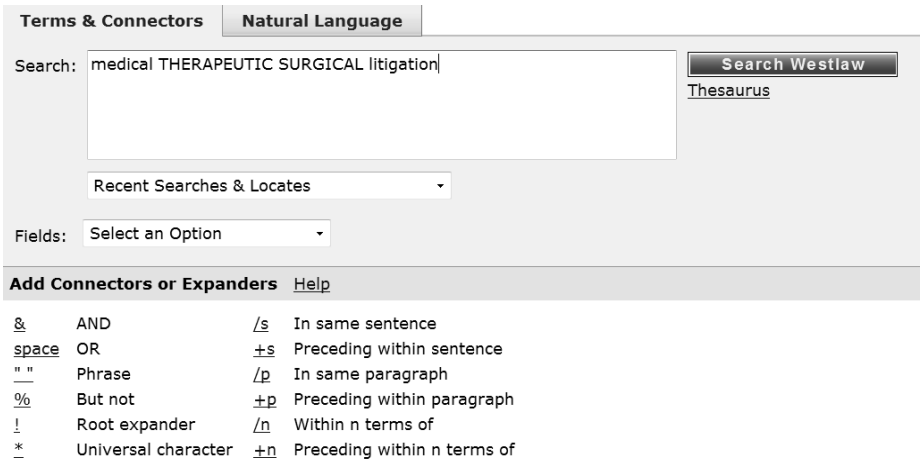
Recent Searches & Locates

Fields: Select an Option

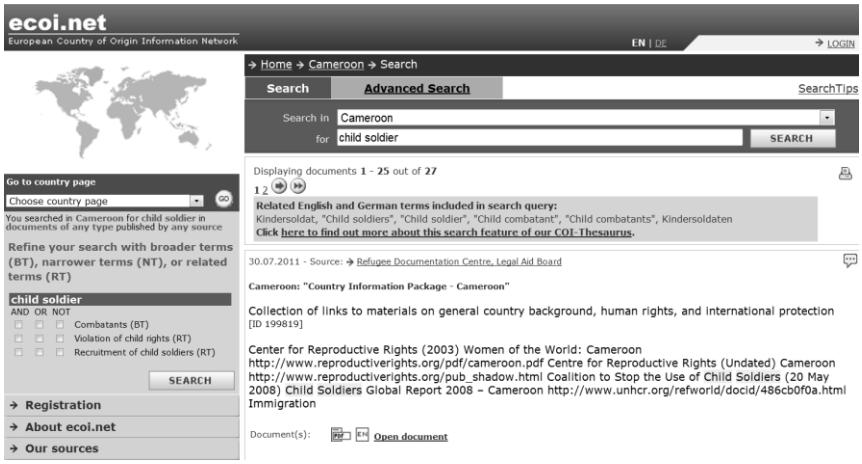
Add Connectors or Expanders Help

&	AND	/s	In same sentence
space	OR	+s	Preceding within sentence
" "	Phrase	/p	In same paragraph
%	But not	+p	Preceding within paragraph
!	Root expander	/n	Within n terms of
*	Universal character	+n	Preceding within n terms of

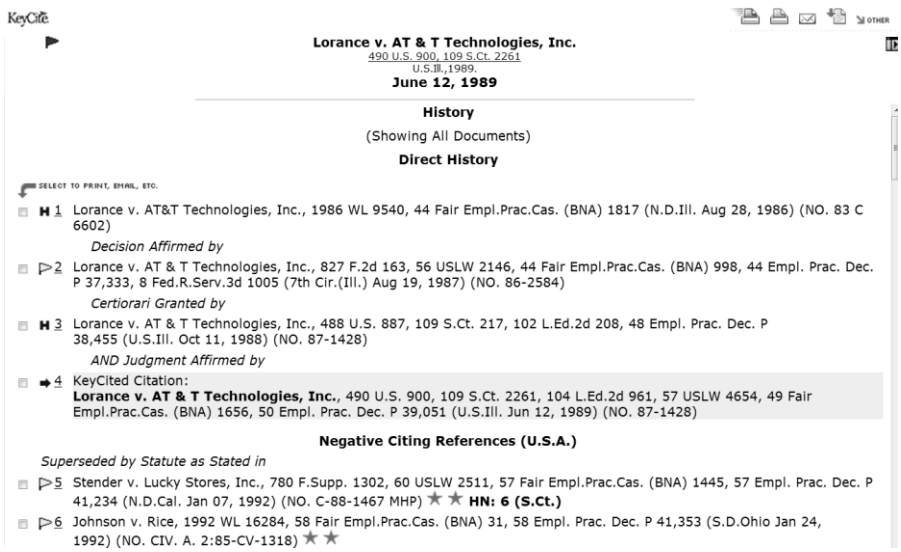
Screenshot 15: Boolean connectors in Westlaw.



Screenshot 16: Conceptor retrieval options offered by Westlaw.



Screenshot 17: Search interface of ECOI.


KeyCite

Lorance v. AT & T Technologies, Inc.
490 U.S. 900, 109 S.Ct. 2261
U.S.Ill.,1989.
June 12, 1989

History

(Showing All Documents)

Direct History

SELECT TO PRINT, EMAIL, ETC.

H 1 Lorance v. AT&T Technologies, Inc., 1986 WL 9540, 44 Fair Empl.Prac.Cas. (BNA) 1817 (N.D.Ill. Aug 28, 1986) (NO. 83 C 6602)

Decision Affirmed by

2 Lorance v. AT & T Technologies, Inc., 827 F.2d 163, 56 USLW 2146, 44 Fair Empl.Prac.Cas. (BNA) 998, 44 Empl. Prac. Dec. P 37,333, 8 Fed.R.Serv.3d 1005 (7th Cir.(Ill.) Aug 19, 1987) (NO. 86-2584)

Certiorari Granted by

H 3 Lorance v. AT & T Technologies, Inc., 488 U.S. 887, 109 S.Ct. 217, 102 L.Ed.2d 208, 48 Empl. Prac. Dec. P 38,455 (U.S.Ill. Oct 11, 1988) (NO. 87-1428)

AND Judgment Affirmed by

4 KeyCited Citation:
Lorance v. AT & T Technologies, Inc., 490 U.S. 900, 109 S.Ct. 2261, 104 L.Ed.2d 961, 57 USLW 4654, 49 Fair Empl.Prac.Cas. (BNA) 1656, 50 Empl. Prac. Dec. P 39,051 (U.S.Ill. Jun 12, 1989) (NO. 87-1428)

Negative Citing References (U.S.A.)

Superseded by Statute as Stated in

5 Stender v. Lucky Stores, Inc., 780 F.Supp. 1302, 60 USLW 2511, 57 Fair Empl.Prac.Cas. (BNA) 1445, 57 Empl. Prac. Dec. P 41,234 (N.D.Cal. Jan 07, 1992) (NO. C-88-1467 MHP) ★★ **HN: 6 (S.Ct.)**

6 Johnson v. Rice, 1992 WL 16284, 58 Fair Empl.Prac.Cas. (BNA) 31, 58 Empl. Prac. Dec. P 41,353 (S.D.Ohio Jan 24, 1992) (NO. CIV. A. 2:85-CV-1318) ★★

Screenshot 18: KeyCite system of Westlaw indicating related legal texts.

BASIC DATA DESCRIBING THE RESOURCE					
Title of the resource	Source of the resource	Language of the resource	Date of the resource	Content of the resource	Relations with other resources or entities, *et cetera*.
DATA SPECIFIC TO JUDICIAL DOCUMENTS					
Case name, short title	Related information	Phase of case	Outcome of trial	Information about judge, court	Information about other participants
DATA SPECIFIC TO DOCUMENTS OF THE INTERNATIONAL CRIMINAL COURT					
Court record, number, interlocutory appeal number		Officiality of the document		Titles for situations in the International Criminal Court	
Access rights, Bibliographical information, Subject levels, Administration and quality control					
Level of confi-dentiality, copyright authorization	Resource citation	Subject, phase of preparatory works	Date accessed, downloaded, published	Responsible outsourcing partner	Path name, file name, database record number

Table 1: Overview of the metadata of the manual.

12

The ICC Legal Tools Advisory Committee: Mandate, Role and Work

Gilbert Bitti*

The Legal Tools Project started at the International Criminal Court (ICC) in 2003, at the Office of the Prosecutor (OTP), Legal Advisory Section.

At the end of 2005, at the initiative of the ICC Prosecutor, a Court-wide Legal Tools Advisory Committee (LTAC) was established with members from all Organs of the Court: Office of the Prosecutor, Registry and Pre-Trial, Trial and Appeals Divisions. This composition of the LTAC was somewhat complex as not only all Organs of the Court, but also different bodies within the Organs must be represented.

Indeed, concerning the Registry alone, six different sections, offices or divisions are represented, namely, the Division of Court Services, the Legal Advisory Section, the Division of Victims and Counsel, the Library, the Office of Public Counsel for the Defence and the Office of Public Counsel for Victims. Those two last offices, although within the remit of the Registry for administrative purposes, do function independently in the assistance they provide respectively to the defence[1] and to the victims[2]participating in the proceedings, the latter being a distinct feature of the ICC Statute and Rules of Procedure and Evidence.[3]

The LTAC had also long discussions about how to involve in its work counsel practicing before the ICC, especially the views of those who were already on the list of counsel established by the Registrar in

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* **Gilbert Bitti** is Senior Legal Adviser to the Pre-Trial Division, ICC (2005–); formerly, Chair, *ICC Legal Tools Advisory Committee* (2005–09); Member of the French Delegation during the ICC negotiations in the *Ad Hoc* Committee (1995), Preparatory Committee (1996–1998), Rome Conference (1998) and Preparatory Commission (1999–2002); Counsel of the French Government before the European Court of Human Rights (1993–2002); former Assistant Professor at the Faculty of Law in Paris.

1 See regulation 77 of the Regulations of the Court.

2 See regulation 81 of the Regulations of the Court.

3 See article 68, paragraph 3, of the ICC Statute and Rules 89 to 93 of the Rules of Procedure and Evidence.

accordance with rule 21 of the Rules of Procedure and Evidence. After a lengthy discussion, it was finally decided that the offices of public counsel (both victims and defence), together with the Division of Victims and Counsel within Registry, would be in charge of presenting the views of counsel acting before the Court to the LTAC.

The composition and the discussion about the composition of the LTAC were delicate and important issues because the "*raison d'être*" of the LTAC is to take into consideration the interests of all the "bodies" constituting the ICC and those participating in its proceedings in order to reach conclusions on how the Legal Tools should be developed and used.

It has not always been easy to reach agreement in the LTAC on the development of the Legal Tools. For example, when we were discussing what were the most important materials on which the Legal Tools outsourcing partners should start their work, many people referred to the decisions issued by the Appeals Chamber of the *ad hoc* Tribunals for the former Yugoslavia and for Rwanda. However, the Office of Public Counsel for the Defence reminded everybody that for the defence, the decisions of the Registrars of the *ad hoc* Tribunals concerning the appointment and remuneration of counsel could be as important as the decisions of the Appeals Chamber of those tribunals, and maybe more urgent.

Concerning the role played by the LTAC, one must bear in mind that the LTAC as such has no budgeted posts and that all tasks are carried out by staff members in addition to their regular functions at the ICC. This has in some periods proved challenging, especially for the Secretary and the Chair of the LTAC.

The LTAC has held more than 15 meetings since its start in November 2005 and has dealt with many issues:

- Preparation of lists of metadata and keywords for all the materials contained in the Legal Tools Database. This was a very time-consuming task for the LTAC members who worked in two different working groups for this purpose. The keywords refer to the articles, rules and regulations in the legal texts of the Court, and also consist of a long list of analytical terms;
- commenting on co-operation agreements and operational protocols for the outsourcing partners;

- contributing to the internal and external review of the Means of Proof Digest incorporated in the Case Matrix;
- contributing to a Legal Tools business case;
- incorporation of the Legal Tools into TRIM, the record information management system of the Court;
- co-ordination between the Legal Tools Database and the database of judicial records maintained by the Court Management Section of the Court;
- contributing to the publication of the Legal Tools on the website of the Court;
- contributing to the design and distribution of brochures concerning the Case Matrix and the Legal Tools Project; and
- contributing to the incorporation in the Legal Tools Database of all judgments and opinions rendered by the International Court of Justice.

The LTAC has played a role in providing access to the Legal Tools to the different Organs of the Court and providing assistance and training in this regard.

In 2005, the ICC decided to outsource work concerning the content development and updating of the Legal Tools to different universities, initially the Norwegian Center for Human Rights at the University of Oslo (Norway), the Institute of Informatics and Law at the University of Saarland (Germany), the Hague Institute for the Internationalisation of Law (the Netherlands) and the International Research and Documentation Centre for War Crimes Trials at the University of Marburg (Germany).

The LTAC has followed the application of these co-operation agreements and has contributed to the development of co-operation with other universities in order to further develop the Legal Tools.[4] This has developed the capacity of the Legal Tools Project regarding legal materials from, for example, national jurisdictions. This has been vital to offer to the Organs of the Court, those participating in the proceedings and, more generally, the public free, democratic access to legal resources

[4] A list of the concluded agreements are available at http://www.legal-tools.org/work-on-the-tools/table-of-responsibilities.

relevant to international criminal law, many of which would otherwise be difficult to access.

13

Operative Networking and the Development of the Legal Tools Database

Emilie Hunter* **and Christian Ranheim****

13.1. Introduction

The International Criminal Court (ICC) draws on the support of outside partners for the development and maintenance of the Legal Tools. The purpose of this outsourcing is to create a broad, stable and long-term capacity to collect relevant documents, register metadata for each document, and upload the documents onto the Legal Tools Database, with a view to ensuring that the quality of its services will be as high as possible.[1]

Between November 2002 and December 2005, the Legal Tools Project operated as an internal service for the ICC Office of the Prosecutor (OTP), created and developed by its Legal Advisory Section. In 2005, the decision was first taken to share the Legal Tools with the other Organs of the ICC and the public. Secondly, it was decided to outsource the further development and maintenance of the content of the Legal Tools in order to ensure a stable capacity for the most labour-intensive tasks. The work on the Tools continued to be led by the Co-ordinator of the Legal Tools Project, who had created the Tools and started the Project as Chief of the OTP's Legal Advisory Section. He secured the agreement of the ICC Prosecutor that the Legal Tools had a

* **Emilie Hunter** is a doctoral researcher at the European University Institute, Fellow of the International Criminal Justice Unit of the University of Nottingham Human Rights Law Centre, and Case Matrix Network Adviser. Between 2006 and 2009, she co-ordinated the design and completion of phases 1–3 of the National Implementing Legislation Database (NILD), which forms part of the ICC Legal Tools. She co-ordinated the newly established Legal Tools Outsourcing Partners Network (LTOP) between May and November 2008.

** **Christian Ranheim** is the Director of the ICC Legal Tools Programme at the Norwegian Centre for Human Rights.

1 ICC, "What are the ICC Legal Tools?", available at http://www.legal-tools.org/en/what-are-the-icc-legal-tools/, last accessed on 21 November 2009.

broader utility, beyond the OTP and other Organs of the Court, and that it could be of service to broader stakeholders of international criminal justice. Both the decision to outsource the work to update the content of the Legal Tools and the commitment to making the Legal Tools a public resource were key objectives of the Legal Tools Project from its very conception. The success of the Project is in no small way connected to its public utility. In November 2011, some six years after it was allocated as a public resource, the more than 52,000 documents contained in the Legal Tools Database were accessed by over 1,900 unique visitors, amounting to more than 42,000 hits.[2]

The outsourcing model designed by the ICC is underpinned by an individual co-operation agreement signed between the Court and the outsourcing partner, which forms the contractual basis for all work conducted by the external organisation. This formal outsourcing gains operational practicality through co-ordination efforts, designated in the co-operation agreement to a named Co-ordinator, Morten Bergsmo. He has encouraged the outsourcing partners to establish a network which has become known as the 'Legal Tools Outsourcing Partner Network'. While the international lawyers who represent the partners have expertise in the substantive components of their contractual obligations to the Court, the operational components of their work has developed more organically in response to the needs of the Legal Tools Project, technological developments, and the outsourcing environment.

This chapter considers the development of the outsourcing scheme, its formalised co-operation agreements, and its operational infrastructure, before finally turning to the Legal Tools Database.

13.2. Development of the Co-operation Model for Outsourcing Partners

The decision to outsource the work to update the content of the Legal Tools Database from the ICC was driven by concerns over the ability of an operational Court to sustain such work over time, the human cost of allocating several members of staff and interns to contribute to the

[2] According to the internal web statistics of the Legal Tools Database as provided by the Legal Tools Project Co-ordinator to the authors.

Project, as well as the financial consequences of such an allocation. [3] The rationality for most legal outsourcing is to reduce the cost of providing services by contracting this out to partners who can work for less, while delivering the same, or better, standards or quality of work. The model adopted by the Court differs from this in that the outsourcing partners must also self-finance their contracted obligations with the Court.[4]

In responding to the challenges of further developing the services of the Legal Tools, the Court deconstructed the Legal Tools into a series of tasks, before identifying appropriate specialists to complete these self-contained tasks, a process consistent with legal outsourcing patterns.[5] Over time, the allocation of tasks has evolved as the Tools have expanded and new partners with complementary competences have been recruited. To date, 15 agencies,[6] or outsourcing partners, contribute to the content development of the Legal Tools. The Court seems to have preferred universities or research institutes[7] that have demonstrable specialist expertise to undertake the individual tasks, or groups of tasks.

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3 Consider journals covering legal outsourcing. Within international criminal law outsourcing has been less well received, see for example: E.A. Baylis, "Outsourcing Investigations", 2009, in *Legal Studies Research Paper Series*, Working Paper No. 2010-20.

4 Emphasis added, Work on the Tools, available at http://www.legal-tools.org/en/work-on-the-tools/, last accessed on 21 November 2009.

5 Richard Susskind, *The End of Lawyers. Rethinking the Nature of Legal Services*, Oxford University Press, 2008, pp. 42–48.

6 The 16 Outsourcing Partners are: Institute of Informatics and Law, University of Saarland, Germany/European Academy of eJustice (EEAR); Norwegian Centre for Human Rights, University of Oslo, Norway (NCHR); International Research and Documentation Centre for War Crimes Trials, University of Marburg, Germany (IWCW); Human Rights Law Centre, University of Nottingham, United Kingdom (HRLC); Hague Institute for the Internationalisation of Law, Netherlands (HiiL); T.M.C. Asser Instituut, the Netherlands (Asser); Korea University School of Law, Soul, South Korea (KUSL); Witney R. Harris World Law Institute, Washington University, USA (WRHWLI); University of Goettingen (GAUG); UC Berkeley War Crimes Study Center (WCSC); University of Salzburg; University of Richmond (UoR); Canadian Centre for International Justice, the Human Rights Research Centre and the Faculty of Law of the University of Ottawa (Ottawa), Central and European Initiative for International Criminal Law and Human Rights (CEEI); and University Torcuato di Tella (UTDT).

7 With the exception of TRIAL, the Swiss-based NGO which functioned as a Legal Tools Partner from 2008 to 2010.

13.3. The Co-operation Agreement Model

Each outsourcing partner completes its work in accordance with a formal co-operation agreement held between the Office of the Prosecutor and the partner. Between 2005 and 2007, these co-operation agreements were supplemented by an 'Operational Annex' and the 'Legal Tools Advisory Committee Business Case'[8] which established some work standards to be adhered to by the outsourcing partners. Part I of these co-operation agreements establishes the general provisions of the agreement, while Part II sets out the specific tasks to be carried out by the partner. As part of its commitment to full transparency, the active co-operation agreements of each outsourcing partner are published on the Legal Tools Website.[9]

13.3.1. Part I: General Part

The object of the co-operation agreement and the partnership is identified as the "performance of co-operation activities related to the development and maintenance of aspects of the ICC Legal Tools".[10] It is concluded between the OTP, represented by the Head of the Legal Advisory Section and the relevant signatory of the outsourcing partner.[11] The outsourced tasks must be performed in close co-operation with the ICC, through the Legal Tools Project Co-ordinator, who shall ensure that the partner implements the agreement with adequate quality control mechanisms. The Co-ordinator is responsible for all interaction with the ICC for the

[8] Legal Tools Advisory Committee Business Case, ICC/CASD/ICT/2006/002-X, a copy is on file with the authors.

[9] ICC, "Legal Tools Co-operation Agreements", http://www.legal-tools.org/en/work-on-the-tools/co-operation-agreements/, last accessed on 12 November 2011.

[10] Para. 2, Co-operation Agreement with the Law School at the University Torcuato Di Tella, 3 October 2011.

[11] Overall responsibility for the Legal Tools Project currently rests with the ICC Prosecutor: the Legal Tools Project is listed as part of the programme objectives of the Prosecutor, where in 2008 it met 100% of its performance indicators and achievements. The relevant objective was states as, "Develop policies for implementing the quality standards specified in the Statute and the Rules of Procedure and Evidence with respect to all participants in proceedings and persons otherwise affected by the Court's activities, in a manner that is respectful of diversity. (SO 3)", in *Report of programme performance of the International Criminal Court for the year 2008*, ICC-ASP/8/7, p. 21.

purpose of ensuring that the partner receives adequate assistance and support from the Court.[12] The general duty of the Court is to "provide such guidance and advice to the Partner as may be necessary for the proper development and maintenance of the Legal Tools specified in Part II".[13] The partner organisation owes three key duties to the Court in executing the agreement:

i. Timeliness: co-operation activities should be conducted in a timely manner. The Court must be consulted immediately when any difficulty regarding timeliness may be encountered.
ii. Duty of care: the partner is required to exercise due diligence in protecting the interests of the ICC as the creator and developer of the Legal Tools Project, and is excluded from disclosing any part of the Legal Tools without the prior approval of the ICC.
iii. Duty of disclosure: full access to the information linked to the work processes of the partner must be provided to the Court, including its participation in compliance assessments by the Court.[14]

13.3.2. Duration, Termination, Modification and Dispute Settlement

The duration of each agreement varies but is limited to five years, with the possibility for extension, and can be terminated by either party following a written notice of 30 days.[15] Where the partner terminates the agreement prematurely, it is required to deliver all content developments and technical solutions that have been developed up until the point of termination. Modifications and additions to the agreement may be incorporated when a written request has been submitted, and no objection has been made within 30 days of the receipt of the written request. This clause allows for the maintenance of work flow without undue delays.

Should a dispute arise, both parties are required to find an amicable solution before moving to conciliation, which will be held under the United Nations Commission on International Trade Law (UNCITRAL) Conciliation Rules. Resort to arbitration must follow UNCITRAL

[12] Para. 9, Co-operation Agreement with the Law School at the University Torcuato Di Tella.

[13] Para. 7, *ibid.*

[14] Para. 6, *ibid.*

[15] Paras. 4–5, *ibid*.

Arbitration Rules, according to which the arbitration award forms the final adjudication of the dispute.[16]

13.3.3. Ownership and the Right to Use Intellectual Property

Perhaps the most contentious component of these co-operation agreements is automatic accrual to the ICC of the intellectual property of the contents and technical solutions developed by the partner in the course of the agreement.[17] The ICC has typically preferred to select university research institutes as project partners, and yet many universities are ill-disposed to allocating its intellectual property rights to an external body. Generally, universities retain ownership over the intellectual and material property arising from any research activity; faculty members and other university employees usually sign an employment agreement to this effect. The automatic accrual of intellectual and material property to the Court resembles industry-sponsored research, where the industrial sponsor has invested substantial financial resources and technology into the research activity. In many instances it can be argued that by developing the Legal Tools Project (primarily the Legal Tools Database and the Case Matrix), the Court has made a substantial technological investment to which the partners simply add documents. The loss of intellectual and material property has, on occasion, been a contentious subject during negotiations with research institutes, primarily as the ICC does not provide any payment for these goods. A central concern of many universities when entering into industry-sponsored research is a fear that the research results will remain a "trade secret" and not come to the attention of the larger public. In the case of the Legal Tools, this fear is mitigated as the free and public use of research material is clearly stipulated in co-operation agreements and as the Legal Tools are made freely available to the public. For example, the renewed agreement between the ICC and the Norwegian Centre for Human Rights states that "the ICC commits itself to have published

[16] Para. 13, *ibid.*

[17] Para. 10, *ibid.*

documents collected by the NCHR for the Legal Tools Project free of charge to the general public through the ICC Legal Tools website".[18]

13.3.4. Part II: Division of Activities

The second part of each co-operation agreement establishes the specific tasks that each partner bears responsibility for, in particular the collection and registration of documents relevant to their work on the Legal Tools Database. As can be seen in Table 2, most platforms, or folders, have more than one partner working on it, based upon the specific tasks of the relevant co-operation agreement.

While many of the task-based activities stated in the co-operation agreements are of a more technical than substantive legal nature, the outsourcing partners have made substantive contributions to the Legal Tools Project, for example, by schematising legal keywords into the Codebooks in the work on the National Implementation Legislation Database (NILD),[19] by participating in restructuring the framework of the Digests, and by contributing to the Court's work on the Project's keywords and metadata.[20]

See Table 1: Outsourcing Partners responsibilities, at the end of this chapter.

13.4. The Legal Basis for Outsourcing Work on the Content of the Legal Tools

The Legal Tools Project is controlled by the ICC OTP, who acts as signatory to the co-operation agreement concerned. While the Prosecutor is provided with both a duty and power to conclude co-operation agreements under article 54(3)(c) and (d), this is not a likely legal basis for the Legal Tools partner agreements. These two sub-paragraphs allow

[18] Agreement section 13, available at http://www.legal-tools.org/uploads/media/081015_LT_CA_NCHR_renewed__countersigned.pdf, last accessed on 21 December 2009).

[19] Two core documents would be the Codebook on Keywords and the Framework for State Level Overviews. See O. Bekou, "Building Databases for the ICC Legal Tools Project: Data Structures and the National Implementing Legislation Database", chapter 8 in the present volume.

[20] See F.C. Ecklemans, "Taxonomy by Consensus: The ICC Keywords of the Legal Tools", chapter 7 in the present volume.

the Prosecutor to seek the co-operation of, and form agreements with, international organisations that are in accordance with the competence of the external body and consistent with the ICC Statute. It has been used by the Prosecutor to conclude a Co-operation Agreement with INTERPOL to facilitate their the organisation's co-operation with the Court as well as to establish a formal route for the Prosecutor to seek additional information during preliminary examinations.[21] However, the textual meaning of article 54(3)(c) and (d) would need to be stretched in order to reflect the legal status of the outsourcing partners as the Statute provides authority to co-operate only with States or intergovernmental organisations. While the majority of the partners are public universities that receive significant funding from State institutions, they hold separate legal personality from such institutions. Second, the agreement is intended to facilitate the co-operation of a State, intergovernmental organisation or person within the context of investigations by the OTP. While the purpose of the Legal Tools Project clearly includes the investigative phase of the Prosecutor's work, the object of these co-operation agreements is more specific and is limited to the development and maintenance of aspects of the Legal Tools Project, without any reference to any phase of the Prosecutor's work. It is therefore more plausible to locate the co-operation agreements within the general powers of the Prosecutor, under article 42(2) where the Prosecutor is provided with full authority over the management and administration of his Office.[22]

13.5. Co-ordination of the Outsourcing Partners

Under paragraph 9 of these co-operation agreements, the ICC delegates the co-ordination of the Legal Tools to the Legal Tools Project Co-ordinator, Morten Bergsmo.[23] The Co-ordinator is in regular contact with the partners, depending on their need for supervision and support.

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[21] ICC Office of the Prosecutor and Interpol, *Co-operation Agreement between the Office of the Prosecutor of the ICC and INTERPOL*, 22 December 2004.

[22] Article 42(2).

[23] Consisting of representatives of all Organs of the Court, it is well situated to draft policy instruments, but to a lesser degree equipped to provide day to day guidance on content development. In addition, a Legal Tools Expert Advisory Group provides expert advice and input into the conceptual design and development of the Project.

In the initial two years of outsourcing, the partners operated in relative isolation of each other, according to their co-operation agreements, and with limited contact with other partners. The Co-ordinator encouraged co-operation between the partners and the formation of a network. During this period, two outsourcing partners hosted public conferences that addressed current questions faced in the context of the Legal Tools Project.[24] Working meetings of the Legal Tools partners took place alongside the conference, providing the first opportunity for all partners to meet and exchange work experiences. It quickly emerged that the formation of a multi-partner operational network could enable more effective communications, problem solving and team building for the Project's lawyers, who often worked on shared tasks or experienced similar work flow patterns, but were spread over a wide geographical area with different technical competences and requirements.

13.5.1. The Network of Legal Tools Outsourcing Partners

The Network seeks to facilitate inter-partner communication in support of the collective and individual obligations set out in co-operation agreements as well as ancillary or spin-off projects which partners may seek to collaborate on. In the first two years, voluntary co-ordinators from the outsourcing partner's staff oversaw the development of the Network.[25] It sought to establish joint Legal Tools internships or fellowships to facilitate the tasks of the outsourcing partners, periodic working meetings, hosted by one of the outsourcing partners, and conferences or seminars to contribute to the further development of the international profile of the Legal Tools Project. In addition, a blog was created to enable the external communication of Legal Tools activities and to allow the advertisement

[24] These were *The ICC Legal Tools Programme of the Norwegian Centre for Human Rights and the broader ICC Legal Tools Project*, hosted by the Forum for International Criminal and Humanitarian Law and the Norwegian Centre for Human Rights (University of Oslo), 27 September 2007; informal meetings on the Legal Tools with members of the Legal Tools Expert Advisory Group, University of Oslo, 28 September 2007; *The ICC and the State* conference, 9 November 2007, convened by the University of Human Rights Law Centre and followed by a Legal Tools partners meeting, 10 November 2007.

[25] Nov 2007 to April 2008 - Christian Ranheim, Norwegian Center for Human Rights; May 2008 to November 2008- Emilie Hunter, Human Rights Law Centre; December 2008 to present- Christian Ranheim, Norwegian Center for Human Rights

of internships or short-term fellowships in support of the Legal Tools Project as well as other collaborative exchanges and visiting lectures.[26]

The largest collaborative effort carried out by the Network to date has been the registration of complete metadata for documents collected by the Court prior to the adoption of the ICC Metadata Manual. Co-ordinated by the Norwegian Centre for Human Rights, a total of 52 interns, drawn from the European outsourcing partners, were trained and supervised in the completion of metadata registration of 32,000 documents in the four months between November 2008 and February 2009.[27]

In April 2009, an expanded version of the Legal Tools Database was published on the Legal Tools Website[28] followed shortly afterwards with the public launch of the Case Matrix Network, an independent platform used by the Legal Tools Project Co-ordinator to administer the co-ordination of the Legal Tools and to disseminate information on the Case Matrix, a law-driven case management and legal information application, to current and potential users outside of the Court.[29]

13.5.2. Internal Network Communications

Since 2008, five international meetings of Legal Tools Project team members have taken place.[30] The meetings are convened by the Legal Tools Project Co-ordinator. They have been operational in nature, seeking

[26] http://legaltoolspartners.wordpress.com/, last accessed on 26 November 2009 (no longer available).

[27] Each participating intern received a letter of reference jointly signed by the directors of all participating outsourcing partner institutions.

[28] Available here http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Legal+Tools+Extern/ by selecting the Legal Tools button, and widely publicized through the websites of the outsourcing partners, listservs, blogs, including http://www.huridocs.org/involved/open-list/archive/2009/05/1242650853522/forum_view and http://internationallawobserver.eu/2009/05/27/new-version-of-the-icc-legal-tools/, last accessed on 21 November 2009.

[29] See http://www.casematrixnetwork.org/purpose/, last accessed on 21 November 2009.

[30] ICWC, Marburg, May 2008; University of Saarland, Saarbrücken, June 2008; HiiL, November 2008; the European University Institute, Florence, November 2010, convened by the Legal Tools Co-ordinator and hosted by Professor Giovanni Sartor, member of the Legal Tool Expert Advisory Group, and May 2011, convened by the Legal Tools Co-ordinator and hosted by Professor Martin Scheinin of the European University Institute.

in part to provide the partners with a working environment in which to consider and resolve specific aspects relevant to the completion of the tasks outlined in the respective co-operation agreement as well as to consider further developments to the Legal Tools.

Outside of operational meetings, partners communicate through closed forums as well as Skype and other instant message services. As an international network of outsourcing partners, who bear overlapping responsibility for document collection and entry, the day to day sharing of work processes and other information by each partner and the securing of equal access for everyone to relevant information is a challenge. The partners have found ways to reduce travel, office and other operational costs, although there continues to be a need for occasional Legal Tools Project team meetings, given the complex and shared nature of the work involved.

13.5.3. Conferences and Seminars

The outsourcing partners have been invited to participate in a number of presentations of the Legal Tools Project, alongside the Project Co-ordinator and other representatives of the Court. These activities include:

- COJUR, the Working Party on Public International Law of the European Council, May 2008 (facilitated by the EU Focal Point on the ICC);
- States, Assembly of States Parties, November 2008 (sponsored by the Governments of Austria, Germany, the Netherlands, Norway, Switzerland and the UK);
- NGOs, Assembly of States Parties, November 2008 (hosted by the Coalition for the International Criminal Court);[31]
- States and NGOs, ICC Review Conference, Kampala, June 2010; and
- ICC Assembly of States Parties, December 2010.

[31] The Legal Tools Project Co-ordinator requested the University of Nottingham Human Rights Law Centre to assist with the organization of these meetings, as part of a further project, the *ICC Legal Tools and the European Union: towards a successful partnership*. See http://www.nottingham.ac.uk/hrlc/documents/projectsummaries/pdfs/projecticclegaltoolsandtheeu.pdf, last accessed on 15 December 2009.

Since 2009, the Legal Tools Project Co-ordinator hosts the common meetings and actions of Legal Tools team members directly, rather than acting through the Network of outsourcing partners or individual partners. The Project's Co-ordination capacity was strengthened by a financial contribution of the European Union to the ICC Legal Tools Trust Fund. This will reduce the role of the Network of outsourcing partners in the years to come.

13.6. The Legal Tools Database: an Electronic Knowledge Platform for International Criminal Justice

Unlike other web-based legal libraries, including Westlaw, LexisNexis and HeinOnline, the Legal Tools Database is made available free of charge to its users. Rather than following a profit-seeking business model, it has adopted a not for profit model that can provide a stable "one stop" repository of all relevant documentation for the practice of international criminal law, one that is free at the point of access. Its comprehensive content distinguishes it from other existing efforts to provide free online catalogues of themes relevant to the practice of international criminal law.[32] Furthermore, users of the Database profit from its orientation as a tool provided by the ICC and the strict taxonomy,[33] quality standards,[34]

[32] ICRC Database on Customary International Humanitarian Law: http://www.icrc.org/customary-ihl/eng/docs/home and its previous efforts on national implementing legislation on international humanitarian law, ICRC Database on National Measures Implementing International Humanitarian Law; the DomCLIC Pilot Project of domestic jurisprudence relating to international crimes: http://www.haguejusticeportal.net/eCache/DEF/6/579.html; the subscription Oxford Reports on International Law which collates a variety of decisions on public international law from international law courts, domestic courts, and *ad hoc* tribunals; the International Humanitarian Law Research Initiative, a portal developed by the Harvard Program on Humanitarian Policy and Conflict Research, which provides a searchable database of links to current research, reference materials, and regional and international news on International Humanitarian Law: http://ihl.ihlresearch.org/; the T.M.C. Asser Institute's bibliography on international humanitarian law: http://www.asser.nl/index.htm; the Crimes of War Project provides summaries and essays on international humanitarian law issues without functioning as a database; the War Crimes Research Office (Washington College) provides a wide variety of internet links related to international humanitarian law, including jurisprudence and reports on international tribunals: http://www.wcl.american.edu/warcrimes/.

[33] S. Kim, "The Anatomy of the Means of Proof Digest", chapter 10 in the present volume; F. Eckelmans, "Taxonomy by Consensus: the ICC Keywords of the Legal Tools

technical construction[35] and search functions[36] that can be expected of a permanent international judicial institution.

By November 2011, the Legal Tools Database held over 52,000[37] documents relevant to the practice of international criminal law. In order that it can be properly searched and used, and so that users can find what they are looking for quickly and accurately, the documents have been entered, organised and stored in a database, referred to as the Legal Tools Database (LTD). Each registered document has a breadth of metadata registered with it when it is added to the LTD; this provides users with greater accuracy when searching for documents through the LTD search function and provides users with full references to the type of document. While documents can be searched through the search function, they are also accessible and organized through 12 tools, folders or platforms, listed in Tables 1 and 2. They appear as a map of folder-icons. From here the user can manually navigate through the folder structure in order to identify the documents required. The Elements Digest and the Means of Proof Digest are incorporated into the Case Matrix, which draws from the resources of most of the platforms and is made available to users who work on core international crimes cases, upon application. [38]

Project", chapter 7 in the present volume; V. Nerlich, "The Metadata Scheme of the Legal Tools Project", chapter 6 in the present volume.

34 O. Bekou, "Building Databases for the ICC Legal Tools Project: Data Structures and the National Implementing Legislation Database", chapter 8 in the present volume; C. Safferling, W. Form and L. Büngener, "Bringing Online World War II War Crimes Trial Documents", chapter 14 in the present volume.

35 R. and A. Hecksteden, "The Technical Construction of the Case Matrix", chapter 9 in the present volume.

36 A. Sidorenko, "Improving Legal Information Retrieval by the Online Legal Tools Database", chapter 11 in the present volume.

37 "Current Status of the Tools" available at http://www.legal-tools.org/en/current-status-of-the-tools/.

38 It has been acknowledged for its effort to "improve quality and transparency" for "lawyers, prosecutors, judges and other relevant groups who are responsible for international criminal proceedings". See "Case Matrix developers honored with the Dieter Meurer Förderpreis", available at https://www.edvgt.de/pages/dieter-meurer-foerderpreis-rechtsinformatik/dieter-meurer-foerderpreis-2008-english.php, last accessed on 16 December 2009.

Tools or Platforms of the Legal Tools Database		
Platform title	**Number of documents**	**Number of outsourced partners**
ICC Documents	11,272	1
ICC Preparatory Works and Rome Statute Amendments	9,028	1
International Legal Instruments	316	1
Internationalised Criminal Jurisdictions	1,359	2
Internationalised Criminal Judgements	15,158	3
National Jurisdictions	10,362	6
National Implementing Legislation (including the National Implementation Legislation Database (NILD))	332 (6,695 keyword level entries)	1
National Cases of Core International Crimes	1,893	7
Publicists	238	2
Human Rights Decisions	652	1
Other International Legal Decisions	1,750	1
Elements Digest (Case Matrix)	N/A	2
Means of Proof Digest (Case Matrix)	N/A	2

Table 2: Platforms, Current Status and Partners of the Legal Tools Database as of June 2011.

The outsourcing partners have been assigned responsibility for specific folders or subfolders in the Legal Tools Database. While this creates clear responsibilities for each partner, it can be challenging to ensure the uniform implementation of metadata and keyword registration as well as and document uploading. The work of the partners is subject to the overall supervision of the Project Co-ordinator. Earlier in the Project,

he drew on the considerable day-to-day assistance and technical co-ordination of outsourcing partner staff, in particular the Norwegian Centre for Human Rights. Adopted by the Legal Tools Advisory Committee on 17 October 2008, the 78-page Metadata Manual consists of 11 sections with detailed explanations on the content of all 76 metadata fields and a file naming and citation convention for application by each partner. Amendments to the Manual are made from time to time by the Committee and distributed to all Project partners. The Manual is an important co-ordination tool.

13.7. Funding the Legal Tools Scheme

By outsourcing the further development of content in the Legal Tools, the ICC has broadened and stabilised the capacity of the Legal Tools Project, while also reducing the cost and resources that such an endeavour would otherwise impose on the ICC. The Court justly describes the creation and maintenance of the Legal Tools as labour intensive, and that the intensity of labour goes beyond its resources as an "operational criminal Court".[39] It therefore does not make any financial contributions to or payments for the outsourced tasks: this is the responsibility of the individual partners. As the Legal Tools Project remains the property of the Court, and is made available at no cost to users, the partners must seek alternative sources of funding to complete their obligations. References and letters of support are provided by the Court when requested. A common courtesy practice has been encouraged whereby outsourcing partners should seek funds only from their own State's institutions or procedures, in order that States with a relevant grant scheme do not receive multiple requests for funding from different partners. While this provides partners with strong financial autonomy within their own national jurisdictions, they become subject to the strategic priorities of relevant national funders and are required to exert additional resources to secure funding. It has been a common practice to seek funding from State grant schemes rather than through research routes, but State grants are usually made for a maximum of one or two years at a time. Partners also remain vulnerable to the changing strategic priorities of State institutions.

The decision to have several outsourcing partners has limited the potential negative effects of donor reliability by distributing the responsi-

[39] Work on the Tools, available at http://www.legal-tools.org/en/work-on-the-tools/.

bilities to partners in different countries. In October 2011, the Legal Tools Project raised the number of partner institutions to 15. Additionally, much creativity and flexibility has been shown by some partners in the organisation and staffing of their work, sometimes completing co-operation agreement tasks on shoestring budgets.

13.8. Concluding Remarks

From the inception of the outsourcing scheme in 2005 to the present, a very significant effort has been made by a number of partner institutions around the world to ensure that the free Legal Tools add as much value as possible to the public. The number of document files in the Legal Tools Database has grown by more than 50% and the use of the Database has surged. It is estimated that around 170 people have directly contributed to the development of the Project since the introduction of outsourcing in 2005, combining legal and technical knowledge to provide a better online service to users.[40]

In conclusion, the Legal Tools Project has benefited from a strong, shared vision of the value that it could bring to the difficult, laborious and often painful process of international criminal justice and to our fundamental understanding of international criminal law more generally. This collective belief has often acted as a salve to the pressures we have outlined and has generated more common bonds than fractures. When such commitment is shared with precision and resourcefulness, the opportunities to further develop the operative networking of the Legal Tools Database, and to respond to new technological solutions, remain fertile.

[40] An informal estimation of the number of people who have contributed to the Legal Tools Project in a documented manner since its outsourcing.

	EEAR	NCHR	ICWC	HRLC	HiiL	Asser	IILIR	KUSL	WRHWLI	GAUG	WCSC	UoR	Ottawa[1]
Platform													
ICC Documents													
ICC Preparatory Works													
International Legal Instruments													
Internationalised Criminal Jurisdictions													
Internationalised Criminal Judgements													
National Jurisdictions													
National Implementing Legislation													

[1] See footnote 6 above for acronyms of the outsourcing partners.

National Cases of Core International Crimes													
Publicists													
Human Rights Decisions													
Other International Legal Decisions													
Element of Crimes Digest													
Means of Proof Document													
Metadata Registration													

Table 1: Outsourcing partners responsibilities.

14

Bringing Online World War II War Crimes Trial Documents

Lars Büngener,[*] Wolfgang Form[**] and Christoph Safferling[***]

14.1. Introduction

Traditionally, the main focus of legal practice and scholarship in international criminal law as concerns historical war crimes trials has been on Nuremberg – comprising the so-called "Trial of the Major War Criminals"[1] by the International Military Tribunal (hereinafter IMT), as well as the 12 American trials held in Nuremberg against specific groups of perpetrators, often referred to as the "Nuremberg Subsequent Trials".[2] Other than that, the International Military Trial for the Far East (hereinafter IMTFE), the so-called "Tokyo Trial", has gained some recognition, albeit not nearly as much as Nuremberg.[3]

This is despite the fact that quite a few judgments of post World War II trials held on the national level were published until the early

[*] **Lars Büngener** was a doctoral candidate, research associate and lecturer at the law faculty of the University of Marburg and the ICWC at the time of writing.

[**] Dr. **Wolfgang Form** teaches political science and conflict studies at the University of Marburg and is the Project-Coordinator of the International Research and Documentation Centre for War Crimes Trials (ICWC).

[***] Prof. Dr. **Christoph J.M. Safferling** LL.M. (LSE) teaches law at the University of Marburg, where he holds the Chair for Criminal Law, Criminal Procedure, International Criminal Law and Public International Law. He is the Executive Director of the ICWC at the University of Marburg.

1 *USA, France, UK, and USSR* v. *Hermann Goering et al.*; the (nearly) complete record of the proceedings can be found best at the website of the Library of Congress at http://www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html, last accessed on 4 January 2010.

2 *The Doctors' Trial*, the *Judges' Trial* and the *Einsatzgruppen Trial* probably being the most famous. Part of the documentation is also available online at the Library of Congress Website at http://www.loc.gov/rr/frd/Military_Law/NTs_war-criminal s.html, last accessed on 4 January 2010.

3 See on the IMTFE lately Totani, *The Tokyo War Crimes Trial*, Harvard University Press, 2008.

1950s. This applies to the 15 "Law Reports of Trials of War Criminals of the United Nations War Crimes Commission", in which 87 relevant cases were published, among which were also some of the already mentioned "Nuremberg Subsequent Trials".[4] Another major publication named "War Crimes Trials Vol. I – XI" was edited in the UK.[5] Some of the appeal decisions of the Supreme Court for the British Zone were also published.[6]

However, thousands of other "minor" trials took place against lower ranking defendants in many countries. It is estimated that from the first documented war crimes trial, the Kharkov Trial held in the Soviet Union in 1943,[7] until today more than 20,000 persons have been tried. Most of these cases are virtually unknown to the general public, or have been forgotten,[8] which is partially due to the fact that the respective documents are not publicly available.

Since its foundation in 2000 as a pilot project at the Max-Planck-Institute for European Legal History in Frankfurt am Main, Germany, it has been the primary goal of the International Research and Documentation Centre for War Crimes Trials (ICWC) to collect the historic heritage of war crimes trials held in the aftermath of World War II, and make it available to a broader public. Since the "major" trials mentioned above are generally well documented, the focus of the ICWC has been primarily on the "minor" trials.

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4 The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals*, Vol. I – XV, 1997, reprint William S. Hain & Co, Buffalo. They contain the reports of 28 British, 26 American, 11 French, seven Dutch, five Australian, four Norwegian, four Polish trials, as well as one Canadian and one Chinese trial, which were mainly held in Europe and the Far East.

5 Vol. 1 – *Peleus Trial*, Vol. II – *Belsen Trial*, Vol. III – *Gozawa Trial*, Vol. IV – *Hadamar Trial*, Vol. V – *Natzweiler Trial*, Vol. VI – *Falkenhorst Trial*, Vol. VII – *Velpke Baby Home Trial*, Vol. VIII – Double Tenth Trial; Vol. IX – *Dulag Luft Trial*, 1948ff, London, Edinburgh, Glasgow.

6 *Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen*, Bd. 1 bis 3, De Gruyter 1949–1950.

7 Trial in the Case of the Atrocities Committed by the German Fascist Invaders in the City of Kharkov and in the Kharkov Region, Moscow 1944, cited according to G. Ginsburgs, "The Nuremberg Trial: Background", in G. Ginsburgs and V.N. Kudriatsev (eds.), *The Nuremberg Trial and International Law*, Kluwer, 1990, p. 19.

8 See D. Cohen, "Öffentliche Erinnerung und Kriegsverbrecherprozesse in Asien und Europa", in C. Cornelißen *et al.* (eds.), *Erinnerungskulturen*, Fischer Taschenbuch Verlag, 2002, p. 51, at p. 52.

Since 2003, the ICWC has been situated at the University of Marburg, and was (re-)established as an independent research centre in 2008. Work is done by an interdisciplinary team of experts: the trial documents and files are collected, evaluated and, little by little, documented by making them available to the public. One major way of publication lies in the Legal Tools Project of the International Criminal Court (hereinafter ICC), of which the ICWC has been an outsourcing partner since 2006.

In the following we will elaborate on the practical use of historical war crimes jurisprudence in general, and the working methodology of the ICWC in particular, as regards the collection and evaluation of the files and documents as well as on the challenges faced within the work process and the transfer of the data into the Legal Tools Database.

14.2. The Relevance of the Trials

14.2.1. Relevance for Legal Researchers and Practitioners

More than 60 years after the completion of most World War II cases, it may be questioned whether they still warrant a specific interest for contemporary legal practitioners and researchers in the field of international criminal law.

As far as the UN *ad-hoc* Tribunals of the 1990s are concerned, the factual significance of these historical cases is obvious. The early jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) relied heavily on then available World War II jurisprudence;[9] but references can still be found well into the 2000s.[10] The

[9] See, above all, the Trial and Appeals Judgments against Duško Tadić, ICTY Case No. IT-94-1, the Trial Judgment in the case against Anto Furundžija ("*Lašva Valley Case*"), ICTY Case No. IT-95-17/1, as well as Zdravko Mucić *et al*. ("*Čelebići*"), ICTY Case No. IT-96-21, and many more, *passim*.

[10] See, for instance, *Prosecutor* v. *Milorad Krnojelac*, Appeals Judgment, ICTY Case No. IT-97-25, 17 September 2003, footnotes 36 *et subs*., making reference to the American *Trial of Martin Gottfried Weiss and Thirty-Nine Others* (*"Dachau Concentration Camp Trial"* Case 050-0002, National Archives Washington [NARA] Microfilm Series M-1174, roll 1–6) and the British *Trial of Joseph Kramer and 44 others* (*"Belsen Trial"*, Case #12, The National Archives, Kew, London [TNA] WO 235/12 - 23); or *Prosecutor* v. *Radislav Krstić*, Appeals Judgment, Partial Dissenting Opinion of Judge Shahabuddeen, ICTY Case No. IT-98-33, 19 April 2004, footnote 525,

Tribunal has been criticised for utilizing post World War II jurisprudence to discover customary international law.[11] While there is considerable merit in this criticism, part of it is based on the fact that post World War II jurisprudence was used selectively by the ICTY, which is, without doubt, the case. However, it must be noted that as a matter of course the ICTY judges could only rely on jurisprudence which was actually accessible at the time. Yet the available jurisprudence, as already noted in the introduction, was and remains until today only a very small portion of the jurisprudence that actually exists. At the same time, much of it was, and unfortunately still is, publicly available only in the form of summaries.[12]

However justified the general criticism of utilising World War II jurisprudence may be, it is fair to say that at least as far as selectivity is concerned, the only way to assess whether the allegation of selectivity is justified is to find out more about the legal practice of national States concerning World War II cases. The more we know about the legal practice of national courts with regard to cases involving core international crimes, the better we will be able to assess whether it was or still is justified to conclude that this practice in fact did constitute State practice as required for the recognition of customary international law. In any case, the legal arguments contained in the documents can serve as a source of inspiration for today's legal scholars and practitioners.

Lately another ambit of possible practical use of the historical jurisprudence has emerged before the Extraordinary Chambers in the Courts of Cambodia (ECCC), where alleged perpetrators of core international crimes committed during the Khmer Rouge regime, which was in power between 1975 and 1979, are being put on trial. It is estimated that up to more than two million Cambodians fell prey to the human rights abuses of the Khmer Rouge.[13] At the time of the alleged

citing the British trial held in Hamburg against *Bruno Tesch and two others* (*"Zyklon B Case"*, Case #71, TNA WO 235/83).

11 For a very poignant criticism of the use of post World War II jurisprudence and the methodology of discovery of customary international law by the ICTY, see in general A. Zahar and G. Sluiter, *International Criminal Law*, Oxford University Press, 2008, pp. 97 *et subs*.

12 For example, the above mentioned Law Reports of the UNWCC, see *supra* note 4.

13 For the different estimates, see B. Sharp, *Counting Hell: The Death Toll of the Khmer Rouge Regime in Cambodia*, available at http://www.mekong.net/cambodia/

crimes, no international criminal jurisdiction of any sort was in existence. Obviously, the ECCC cannot rely on the jurisprudence of the later *ad hoc* Tribunals; it is also problematic that the Additional Protocols to the Geneva Conventions only entered into force in 1978. If one is to discover any customary international law which was in force during the period of Democratic Kampuchea, it will have to be derived from post World War II jurisprudence. In January 2008, the ECCC therefore approached the ICWC in order to obtain part of their collection of case files, predominantly those which concern concentration camp-cases, since the Khmer Rouge also had a system of torture camps in place.[14] The specific interest in these cases is related to the question of whether and how crimes committed by subordinates can be attributed to commanders. Since both Cambodian and German law are rooted in the Continental European tradition,[15] a particular focus lies on German cases and the courts' practice as concerns models of co-perpetration in criminal systems, such as concentration camps hierarchies, within a macro-criminal context. Even if the ECCC should, in contrast to the ICTY, come to the conclusion that the World War II cases did not create customary international law which was in force in the 1970s, an evaluation of the legal arguments contained in the jurisprudence may still help the Chambers in deciding their own cases.

As a matter of fact, it must be admitted that the importance of World War II jurisprudence for forensic practice will decline over time. The *ad hoc* Tribunals have created a vast amount of case law of their own, and though the ICC is obviously not bound by any precedent set by the *ad hoc* Tribunals,[16] it is generally more likely to rely on the latter than on jurisprudence dating back 50 or 60 years ago. Other new *ad hoc* tribunals concerning crimes committed between the 1940s and 2002, like the ECCC, are not likely to be established.

deaths.htm, with further references. See also W. Form, "Justice 30 years later?", in *The Journal of Nationalism and Ethnicity*, December 2009, vol. 37, pp. 889–923.

[14] The most notorious being "S-21", also known as Tuol Sleng, where allegedly 14,000 people were killed and only seven survived.

[15] This is due to the fact that Cambodian law was heavily influenced by French law, Cambodia having been a French colony for about 90 years.

[16] See article 21 of the Rome Statute of the ICC.

The ongoing relevance of the documents for users of legal disciplines apart from (international) criminal law, such as legal historians, criminologists or sociologists of law, in turn, is obvious.

14.2.2. Relevance for Non-legal Disciplines

Almost needless to say, researchers in other fields, such as historians, sociologists or political scientists, prove to have a continuing interest in this field. The anniversaries of the Nuremberg Trials and the Genocide Convention as well as the UN Charter and the Universal Declaration of Human Rights, all of which in their way were reactions to the atrocities committed in World War II, together with the creation of the *ad hoc* Tribunals and the implementation of the ICC, have evoked renewed interest and a considerable amount of new research on World War II and the world's reaction to it, since oftentimes the first access to research on the crimes committed in World War II is provided by the factual findings of the courts established in its direct aftermath as reflected in the case files.[17]

14.3. Obtaining and Reproducing the Documents

As mentioned above, the ICWC has the overall goal of finding, reproducing, systematising and making available resources related to judicial reactions to atrocities committed in World War II. The trials were mostly held by the Allies, which is why most documents are to be found in the archives of the respective countries. During the years since its establishment, researchers of the ICWC have obtained a considerable amount of case files from all over the world, be it reproductions of documents provided to the ICWC by the archives, or, more predominantly, documents personally collected by researchers of the ICWC. The following table lists the estimated total numbers of existing cases.

[17] See lately J. Finger, S. Keller and A. Wirsching (eds.), *Vom Recht zur Geschichte*, Vandenhoeck und Ruprecht, 2009.

Australia [I, V]	more than 900
Belgium [II]	75
Canada [V]	4
China [V, VIII]	about 880
Czechoslovakia [XI]	several thousand
Denmark [III]	80
France (including French Zone of Occupation) [V, IV]	over 3,500
French Indochina	196
Germany [V, X] (British & French Zone)	over 2,000
Greece [V]	13
Italy [V, IX]	about 20
Norway [V]	96
Netherlands in Europe [V, VI]	240
Netherlands in East India [V, VIII]	over 1,000
Poland [V, VII]	about 5,000
Philippines [VIII]	169
Soviet Union	several thousand
United Kingdom (worldwide) [V]	about 2,000
USA (worldwide) [V]	about 3,600
Yugoslavia [XII]	835
International Tribunals (Nuremberg, Tokyo)	24 + 28

[I] D.C.C. Sisson, The Australian War Crimes Trials and Investigations (1942–51), p. 20, available at http://socrates.berkeley.edu/~warcrime/documents/Sissons%20Final%20War%20Crimes%20Text%2018-3-06.pdf .

[II] P. Lagrou, "Eine Frage der moralischen Überlegenheit? Die Ahndung deutscher Kriegsverbrechen in Belgien", in N. Frei (ed.), *Transnationale Vergangenheitspolitik*, 2006, Wallsteinverlag, (hereinafter N. Frei), pp. 326–350.

[III] K.C. Lammers, "Die Kriegsverbrecherprozesse gegen Deutsche in Dänemark", in N. Frei (ed.), *op. cit.*, pp. 351–69.

[IV] Archives de Colmar (France) record group AJ 3629 No. 96/4774.

[V] Database ICWC.

[VI] C. Rüter and D. de Mildt, available at http://www1.jur.uva.nl/junsv/NED/NL-Uebersicht.htm; Database ICWC.

[VII] W. Borodziej, "Hitleritische Verbrechen", Die Ahndung deutscher Kriegs- und Besatzungsverbrechen in Polen", in N. Frei (ed.), *op. cit.*, pp. 399–438, p. at 431.

[VIII] P.R. Piccigallo, *The Japanese on Trial*, University of Texas Press, 1979, p. 264.

[IX] F. Focardi, "Das Kalkül des "Bumerangs". Politik und Rechtsfragen im Umgang mit deutschen Kriegsverbrechen in Italien", in N. Frei (ed.), *op. cit.*, pp. 546–547.

[X] W. Form, "Justizpolitische Aspekte west-alliierter Kriegsverbrecherprozesse 1942–1950", in L. Eiber, R. Sigel (ed.), *Dachauer Prozesse*, Wallstein Verlag, 2007, p. 58.

[XI] K. Kočová and J. Kučera, "Sie richten statt unser und deshalb richten sie hart": Die Abrechung mit deutschen Kriegsverbrechen in der Tschechoslowakei", in N. Frei (ed.), *op. cit.*, pp. 438–473, at 454.

[XII] German Federal Archives, Koblenz, record group B 305 No. 416.

Usually the case files are to be found in the national archives of the countries concerned, and not in those of the entities which were responsible for the trials themselves (an exception being Italy and some others). However, the possibilities and ways of getting access to them differ significantly. Furthermore, the applicable rules and laws for privacy protection as well as archive policies vary, making access to the files and their reproduction oftentimes challenging. The same holds true for permissions of publication.

In Germany, for example, documents containing personal data are only freely accessible 100 or 110 years after the death of the person concerned. However, there are exceptions, especially for research purposes. The ICWC has fortunately been allowed to access all German documents, albeit, up to now, with limitations as to their publication. Other countries are less strict as far as their archives are concerned, such as the USA, the UK and Australia. In these countries, official documents (excluding classified information) can usually be accessed and reproduced after 30 years. France in the 1990s issued a 100-year confidentiality clause concerning all war crimes cases, which fortunately was attenuated in 2009. As to the Soviet documents, almost all of them are in the State Archive of the Russian Federation (GARF). They are openly accessible; the possibility of their reproduction, however, is quite limited, making their transfer to the ICWC and the Legal Tools Project difficult. In some cases, reproductions of documents can be obtained from other archives, such as that of the United States Holocaust Memorial Museum (USHMM), where researchers of the ICWC were able to find, in addition to several Soviet files, some Chinese cases. The situation in the

Netherlands poses yet another challenge: here the documents can be accessed and reproduced, albeit only if it can be shown that the person concerned is already dead. Even though there are relatively few Dutch cases (240 defendants), it can be quite complicated to find out and prove the date of death for each of the persons concerned.

It is also not always easy to identify the relevant record groups within the archives. In this regard, the British National Archives set a very good example by filing all relevant war crimes trials documents under a specific unit, the "War Office" (WO No. 235). Other countries, however, have different classification systems, such as by regions or even continents. This can obscure the search for documents. Sometimes the classification systems have also changed over time. Without a specific finding aid, the process is particularly time-consuming.

If access to the archives is granted, and if one has identified the relevant documents, the reproduction of the files poses the next challenge. Privacy laws can impede this stage of the procedure as well; it is also not always possible to reproduce the documents personally. An exceptionally positive example in this regard is the National Archives of Australia, which decided to digitise all relevant documents and make them publicly available on the Internet.[18] This example, however, is unique. In some other archives it is possible to personally reproduce the documents digitally. Other archives require the user to specifically order the desired files as digital copies without easily allowing personal reproduction in the first place. While this has some disadvantages, it can on the other hand prove to be cost-effective. By the mentioned means, the ICWC has collected more than 400,000 digital pages in the last four years. In some instances, the researchers can also rely on microfilms which the archives used to produce until recently. Copies of these films can be produced easily and in little time. At the ICWC, particularly for their inclusion in the Legal Tools Database, they need to be digitised, which is done by student assistants.

14.4. Systematisation and Transferral into the Legal Tools Database

The systematisation of the documents and their metadata poses one of the biggest challenges in the process of making these documents available online and transferring them to the Legal Tools Database.

[18] See website of the National Archives of Australia at http://www.naa.gov.au/.

14.4.1. Procedural Differences

For the time being, the most time-consuming challenges are, without doubt, the ones rooted in differences in legal procedures. As for other outsourcing partners dealing with national cases, it is often difficult to categorise these historical documents because they come from different jurisdictions and thus different procedural systems.

Firstly, there is generally a considerable difference between documents from military and civil jurisdictions. Judgements coming from military jurisdictions very often do not contain any relevant judicial information, but rather only state whether the defendant was found guilty or not, and the imposed sentence. Nevertheless, from files of military jurisdictions other documents can be extracted, such as the "reviews and recommendations" in which the prosecuting authority summarises the case and recommends to the confirming officer whether to confirm or not to confirm the verdict reached by the military court.[19] Typically the files also contain trial transcripts, which may be interesting for the Database, even though it is time-consuming to extract legal information from them, which is sometimes contained in the briefs and the oral statements of the parties. Case files from civil jurisdictions, on the other hand, generally set out legal information which is more straightforward, contained in court opinions and trial briefs. However, the extent of the reasons given for these judgments also varies significantly.[20] Generally, it appears that much more military trials were held than civil ones.[21]

Additionally, the files concerning World War II cases involve different national and international(ised) jurisdictions. For one, this poses a language problem. While the human resources of the ICWC can deal with English and German documents, many documents are in French,

[19] In military jurisdictions, the verdict reached by the court must generally be confirmed by a military officer, who is not a member of the court and was not present at trial; oftentimes this officer is not even a lawyer (neither are necessarily the judges of the military court).

[20] Comparing, for instance, judgements of the Dutch Special Courts for War Crimes with those of German or Norwegian courts, which tended to be more elaborate.

[21] All of the main Allies and some other countries relied exclusively on military courts. Civil courts were used in Poland, Norway, Germany, Czechoslovakia and a few other countries. The Netherlands implemented both military and civil courts.

Russian or Chinese.[22] The language problem, however, is followed and deepened by the differences of procedural systems of various countries, which create "types" of documents for one procedural system which are unknown to other jurisdictions. This is particularly relevant for the categorisation of the documents within the Legal Tools Database. While the metadata scheme of the Legal Tools Database is relatively "open" and thus "entry-friendly", it is important to keep the nomenclature consistent in order to keep the database sensibly searchable ("user-friendly") by users who are not proficient in a certain foreign legal system.

14.4.2. Structural and Technical Challenges

Another type of challenge posed in the process of bringing online these historical documents, particularly within the Legal Tools Project, can be described as "structural" or "technical". Since the beginning, the ICWC has, for its own database, developed, maintained and partially adjusted its own metadata scheme in order to systematise the metadata of the documents. Later on, when the ICWC became an outsourcing partner of the Legal Tools Project, the metadata scheme of the Legal Tools Database had to be adopted; and it is a constant challenge to synchronise the two schemes, also because the Legal Tools metadata scheme has been amended several times for other reasons.

The aim of the ICWC's database is, to a large extent, different from the one of the Legal Tools, as the "target group" of the ICWC are not only lawyers, but also, to a large extent, historians, political scientists and sociologists. This different aim, as a matter of course, is also reflected in the metadata scheme of the ICWC. The sentence, for instance, is of secondary importance for legal users, since they will generally be more interested in the legal arguments exchanged at trial and in the trial briefs. A historian, on the other hand, will be interested to know what sentencing practice a given court had for specific crimes at a specific time, the kind of social background which the perpetrators came from, how old the perpetrators generally were, or who their victims were.

Also, and perhaps more importantly, the ICWC's database is structured by archive records, "trials", persons and courts, whereas the

[22] The French "language problem" has been solved by a new staff member who joined the ICWC at the beginning of 2010. Quite a few documents in the possession of the ICWC, however, are also in other "exotic" languages, such as Dutch or Estonian.

Legal Tools Database is structured by single documents. In the ICWC's database, the user gets "from" the search regarding a person, court, or certain trial "to" a document; however, the document as such was originally not *per se* findable in the database. In the Legal Tools Database, in turn, the basis of the database is the document, for which metadata is entered. As was mentioned above under "digitisation" of the documents, at the ICWC, you would originally only arrive at a (more or less) complete case file and not at a certain document within this file, which is why the case files have to be 'taken apart' and transformed into single documents, such as judgments, decisions and trial briefs.

Another frequent challenge is the implementation of differing or incomplete naming conventions that need to be adjusted (for example, regarding case names, which are uncommon in many jurisdictions). This holds true especially for resources which are interrelated and thus have overlapping metadata, particularly if they pertain to the responsibility of different outsourcing partners. Finding consistent and universal standards remains a constant issue.

While the structural differences have caused and continue to cause challenges, it would, on the other hand, be a waste of resources and raise the risk of errors in the registration of the metadata if one were to keep the two databases separate, given the fact that the ICWC's database does contain a considerable part of the information relevant for the Legal Tools Database. For the same reasons of effectiveness and lowering of the error rates, and in order to maintain the searchability of the database, it is constantly necessary to automatise as many metadata entries as possible, both within the ICWC's database and in the transmission process to the Legal Tools Database. The "translation" of the ICWC's metadata into the metadata scheme is thus indispensable. The Institute for Legal Informatics at the University of Saarbrücken has been of immense help in this regard.

14.4.3. The Legal Content

Thirdly, it is generally difficult and time-consuming to systematise the substantive legal content of the documents. It is of very limited help for the "general user" of a database to only know the metadata of a certain document – the title usually contains no information whatsoever on the relevance of the legal content of the resource. Modern jurisprudence is

generally digitally searchable, and thus can be easily "scanned" for relevant keywords. The vast majority of the historical documents, in turn, can, for the time being, not be satisfactorily treated with OCR[23]-software. The quality of both the paper and the typing is oftentimes poor; moreover, quite a few of the historical documents are in handwriting or contain handwritten notes or amendments. It is therefore necessary to actually *read* the documents in order to be able to assess the relevance of their legal content. Needless to say, proficiency in substantive and procedural law (and legal history) is required to do this properly.

The process of assigning keywords to the documents is only in its infancy. In the future, this will be by far the most demanding aspect of the systematisation of the historical documents. It must be hoped that the technical resources available will improve over the next years.

14.5. Conclusion

Summing up, it has been shown that bringing online World War II related documents indeed makes sense, since they, while arguably not establishing customary international law, nevertheless constitute an important, and, in some cases, hardly dispensable source for modern practice in international criminal law, particularly on the national level. They are thus of considerable interest to legal practitioners dealing with macro-criminality in general. The interest of non-legal scholars in these historical documents is even more obvious. At the same time, the challenges faced in the collection of these documents and bringing them online in a sensible way are many. They "multiply" those generally faced by historians with those faced by lawyers. The process is therefore complicated and time-consuming, and the necessary expertise is not easy to find. However, it is worth the effort.

[23] "Optical Character Recognition".

PART III:
THE LEGAL TOOLS AND PRACTICE

15

The In-depth Evidence Analysis Charts at the International Criminal Court

Olympia Bekou[*] and Morten Bergsmo[**]

In December 2010, the President of the International Criminal Court (ICC) in his address to the 9th Session of the Assembly of States Parties emphasised the measures taken within the Court to enhance the efficiency of judicial and investigative proceedings. In particular, the President remarked:

> In 2008, the Pre-Trial Chamber introduced an innovative legal tool called the in-depth analysis chart. It directs the Prosecutor to link every piece of evidence with a specific element of the crimes and mode of liability as contained in the charges, making the review of evidence more efficient and enabling the judges to organise the presentation of evidence in an expeditious manner.[1]

The introduction and use of in-depth analysis charts by the ICC as a modality of disclosure as well as organisation and communication of evidence within the Court, represents a significant development not only in terms of advancing the expediency and efficiency of judicial activities, but also in ensuring that the rights of the accused are properly respected. This chapter will focus on an analysis of the relevant ICC jurisprudence

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[*] **Olympia Bekou** is Associate Professor and Head, International Criminal Justice Unit, Human Rights Law Centre, University of Nottingham and Senior Advisor, Case Matrix Network. I am indebted to Hemeeni Mistry for her research assistance and contribution to earlier drafts. All errors or omissions remain those of the authors alone.

[**] **Morten Bergsmo** is Visiting Professor, Georgetown University; Visiting Fellow, Stanford University; Senior Researcher, University of Oslo; and Consultant to the International Criminal Court (Legal Tools Project Co-ordinator). He was formerly Senior Legal Adviser and Chief of the Legal Advisory Section of the ICC Office of the Prosecutor (2002–2005) and Legal Adviser in the Office of the Prosecutor for the International Criminal Tribunal for the Former Yugoslavia (1994–2002).

[1] Statement by Judge Sang-Hyun Song, President of the ICC, 'Remarks to the Assembly of States Parties 9th Session' (6 December 2010), available at: http://icc-cpi.int/iccdocs/asp_docs/ASP9/Statements/ICC-ASP9-statements-SangHyunSong-ENG.pdf, last accessed on 11 November 2011.

on the use of in-depth analysis charts which will demonstrate that this development has the potential to revolutionise the manner in which investigations and prosecutions of core international crimes are conducted by providing an efficient and logical methodology upon which to structure a case.

15.1. The Pre-Trial Phase before the ICC

The pre-trial phase before the ICC, particularly the process before the Pre-Trial Chambers, represents a *sui generis* regime in international criminal procedure.[2] Unlike the *ad hoc* Tribunals where the Trial Chambers engage in some limited 'pre-trial' functions (such as organising status conferences and hearing preliminary motions) that do not constitute a distinct stage in proceedings,[3] the regime set forth in the Rome Statute and the ICC Rules of Procedure and Evidence delimits distinct stages in the proceedings before the Court, and allocates specific functions to that effect. Evidence of this can be found in the provision of three different evidentiary thresholds depending on the stage of proceedings and the purpose of the proceedings in question.[4] Against this background, one of the key tasks before the Pre-Trial Chambers in early cases before the Court has been to elaborate upon and delimit the appropriate functions and duties of the Chambers. Pre-Trial Chamber III has identified the key functions of the pre-trial (that is, pre-confirmation hearing) phase as 'ensuring the efficient organisation of the confirmation hearing, in determining whether or not to send the case to trial and in facilitating the conduct of

[2] K. Ambos and D. Miller, "Structure and Function of the Confirmation Procedure Before the ICC From a Comparative Perspective" in *International Criminal Law Review*, 2007, vol. 7, p. 335; On the 'internationalization of criminal procedure' evidenced in the RPE adopted by the ICTY judges, see O-Gon Kwon, "The Challenge of an International Criminal Trial as Seen From the Bench" in *Journal of International Criminal Justice*, 2007, vol. 5, p. 360, at p. 361.

[3] W.A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda, and Sierra Leone*, Cambridge University Press, 2006, pp.403–407.

[4] W.A. Schabas**,** *The International Criminal Court: A Commentary on the Rome Statute,* Oxford University Press, p. 740. On the different functions and the possible implications upon the duplication of activities by the Trial Chambers and the PTCs given the fundamental differences in objectives behind the Confirmation Hearing and the Trial, see K. Gibson and C. Lussiaà-Berdou, "Disclosure of Evidence" in K.A.A. Khan, C. Buisman, and C. Gosnell (eds.), *Principles of Evidence in International Criminal Justice*, Oxford University Press, 2010, at pp. 353 and 370.

the trial if the charges are confirmed'.[5] Whilst each stage of the proceedings are at least in principle distinct, the successful implementation of an appropriate pre-trial disclosure and evidence-organisation regime is crucial to the integrity of the trial proceedings before the ICC as a whole. When understood in this light, the introduction of innovative new methodologies by the Pre-Trial Chambers illustrates the development of a broader culture of dynamism in and around the Court.[6]

The introduction of 'in-depth analysis charts' is part of a broader engagement with questions of pre-trial disclosure and evidence organisation, which the Chambers are addressing alongside the questions of *how* evidence should be disclosed, *what* should be disclosed, to *whom*, and *when*.[7] In the absence of a system of precedent in international criminal law, an analysis of the emerging body of disclosure and evidence jurisprudence from the different Chambers, of which the submissions by both the Office of the Prosecutor (OTP) and defence counsel are important contributions, provides a useful mechanism to address many of these fundamental issues. As Klamberg notes, international criminal procedure represents a system of interrelated rules, 'all in order to serve overlapping objectives found at a deeper level of the law' and that 'the law is an expression of competing objectives'.[8] Accordingly, when the judges of the ICC Pre-Trial Chambers have acted in their judicial role when pronouncing upon matters of evidence disclosure and organisation[9], they too have

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5 *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-55, "Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties", 31 July 2008, at para. 5.

6 I. Bonomy, "The Reality of Conducting a War Crimes Trial" in *Journal of International Criminal Justice*, 2007, vol. 5, p. 348 at p. 351: "The judges of the ICC are in the fortunate position, while their active case-load is so light, of having time to devise procedures, which will ensure that trial chambers have adequate powers of judicial control over the proceedings to ensure that they are focused and conducted expeditiously".

7 On 'who, what, when, why' characterisation of the disclosure theme, see H. Brady, "Disclosure of Evidence", in R.S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, New York, 2001, p. 404.

8 M. Klamberg, "What Are the Objectives of International Criminal Procedure? Reflections on the Fragmentation of a Legal Regime" in *Nordic Journal of International Law*, 2010, vol. 79, p. 279 at pp. 280–281.

9 G.-J.A. Knoops, *Theory and Practice of International and Internationalized Criminal Proceedings*, Kluwer International, Deventer, 2005, p. 325.

been guided by the underlying objectives behind the international criminal justice enterprise. Given these implications, the introduction of new modalities of evidence disclosure and organisation demands close attention.

The procedures for the organisation, disclosure and presentation of evidence lie at the heart of the quality of criminal proceedings.[10] Shah writes that '[h]ow justice is dispensed with has a profound effect on the realisation of human rights'.[11] Consequently, the questions that have been raised in the ICC jurisprudence on evidence disclosure, namely the determination of those questions of *what, when, who* and *how*, will play an important part in shaping the nature of the justice that the ICC embodies. Governing the flow of information between the parties and Court, the disclosure regime will have a significant bearing on whether the judicial proceedings will ensure respect for the principle of 'equality of arms'. Though the Chambers have been active in their treatment of the full spectrum of issues presented by evidence disclosure, this chapter will primarily focus upon the introduction of in-depth analysis charts as the preferred means of organising and presenting disclosed evidence. It will examine the strengths and weaknesses of such a system of disclosure and how the methodology underpinning the charts may be utilised in a wider context when investigating and prosecuting core international crimes and, where appropriate, situations of mass human rights violations. Throughout this analysis of the disclosure jurisprudence, particular emphasis will be placed upon its normative and institutional context. Accordingly, the jurisprudence will be examined in light of the principles of fair and expeditious trials that underlie the obligation to disclose evidence.

15.2. Development of the In-Depth Analysis Charts by the Pre-Trial Chambers

As Pre-Trial Chamber III explained, the function of the Pre-Trial Chambers is to ensure 'the efficient organisation of the confirmation hearing, in

[10] See K. Gibson and C. Lussiaà-Berdou, "Disclosure of Evidence", in K.A.A. Khan, C. Buisman, and C. Gosnell (eds.), *Principles of Evidence in International Criminal Justice*, Oxford University Press, Oxford, 2010, p. 306.

[11] S. Shah, "Administration of Justice", in D. Moeckli, S. Shah and S. Sivakumaren (eds.), *International Human Rights Law*, Oxford University Press, 2010, p. 304.

determining whether or not to send the case to trial and in facilitating the conduct of the trial if the charges are confirmed'.[12]

When prescribing measures to improve the efficiency of proceedings, the Chambers have relied on the oversight role established in article 60 ICC Statute and rule 121 RPE. These provisions accord the Pre-Trial Chamber a 'significant role in ensuring that disclosure takes place properly and may issue orders to regulate disclosure'.[13] In delimiting the functions of the Court's Organs, Pre-Trial Chamber III identified the following as the Chamber's functions: (1) ensuring the proper conduct of the confirmation hearing and contributing to the determination of truth;[14] (2) those functions as delimited under article 61 of the Statute, fundamentally, article 61(7), the determination of whether there is sufficient evidence to establish substantial grounds to believe that the person prosecuted committed each of the crimes charged and accordingly whether to confirm the charges; (3) guaranteeing the rights of the accused in accordance with article 67(1)(a) and (b);[15] and (4) guaranteeing the effective organisation of the confirmation hearing and proper preparation for trial.[16]

The Chamber considered that in order to satisfy article 67(1)(a) and (b),

> the defence has to have all necessary tools to understand the reasons why the Prosecutor relies on any particular piece of evidence and that, consequently, the evidence exchanged between the parties and communicated to the Chamber must be the subject of a sufficiently detailed legal analysis relating the alleged facts with the constituent elements corresponding to each crime charged.[17]

To this effect, Pre-Trial Chamber III prescribed a specific method of presenting the evidence disclosed prior to the confirmation hearing, and communication to the Chambers. Referred to as 'analytical disclosure', the Chamber required all evidence disclosed by either party at the

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12 "Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties", see *supra* note 5, para. 5.

13 Brady, see *supra* note 7, p. 407.

14 "Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties", see *supra* note 5, paras. 8–11.

15 *Ibid.*, paras. 20–21.

16 *Ibid.*, para. 24.

17 *Ibid.*, para. 66.

pre-confirmation stage to be presented in the form of an 'in depth analysis chart' that requires the presentation of 'each piece of evidence according to its relevance in relation to the constituent elements of the crimes presented by the Prosecutor' and that each 'piece of evidence must be analysed – page by page or, where required, paragraph by paragraph with one or more of the constituent elements of one or more of the crimes with which the person is charged'.[18] In the disclosure decisions of the two Kenyan cases, the Single Judge specifically directed the parties to follow the disclosure regime established in the aforementioned decision in *Bemba*.[19]

Similarly, Trial Chamber II in *Katanga* required that evidence be disclosed using a 'Table of Incriminating Evidence' that,

> breaks down each confirmed charge into its constituent elements – contextual circumstances as well as material and mental elements – as prescribed by the Elements of crimes. For each element, the Prosecution shall set out the precise factual allegations which it intends to prove at trial in order to establish the constituent element in question. For each factual allegation, the Prosecution shall specify which item(s) of evidence it intends to rely on at trial in order to prove the allegation. Within each item of evidence, the Prosecution shall identify the pertinent passage(s), which are directly relevant to the specific factual allegation.[20]

15.2.1. In-Depth Analysis Charts: Substance not Form

Although the terminology adopted in the various decisions at the time of writing may differ, it appears that as a matter of substance, Trial Chamber II has adopted the same methodology as that underpinning the 'in depth

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18 *Ibid.*, para. 69.

19 *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11-44, "Decision Setting the Regime for Evidence Disclosure and Other Related Matters", 7 April 2011, paras. 21–23; *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-48, "Decision Setting the Regime for Evidence Disclosure and Other Related Matters", 7 April 2011, paras. 22–24.

20 *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-956, "Order Concerning the Presentation of Incriminating Evidence and the E-Court Protocol", 13 March 2009, para. 13.

analysis charts' as prescribed by the Pre-Trial Chamber in *Bemba* in its subsequent case-law.

Whilst the Pre-Trial Chamber in *Bemba*, and the Trial Chamber in *Katanga*, have prescribed the precise format in which evidence must be disclosed to the other party, and communicated to the Chamber, the Pre-Trial Chamber more recently in *Abu Garda*[21] and confirmed in *Banda and Jerbo*,[22] has adopted a less rigorous regime of analytical disclosure. The Chamber confirmed that the appropriate system of disclosure to be adopted was that developed at the confirmation of charges stages in the *Lubanga* case[23] and the *Katanga and Ngudjolo* case,[24] models that predate the comprehensive regime provided for in *Bemba.*[25]

However, when summing up, the Chamber in *Abu Garda* did require that the Prosecutor provide the 'Charging Document and the List of Evidence ... in a language which the person fully understands and speaks. In doing so, the Prosecution shall further ensure that this is organised in such a manner that: i) each item of evidence is linked to the factual statement it intends to prove; and ii) each factual statement is linked to a specific element of crime, a mode of liability, or both',[26] echoing the direction issued to the parties in the *Lubanga* Decision on disclosure.[27] This same direction has been given, *mutatis mutandis*, in the *Mbarushimana* case.[28] Though the Chamber is less prescriptive of the precise format in which that information is conveyed, the underlying logic of analytical disclosure is, nevertheless, evidently present.

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21 *Prosecutor v Bahar Idriss Abu Garda*, ICC-02/05-02/09-35, "Second Decision on Issues Relating to Disclosure", 17 July 2009.

22 *Prosecutor v Abdallah Banda Abakaer Nourainand and Saleh Moahmmed Jerbo Jamus*, ICC-02/05-03/09-49, "Decision on Issues Relating to Disclosure", 29 June 2010.

23 *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06-102, "Decision on the Final System of Disclosure and the Establishment of a Timetable", 15 May 2006.

24 *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, 01/04-01/07-T-12-ENG, "Transcript of Status Conference on 14 December 2007".

25 "Second Decision on Issues Relating to Disclosure", see *supra* note 21, para. 12.

26 *Ibid.*, at para. 17–18.

27 "Decision on the Final System of Disclosure and the Establishment of a Timetable", *supra* note 23, Annex 1, para. 59.

28 *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-87, "Decision on Issues Relating to Disclosure", 30 March 2011, p. 18.

As confirmed recently by both Pre-Trial Chamber I[29] and II,[30] the obligation of analytical disclosure using in-depth analysis does not extend to the disclosure of article 67(2) or rule 77 evidence, namely exculpatory evidence. Pre-Trial Chamber II's reasoning on this matter extended to a referral to the *Bemba* Decision on disclosure, highlighting that it only demanded in-depth analytical disclosure for *incriminating* evidence, whilst Pre-Trial Chamber I in *Mbarushimana* considered that, contrary to the Prosecutor's interpretation of the 'Decision on Issues Relating to Disclosure', the Decision only required 'a concise summary of the content of each item', not a 'detailed summary'.[31]

Whereas the exact format of the modality for disclosure required by the Chambers' decisions differs, it is clear that *analytical disclosure* underpins the approach adopted by the Chambers. It is the approach or substance of the modality that is of primary interest in this chapter, not the format chosen. As regards the origins of analytical disclosure, the authors are aware of only one relevant model for core international crimes that pre-dates the introduction of the in-depth evidence analysis charts at the ICC. The evidence management function of the Case Matrix application[32]

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29 *Prosecutor v. Callixte Mbarushimana*, ICC-01/04-01/10-116, "Decision on the Prosecution's Application for Leave to Appeal the "Decision on Issues relating to Disclosure", (ICC-01/04-01/10-87)"", 21 April 2011.

30 *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11-74, "Decision on the Prosecution's Application for Leave to Appeal the "Decision Setting the Regime for Evidence Disclosure and Other Related Matters (ICC-01/09-01/11-44)"", 2 May 2011; *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11-77, "Decision on the Prosecution's Application for Leave to Appeal the 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters (ICC-01/09-02/11-48)'", 2 May 2011.

31 "Decision on the Prosecution's Application for Leave to Appeal the "Decision on Issues relating to Disclosure", (ICC-01/04-01/10-87)"", *supra* note 29, para. 21.

32 The Case Matrix is a law-driven case management and legal information application developed for the efficient and precise investigation, prosecution, defence and adjudication of international crimes. It allows users to access documents selected from the online Legal Tools Database (the 'Legal Texts' function) as well as access to detailed Elements and Means of Proof Digests. The application also serves as a database for the organisation of information and evidence relating to core international crimes, tailored to the specific crimes that have been committed and relevant modes of liability. In addition, it provides a methodology for the investigation and prosecution of international crimes, offering 'a user's guide to proving international crimes and modes of liability and [providing] a database service to organise and present the potential evi-

includes a sophisticated in-depth analysis structure that correlates legal requirements of the legal classification in a case with (potential) evidence. This is one of the main innovations of the Case Matrix, the development of which was awarded the 2008 Dieter Meurer Prize for Legal Informatics. It is this matrix function which the application takes its name from. Although the Case Matrix was originally developed in the Legal Advisory Section of the ICC Office of the Prosecutor between 2002 and 2005, it has since become a common international good, with more than 125 users around the world at the time of writing. We note that Mr. Gilbert Bitti, Senior Legal Adviser in the ICC Pre-Trial Division when the jurisprudence on in-depth evidence analysis charts emerged, was Deputy Chief of the Legal Advisory Section when the Case Matrix was made. There have also been presentations to ICC Judges and legal advisers on the methodologies of the Case Matrix, including its evidence analysis function, since 2006.

15.3. Advantages of the In-Depth Analysis Charts

The Chambers have introduced in-depth analysis using their supervisory powers under the Statute to assist the Chambers in fulfilling their oversight responsibilities. Quite apart from the benefits accrued to the Chambers themselves, the benefits to the Defence, the Prosecution and to the judicial process as a whole warrant the introduction of the in-depth analysis charts.

The advantages of adopting in-depth analysis charts in the investigations and prosecutions of core international crimes cases can be summarised in two broad categories: They offer unprecedented clarity and enhance fair trial. These will be examined in turn.

dence in a case', see M. Bergsmo and P. Webb, "Innovations at the International Criminal Court: Bringing New Technologies into the investigation and Prosecution of Core International Crimes", in H. Radtke *et al.* (eds.), *Historische Dimensionen von Kriegsverbrecherprozessen nach dem Zweiten Weltkrieg*, Nomos, Baden-Baden, 2007, p. 208. The Case Matrix can be adapted for use by different actors involved in the processing of core international crimes, such as human rights personnel, investigators, prosecutors, defence teams, victims' representatives, judges and civil society.

15.3.1. Enhancing Clarity in Factually Rich Cases

International crimes cases are normally laden with dense facts. Their investigation, prosecution and adjudication require the interpretation and application of specific legal provisions to such factually rich and sometimes complex cases. The quality of justice rendered by criminal justice institutions can be hindered by the inability to adequately comprehend the such specialized legal requirements. Moreover, the failure to develop a precise and structured approach to the application of law to the facts of the case can have a negative impact on the efficiency and precision of the process of criminal justice for atrocities.[33]

The in-depth analysis charts are specifically designed to provide both structure as well as precision throughout the judicial process. For instance, as the Prosecutor noted, the materials subject to disclosure prior to the Confirmation hearing in *Ruto, Kosgey, and Arap Sang* would 'amount to approximately 1,056 documents (a total of 12,947 pages)'.[34] Emphasising that this is for the Confirmation Hearing alone, proceeding to trial, should the Pre-Trial Chamber confirm the charges, one can imagine how the volume of materials subject to disclosure could further increase. On this basis there is a strong imperative to adopt strategies that enable the efficient handling of such volumes of information in order to

[33] See chapter 3 in the present volume. See also OSCE ODIHR, *Supporting the Transition Process: Lessons Learned and Best Practices in Knowledge Transfer. Final Report*, 2009, available at http://www.icty.org/x/file/About/Reports%20and%20Publications/odihr_unicri_icty_2009report_en.pdf, last accessed on 11 November 2011; R. Heinsch, "How to Achieve Fair and Expeditious Trial Proceedings before the ICC: Is It Time for A More Judge-Dominated Approach?" in C. Stahn and G. Sluiter, (eds.), *The Emerging Practice of International Criminal Justice*, Martinus Nijhoff, Leiden, 2009, p. 482.

[34] *Prosecutor v William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11-50, "Prosecution's Application for Leave to Appeal the "Decision Setting the Regime for Evidence Disclosure and Other Related Matters" (ICC-01/09-01/11-44)", 13 April 2011, para. 24; for a similar breakdown see *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, "Prosecutor's Application for Leave to Appeal 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters" (ICC-01/09-02/11-48)", ICC-01/09-02/11-55, 13 April 2011, para. 24, and *Prosecutor v Callixte Mbarushimana*, ICC-01/04-01/10-93, "Prosecutor's Application for Leave to Appeal the 'Decision on Issues Relating to Disclosure (ICC-01/04-01/10-87)'", 5 April 2011, para. 22.

prevent the judicial process from grinding to a halt or from being substantially delayed.

Moreover, the detailed nature of the legal requirements of the core international crimes, coupled with the modes of liability and the nature of the factual situations to which these standards must be applied, renders the imposition of a clear and precise structure to cases particularly important. The crimes of genocide, crimes against humanity and wars crimes, each contain numerous constituent elements. For instance, for the crime of genocide, as set forth in the Elements of Crimes document, it is required that (i) the perpetrator committed one of the genocidal acts listed under article 6 of the Rome Statute, (ii) that the victim(s) of the act belonged to a particular national, ethnical, racial or religious group, (iii) the perpetrator intended to destroy in whole, or in part, that national, ethnical, racial or religious group, and (iv) the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that in itself could effectuate such destruction. In order to secure a conviction, evidence must be presented to support each of the aforementioned elements. Furthermore, in the case of core international crimes, certain contextual circumstances may also need to be established; in the instance of war crimes, it is necessary to establish that the acts were committed in the context of either an international or non-international armed conflict, and in the case of crimes against humanity, the impugned acts must have been committed as part of a 'widespread or systematic attack'.[35]

In addition to establishing the elements of the crime, it is also necessary to satisfy one of the necessary modes of liability, such as perpetration, ordering, command responsibility, planning or complicity. In the context of massive human rights violations of the scale with which the ICC is concerned, it is important to stress the complexity of the task of proving one of these modes of liability, particularly when the Prosecutor's mandate is to prosecute those 'most responsible' for the impugned acts.[36] Accordingly, and as demonstrated by the practice of the Prosecutor to date, it is likely that the Prosecutor will seek to investigate and bring charges against higher level individuals, be they rebel leaders, military

[35] See chapter 3 in the present volume.

[36] H. Takemura, "Big Fish and Small Fish Debate – An Examination of the Prosecutorial Discretion", *International Criminal Law Review*, 2007, vol. 7, p. 677.

leaders, or even Heads of State. Establishing the evidentiary chain necessary to link such an individual to the criminal acts carried out by others can potentially be a complex endeavour. It is therefore imperative that the case is presented in a clear and logical manner.[37]

Presenting the Prosecution's case using these in-depth analysis charts would be of benefit to all parties to the proceedings, the Prosecution included. The jurisprudence of the Court emphasises the benefits of the charts for the defence and the Chambers. However, benefits also extend to the OTP itself. By requiring the Prosecution to structure the case according to a clear format, designed to enhance the understanding of the parties who have not been privy to the detailed investigations (for example, other teams within the OTP or other members of the same team), such charts will help them maintain an overview of the case, which will also assist, when presenting the case, in arguing it in a clear and logical fashion, thus improving its strength. When filled in, the charts highlight and help the Prosecution to identify the weak links in its case. They assist all members of a case preparation team to share a common understanding of the evidentiary state of the case. The charts also compel Prosecution team members to undertake fact-related work with the (draft) legal classification of the case in the forefront of their minds.

15.3.2. Ensuring Fair Trials

The 'disclosure of evidence goes to the heart of the accused's right to a fair trial'.[38] Ensuring that the Defence has a sound grasp of the case against it lies at the heart of the right to a fair trial and the principle of equality of arms. Indeed, some have gone as far as to assert that the fair trial norm, as expounded in article 67 of the ICC Statute, 'given its unique formulation and its historical origin, may be entitled to form a hierarchically superior status within the Statute'.[39] As such, how the Pre-Trial Chambers give effect to this norm provides an indication as to how strong this norm will come to be developed within the ICC regime. More specifically, Scheffer has hailed the Pre-Trial Chambers as the 'front line of

[37] F. Harhoff, "It is all in the Process: Reflections on the Relation between International Criminal Trials and International Humanitarian Law", *Nordic Journal of International Law*, 2009, vol. 78, p. 469, at p. 478.

[38] Brady, see *supra* note 7, at p. 404.

[39] Schabas, see *supra* note 4, at p. 796.

defence' against the risk of miscarriages of justice caused by the disclosure or non-disclosure of evidence. In doing so, he cites the prevalence of such miscarriages occurring within national criminal jurisdictions as a reason for the Court to take a particularly robust stance regarding this issue from the outset of the Court's litigation.[40]

Given the factual and legal richness of core international crimes cases, as discussed above, as well as the potential inexperience of defence teams when working on such cases, the introduction of in-depth analysis charts by the Pre-Trial Chambers represents an important step in strengthening the fair trial credentials of international criminal proceedings. This is because in-depth analysis charts make the case much clearer and easier to comprehend, and thus assist in building a more viable defence strategy. This innovation by the Pre-Trial Chambers complements the considerable developments in international criminal procedure established by the text of the Rome Statute, in light of the experiences of the *ad hoc* tribunals that preceded the creation of the ICC.

The ICC regime for the investigation and disclosure of evidence can be contrasted with that of the two *ad hoc* tribunals and the Special Court for Sierra Leone. Whilst the latter tribunals adopted a liberal, inquisitorial model with regards to the admissibility of evidence, their regimes for the investigation and disclosure of that evidence was essentially governed by the adversarial tradition. Consequently, from the perspective of the defence and the principle of 'equality of arms',[41] there was a significant imbalance between the two parties, with the defence commonly disadvantaged in the collection of its own evidence – poor funding, inadequate resources and difficulty obtaining co-operation from the authorities and accessing potential witnesses.[42] As Higgins described, the conse-

[40] D. Scheffer, "A Review of the Experiences of the Pre-Trial and Appeals Chambers of the International Criminal Court Regarding the Disclosure of Evidence", in *Leiden Journal of International Law*, 2008, vol. 21, p. 151 at p. 152.

[41] S. Negri, "The Principle of "Equality of Arms" and the Evolving Law of International Criminal Procedure", in *International Criminal Law Review*, 2005, vol. 5, p. 513; S. Negri, "Equality of Arms – Guiding Light or Empty Shell?" in M. Bohlander (ed.), *International Criminal Justice: A Critical Analysis of Institutions and Procedures*, Cameron May, London, 2007.

[42] See J. Catz-Cogan, "International Criminal Courts and Fair Trials: Difficulties and Prospects", in *Yale Journal of International Law*, 2002, vol. 27, p. 111, on the manner in which the co-operation regimes under the *ad hoc* Statutes limited the ability of the accused to gain access to material, whereas those limitations do not weigh as heavily

quences for trial proceedings is an extremely time-consuming pre-trial phase involved in the litigation of disclosure issues.[43] Combine these factors with the complex factual and legal situations, defence teams drawn from domestic criminal justice cultures and unaccustomed to the distinct nature and environment of international war crimes trials,[44] an image may presented of a regime that is structurally geared against the vindication of the rights of the accused.

Against this backdrop, it is easy to discern the merits, at least in theory, behind the ICC regime. Requiring the Prosecutor to search for and disclose all evidence, incriminating and (potentially) exculpatory,[45] in contrast to the obligation to merely disclose 'any material which in the actual knowledge of the Prosecutor' may be exculpatory or mitigatory',[46] goes a considerable way to addressing the substantive imbalance between the parties. The diligence with which the Pre-Trial Chambers have discharged their responsibility to supervise pre-trial proceedings is particularly welcome in light of the experience of the ICTY.[47]

However, consequential upon the duty of analytical disclosure is the need for efficient modalities of evidence handling and transfer, without which any expediency gains achieved through the relieving of the burden of the defence may be negated by delays created by the enhanced workload of the Prosecution. Furthermore, experience gained at the ICTY demonstrates the extent to which bulk disclosure of all evidence, without indicating its relevance, can actually inhibit the rights of the accused to prepare an adequate defence.[48] Karnavas has discussed the difficulties faced by the defence teams at the ICTY in obtaining disclosure; focussing upon the minimal disclosure provided for the purposes of the confirmation of the indictment, and the manner in which the substantial disclosure

on the Prosecutor – case studies *Blaskic, Todorovic,* and discusses partial co-operation in the context of *Lockerbie*, p. 121 *et seq.*

43 G. Higgins, "Fair Trials and Expeditious Pre-Trial Proceedings: The Future of International Criminal Trials", in *Journal of International Criminal Justice*, 2007, vol. 9, p. 394, at p. 395.

44 M.G. Karnavas, "Gathering Evidence in International Criminal Trials – The View of the Defence Lawyer", in M. Bohlander (ed.), *op. cit.*, see *supra* n. 41, at p. 76.

45 ICC Statute article 67(2) and 54(1)(a).

46 Rule 68 of the ICTY Rules of Procedure and Evidence.

47 Knoops, see *supra* note 9, at p. 163.

48 Heinsch, see *supra* note 33, p. 483.

material is held back and disclosed as late as possible, close to the trial itself, despite the Prosecution having long known about the existence and importance of that material. In describing how the introduction of the electronic disclosure system (EDS) was designed to assist and expedite the disclosure of evidence, without an adequate referencing and signposting mechanism, access to bulky, raw materials was of little assistance to defence teams.[49]

When analysing the ICC jurisprudence on the disclosure of evidence, it is necessary to do so in this context, for the methodology and form that they prescribe are aimed at alleviating the problems discussed above.[50] Through examining how the institutional precursors to the ICC, the *ad hoc* tribunals, responded to the need to balance judicial economy with respect for the rights of the accused, in particular, in light of the unique challenges presented by prosecuting international crimes, it is clear that the ICC is faced with very similar challenges.

To sum up, in-depth analysis charts present distinct advantages that both enhance clarity and precision as well as ensure respect for the right to fair trial. Seen also in light of the experiences of the *ad hoc* Tribunals, it is clear that the in-depth analysis charts have a significant role to play.

15.4. Are there any Drawbacks associated with the Use of In-Depth Analysis Charts?

Whilst there are compelling reasons to promote the use of in-depth analysis charts, the OTP, has put forward a number of concerns, primarily owing to the fact that the said charts impact on established work processes. Through an examination of the concerns of the OTP in response to the Decisions of the Pre-Trial Chamber, and the responses thereto by the Chambers, it will become even more apparent the extent to which the in-depth analysis charts enhance the fair trial rights of the accused.

15.4.1. Lack of Legal Basis

General objections to the *Bemba* model of the evidence disclosure regime follow the argument that not only was the system put in place by the deci-

[49] Karnavas, see *supra* note 44, at p. 483: "Disclosure proceedings overburden the participations with too much unstructured information".

[50] *Ibid.*, at p. 485.

sion not requested by either party or established by the Statute,[51] but it also deviates significantly from the procedure adopted in the cases of *Lubanga* and *Katanga*, and that the system was implemented without prior consultation with either party. Before the Trial Chamber, the Prosecutor has sought to assert that given that an in-depth analysis chart was not a requirement in the *Lubanga* disclosure regime, it was not necessary for a fair trial, since the duty to make full and sufficiently timely disclosure does not include the preparation of an explanatory analytical chart.[52]

Focusing on a textual interpretation of the Court's Rules, the Prosecutor proceeded to characterise the charted, detailed and subjective analysis of the Prosecution's case, as 'work product' for the purposes of rule 81(1) and thus not required to be disclosed.[53] A rationale for this principle could be derived from US domestic jurisprudence, describing the work product doctrine as sheltering 'the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case'.[54]

With regard to the purported lack of legal basis for the prescription of in-depth analysis charts as a modality for disclosure, one can be di-

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[51] *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-63, "Prosecution's Application for leave to Appeal Pre-Trial Chamber III's 31 July 2008 "Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties"", 6 August 2008, paras. 3 and 4. See also, *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-982, "Prosecution's Application for Leave to Appeal the "Order Concerning the Presentation of Incriminating Evidence and the E-Court Protocol"", 23 March 2009, at paras. 24–35; "Prosecutor's Application for Leave to Appeal "Decision Setting the Regime for Evidence Disclosure and Other Related Matters" (ICC-01/09-02/11-48)", see *supra* note 34, para. 4; "Prosecution's Application for Leave to Appeal the "Decision Setting the Regime for Evidence Disclosure and Other Related Matters" (ICC-01/09-01/11-44)", see *supra* n. 34, para. 4; "Prosecutor's Application for Leave to Appeal the "Decision on Issues Relating to Disclosure" (ICC-01/04-01/10-87)", see *supra* note 34, para. 4.

[52] *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-656, "Prosecution's Submissions on the Trial Chamber's 8 December 2009 Oral Order Requesting Updating of the In-Depth-Analysis Chart", 15 December 2009, paras. 7 and 8.

[53] *Ibid.*, para. 9. "Prosecution's Application for Leave to Appeal the "Order Concerning the Presentation of Incriminating Evidence and the E-Court Protocol"", see *supra* note 51, para. 25. On Rule 81(1) precedent, see *Prosecutor v Blaskic*, IT-95-14-PT, "Decision on the Production of Discovery Materials", 27 January 1997.

[54] *United States v. Nobles*, 422 U.S. 225, 238, 95 S.Ct. 2160, 2170, 45 L.Ed.2d 141 (1975).

rected to the statutory powers, and indeed responsibilities, of the Pre-Trial Chambers under article 61(3) of the ICC Statute as well as ICC rule 121(2) to issue orders to ensure the proper conduct of disclosure. In the case of disclosure, once the case has proceeded to a Trial Chamber, the legal basis for the prescription of disclosure procedure lies firmly in article 64(3)(a) of the Statute, which provides that,

> [u]pon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall: confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings.[55]

In response to the concern that these analytical disclosure obligations conflict with the work product principle under ICC rule 81(1), both Trial Chambers II and III have been at pains to clarify that the order does not compel the Prosecutor to provide a subjective analysis of the evidence; they only require identification of the pertinent areas, which, therefore, imposes no obligation on the prosecution to provide the Chamber or defence with any internal work product relating to the internal analysis by the Prosecutor of the evidence.[56] In fact, the obligation is based solely on the material that has been filed as part of the Prosecution's disclosure obligations, and given that the burden of proof is on the Prosecutor, the sole purpose of the table is to ensure the transparency of the Prosecutor's case in order to enable the Defendant to know the exact case against him sufficiently in advance.[57]

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[55] See for discussion of the Trial Chamber's discretion, see R. Gallmetzer, "The Trial Chamber's Discretionary Power and its Exercise in the Trial of Thomas Lubanga Dyilo", in Stahn and Sluiter (eds.), see *supra* note 33, pp. 501–524.

[56] *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-1088, "Decision on the Prosecution's Application for Leave to Appeal the 'Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol' and the Prosecution's Second Application for Extension of Time Limit Pursuant to Regulation 35 to Submit a Table of Incriminating Evidence and related material in compliance with Trial Chamber II 'Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol'", 1 May 2009, para. 33, and reiterated in Prosecutor v Jean-Pierre Bemba Gombo, "Prosecution's Submissions on the Trial Chamber's 8 December 2009 Oral Order Requesting Updating of the In-Depth-Analysis Chart'", see *supra* note 52, para. 24.

[57] "Decision on the 'Prosecution's Application for Leave to Appeal the 'Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol' and the 'Prosecution's Second Application for Extension of Time Limit Pursuant to Regula-

15.4.2. Specific Grounds for Appeal

It has been submitted that for the purposes of establishing the grounds for appeal under article 82(1)(d) of the ICC Statute, the contested provisions relating to the system of disclosure affect both the *fairness* and *expeditiousness* of proceedings. In doing so, the Prosecutor cites decisions of the Appeals Chamber to assert that 'fairness requires that the procedural and substantive rights and obligations of all parties be respected, which has been held to include fairness to the prosecution'.[58] Indeed, the Prosecutor has submitted that 'the guarantee of a fair and expeditious trial cannot require the Prosecution to undertake an onerous task not otherwise provided for in the Statute'.[59]

One can sympathise with the concerns as to the increased workload imposed upon the OTP as a result of the prescribed analytical modality of evidence disclosure and organisation. However, should the analytical logic be adopted as standard internal prosecution practice, then the additional burden upon the Prosecution at the disclosure stage should be minimal, since the case will have been built following this analytical framework from the start, avoiding the need for duplication of activities. Furthermore, whilst the work of the Prosecutor might be increased and thus has the potential of slowing down the progression of proceedings, the benefits and expediency gains enjoyed by the Chambers and the Defence would outweigh any delays, thus the net benefits of the adoption of the analytical system to the judicial process as a whole should outweigh pos-

tion 35 to Submit a Table of Incriminating Evidence and related material in compliance with Trial Chamber II 'Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol'', see *supra* note 56, at para.34.

58 "Prosecution's Application for leave to Appeal Pre-Trial Chamber III's 31 July 2008 'Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties'", see *supra* note 51, para. 14, referring to the Situation in the DRC, 31 March 2006, ICC-01/04-135-tEN, paras. 38–39; *Kony et al.*, 11 July 2006, ICC-02/04-01/05-90-US-Exp (reclassified pursuant to ICC-02/04-01/05-135), para. 24. Also raised in "Prosecutor's Application for Leave to Appeal 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters ICC-01/09-02/11-48'", ICC-01/09-02/11-55, 13 April 2011, paras. 19–20; "Prosecution's Application for Leave to Appeal the 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters" (ICC-01/09-01/11-44)", see *supra* note 34.

59 "Prosecution's Application for Leave to Appeal the 'Order Concerning the Presentation of Incriminating Evidence and the E-Court Protocol'", see *supra* note 51, para. 26.

sible costs. In this respect, it must be noted that in the context of this judicial regime – a hybrid of inquisitorial and adversarial traditions of criminal procedure, as described by Cassese – 'the Prosecutor is not simply, or not only, an instrument of executive justice, a party to the proceedings whose exclusive interest is to present the facts and evidence as seen by him or her in order to accuse and to secure the indictee's conviction. The Prosecutor is rather conceived of as both a party to the proceedings and also an impartial truthseeker organ of justice'.[60] Consequently, as an Organ of the Court, as opposed to an independent party to the proceedings, the Prosecution bears a particular responsibility to contribute to the efficiency of the judicial process that extends beyond maximising the efficiency of the Prosecution in isolation from the wider system.[61]

In a similar vein, and drawing upon the notion of the Prosecutor as an 'impartial truthseeker organ of justice', with particular regard for the Prosecutor's duty under article 54(1)(a) of the Statute to 'determine the truth', it can be seen that the adversarial or confrontational nature of common law procedure has been eschewed in favour of a regime bearing more of the transparent sentiment of the inquisitorial model of procedure.[62] Therefore, in contrast to adversarial systems of criminal procedure, there should be less of a prosecutorial concern at withholding interpretative information or work product from the Defence in the specific context of the in-depth analytical charts.

15.4.3. Fairness

The Prosecutor's specific concerns about analytical disclosure rest upon the burden imposed upon the OTP when fulfilling those requirements; not only is that burden not contemplated by the Court's instruments, but it is submitted that this burden is an 'exorbitant duty' which 'cannot reasonably be complied with', and fails to appreciate the scale of the material involved, and the implications for the Prosecution's workload and func-

[60] A. Cassese, "The Statute of the International Criminal Court: Some Preliminary Reflections", in *European Journal of International Law*, 1999, vol. 10, p. 144, at p. 168.

[61] "Order Concerning the Presentation of Incriminating Evidence and the E-Court Protocol", see *supra* note 51, para. 15.

[62] See M. Bergsmo and P. Kruger, "Article 54: Duties and Powers of the Prosecutor", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Second edition, Hart Publishing, 2008, pp. 1079–1080.

tioning.[63] This in turn, it is submitted, negatively impacts upon the fairness of proceedings *vis-à-vis* the Prosecution.[64]

It is argued that the degree of analysis required by the analytical regime of disclosure imposes an unfair administrative burden on the Prosecution that 'effectively requires the Prosecution to conduct evidentiary analysis on behalf of another party, and to take time away from its own trial preparation to do that task'.[65] In *Ruto, Kosgey and Arap Sang*, further to the contention that there is no clear legal basis under the Statute or the Rules of Procedure and Evidence for requiring analytical disclosure of non-incriminating evidence, this line of reasoning was taken further, proposing that such a requirement cannot be justified by the principle of 'equality of arms'. It was submitted that the 'Prosecution alone bears the burden of proof. It is manifestly unequal to require the Prosecutor to bear its own burden to establish substantial evidence to hold the person for trial and also to bear the burden to affirmatively guide the defence to understand and fashion a responsive case'.[66]

Interpreting the notion of 'fairness', the Pre-Trial Chamber in *Bemba* stressed that pursuant to the statutory obligation that it be interpreted in accordance with internationally recognised human rights instruments

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63 "Prosecution's Application for leave to Appeal Pre-Trial Chamber III's 31 July 2008 "Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties"", see *supra* note 51, paras. 26–28; "Prosecutor's Application for Leave to Appeal 'Decision Setting the Regime for Evidence Disclosure and Other Related Matters" (ICC-01/09-02/11-48)" see *supra* note 34, para. 19; "Decision on the 'Prosecution's Application for Leave to Appeal the "Decision Setting the Regime for Evidence Disclosure and Other Related Matters" (ICC-01/09-01/11-44)", see *supra* note 34, para. 19.

64 "Prosecution's Application for Leave to Appeal the "Order Concerning the Presentation of Incriminating Evidence and the E-Court Protocol"", see *supra* note 20, para. 30; "Prosecutor's Application for Leave to Appeal the "Decision on Issues Relating to Disclosure" (ICC-01/04-01/10-87)", see *supra* note 34, paras 12–15.

65 "Prosecution's Application for Leave to Appeal the 'Order Concerning the Presentation of Incriminating Evidence and the E-Court Protocol", see *supra* note 51, para. 32.

66 "Prosecution's Application for Leave to Appeal the "Decision Setting the Regime for Evidence Disclosure and Other Related Matters" (ICC-01/09-01/11-44)", see *supra* note 34, para. 22. Also, "Prosecutor's Application for Leave to Appeal "Decision Setting the Regime for Evidence Disclosure and Other Related Matters"", see *supra* note 34, para. 22; "Prosecutor's Application for Leave to Appeal the "Decision on Issues Relating to Disclosure" (ICC-01/04-01/10-87)", see *supra* note 34, para. 17.

(article 21(3) of the ICC Statute),[67] that the right to a fair trial should be practical and effective. A fundamental aspect of the right to a fair trial is that proceedings should be adversarial in nature and that there should be equality of arms between the parties.[68] This echoes the jurisprudence of the European Court of Human Rights in which it has been reiterated that the principle of equality of arms encompasses the fundamental right to adversarial proceedings, in turn intended to guarantee both parties a reasonable opportunity to comment on each others' submissions.[69] Beyond the European Court of Human Rights, the equality of arms principle is firmly established in the canon of international human rights jurisprudence on the right to a fair trial.[70] Since such jurisprudence is concerned with judicial proceedings in the domestic sphere, there is a need to determine the precise content and implications of the principle when transferred to the international criminal justice system, Schabas explains it is more appropriate to look to the jurisprudence of the ICTY, where it has been considered that the principle of equality of arms has taken on a 'distinct connotation'.[71]

Significantly, at the international level, the ICTY has considered that the scope of the principle of equality of arms is broader than that enunciated in the jurisprudence of human rights bodies so as to cover not only 'procedural equality' but to require more generally that the 'Prosecution and Defence must be equal before the Trial Chamber', precisely be-

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67 Article 10 UDRHR, aricle 14 ICCPR, article 6(1) ECHR, article 8(1) ACHR, article 71(1) African Charter.

68 *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-75, "Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure", 25 August 2008, para. 13.

69 ECtHR, *Ocalan v Turkey*, Application No. 46221/99, Judgment, 12 May 2005, paras. 140–147. Discussed in Negri, 2005, see *supra* note 41, at p. 517.

70 *Edwards v UK* – prosecution must disclose to the defence all evidence for or against the accused; *Jespers v Belgium* – requires disclosure of material that may undermine the credibility of a defence witness and material which may be relevant to sentencing; *Forcher v France* – article 6 ECHR guarantees the accused a right of access to the prosecution.

71 In particular, *Tadić*, IT-94-1-A, Judgment, 15 July 1999, para. 52 and *Brdjanin and Talić*, IT-99-36-PT, "Public Version of the Confidential Decision on the Alleged Illegality of Rule 70 of 6 May 2002", 23 May 2002. W. Schabas, *Introduction to the International Criminal Court*, Cambridge University Press, 2007, p. 208. Knoops, *supra* note 9, p. 38.

cause of the difficulties faced by the defence at the international level.[72] Pre-Trial Chamber II of the ICC has understood the principle of equality of arms as being closely related to the concept of fairness, or balance, between the parties. It states '[a]s commonly understood, it concerns the ability of a party to a proceeding to adequately make its case, with a view to influencing the outcome of proceedings in its favour'.[73] This supports the view that at the international level, equality of arms denotes both procedural and substantive equality, thus militating in favour of an enhanced duty of disclosure, particularly in light of the challenges experienced by the *ad hoc* tribunals in effectively vindicating those rights. Indeed, some have suggested that 'it is thus not illogical that, in order to properly supervise and control the exercise of prosecutorial powers and limitation of freedom rights, both the common and civil law systems put greater emphasis on the disclosure obligations of the prosecution rather than on those of the defence' and that this has been echoed in the international sphere.[74]

In order to effect the practical realisation of this right, the adoption of measures such as the in-depth analysis charts can go a significant way to enabling the Defence to prepare its response to the case presented at trial. Given the nature of the crimes and the fact-rich context in which they are alleged to have been committed, without meaningful analysis of the raw evidence disclosed and the manner in which the Prosecution intends to raise it in support of the alleged crimes, it can be difficult to preempt the precise context in which any given piece of evidence is sought to be relied upon, thus affecting the ability of the Defence to prepare its challenge.

In a similar vein to the concerns expressed by the Prosecutor at the ICC, the Prosecution at the *ad hoc* tribunals has sought to invoke the principle of equality of arms in its own favour, 'arguing that there should

[72] "Judgment", see *supra* note 71, para. 52. However, as Knoops concedes, such a strong interpretation of the requirement of the principle of equality of arms has not been consistently sustained by the *ad hoc* tribunals, Knoops, see *supra* note 71, at pp. 39–40, discussing *Prosecutor v Kayishema*, ICTR-95-1-A, "Appeals Judgment", 1 June 2001, para. 73.

[73] *Situation in Uganda*, ICC-02/04-01/05, "Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58", 19 August 2005, para. 30.

[74] Knoops, see *supra* note 9, pp. 159–160.

be a sort of symmetry between the rights of the accused and the recognition of certain powers of the prosecution'.[75] Zappalà however asserts that 'it is certainly incorrect to argue that there is a right of the prosecution that corresponds to the right of the accused to a fair hearing in full equality. This is a right specifically attributed to the defendant and not to *any party* to the proceedings'.[76] This leads Zappalà to caution against placing too great an emphasis upon 'the notion of general symmetry' between the two parties that may be deduced from the jurisprudence of the ICTY. From this perspective, it would thus be a misconception to argue that the increased workload generated by the obligation of analytical disclosure is itself a violation of the principle of equality of arms.

Applying this concept of fairness to the issue of analytical disclosure obligations, the Chamber was quick to dismiss the objection to the additional administrative burden upon the Prosecution, and considered that whilst the impugned decision may incur time and resources, these issues do not constitute legal considerations and therefore are not appealable grounds.[77] Having determined that this is not a valid ground for appeal, the Chamber nevertheless questioned the extent to which the impugned decision imposes novel burdens upon the Prosecutor, asserting that,

> the Prosecutor, having investigated the situation in the Central African Republic since May 2007, has an in-depth knowledge of his own file; it is assumed that the Prosecutor conducts the analysis of the material collected on a

[75] S. Zappala, *Human Rights in International Criminal Proceedings*, Oxford University Press, 2003, p. 113.

[76] S. Zappala, *ibid.*, p. 113, referring to R. May and M. Wierda, "Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague and Arusha", in *Columbia Journal of Transnational Law*, 1998, p. 725, at p. 757.

[77] "Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties", see *supra* note 51, para. 65. See also "Decision on the "Prosecution's Application for Leave to Appeal the 'Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol'" and the "Prosecution's Second Application for Extension of Time Limit Pursuant to Regulation 35 to Submit a Table of Incriminating Evidence and related material in compliance with Trial Chamber II 'Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol'", see *supra* note 56, para. 36.

> continuous basis in order to prepare and present properly his case.[78]

In response to the contention that since the extra administrative burden incurred as a result of the enhanced disclosure obligations are not explicitly required by the Statute or the Rules of Procedure, and thus are not a necessary component of a fair trial, consequently placing it outside the Chambers' court management jurisdiction, Pre-Trial Chamber II considered that the required document is a 'necessary and proportionate procedural tool that assists in revealing the prosecution's case against the accused, notwithstanding the resources that will be necessary for its completion'.[79]

15.4.4. Expeditiousness

A further objection to the use of in-depth analysis charts focuses on the issue of expeditiousness of proceedings. In this regard, the Prosecutor submitted that, given the already stretched resources of the OTP, the scale of the exercise involved in the creation of in-depth analysis charts would divert resources away from securing timely disclosure and inspection of material thus delaying the performance of these core statutory obligations.[80]

Broadly speaking, these concerns as to the scale of the exercise implicated by the obligation of analytical disclosure, do raise legitimate concerns as to whether it is appropriate to require such a time and labour intensive analysis at the pre-confirmation hearing stage of proceedings when there is no guarantee that the charges will be confirmed by the Pre-Trial Chamber and the case sent to trial. According to the Prosecutor, 'the imposition of a taxing extra-statutory duty, and by adopting a more burdensome rule for pre-confirmation disclosure *which is excessive for a*

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[78] See also "Order Concerning the Presentation of Incriminating Evidence and the E-Court Protocol", see *supra* note 20, para. 15.

[79] *Prosecutor v Jean-Pierre Bemba Gombo*, ICC-01/05-01/08-682, "Decision on the 'Prosecution's Submissions on the Trial Chamber's 8th December 2009 Oral Order Requesting Updating of the In-Depth-Analysis Chart'", 29 January 2010, para. 26.

[80] "Prosecution's Application for Leave to Appeal the "Decision Setting the Regime for Evidence Disclosure and Other Related Matters"" (ICC-01/09-01/11-44)", see *supra* note 34, para. 25; "Prosecutor's Application for Leave to Appeal "Decision Setting the Regime for Evidence Disclosure and Other Related Matters"", see *supra* note 34, para. 25.

confined process aimed at filtering unsubstantiated charges such as the confirmation hearing' has 'far reaching consequences for the fair and expeditious conduct of the proceedings'.[81]

Recently, the Prosecutor in his application for leave to appeal the Decision on disclosure in the Kenyan case stated that '[b]ased on reviews conducted in the *Bemba* case, the Prosecution estimates that in order to comply with the terms of the Decision, it will require a total of 421 review days – 206 review days to conduct the disclosure review and 161 review days to produce the in-depth analysis chart'.[82] As the Court's workload builds, there is some force behind the Prosecutor's concerns that the imposition of such disclosure requirements may impact 'on the Prosecution's independence and authority by forcing it to divert its resources', suggesting that such requirements may 'improperly restrict the Prosecution's independent authority to undertake other investigations, including those referred by the Security Council or States.[83]

The Pre-Trial Chamber has interpreted the notion of 'expeditiousness' as bearing a close resemblance to the concept of judicial proceedings 'within a reasonable time'.[84] In this regard, the Pre-Trial Chamber considered that the tabular analysis further assists the goal of having fair and expedited proceedings since, disclosure would be streamlined; it ensures that the defence is prepared under satisfactory conditions and assists the Chamber to fulfil its obligations under article 64(2) of the ICC Statute

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81 "Prosecutor's Application for Leave to Appeal the "Decision on Issues Relating to Disclosure" (ICC-01/04-01/10-87)", see *supra* note 34, para. 11 (emphasis added).

82 "Prosecution's Application for Leave to Appeal the "Decision Setting the Regime for Evidence Disclosure and Other Related Matters" (ICC-01/09-01/11-44)", *supra* note 34, para. 25 (references omitted). For a similar forecasted breakdown of the workload required by the Pre-Trial Chamber's disclosure Decision, see "Prosecutor's Application for Leave to Appeal "Decision Setting the Regime for Evidence Disclosure and Other Related Matters"", see *supra* note 34, para. 24; "Prosecutor's Application for Leave to Appeal the "Decision on Issues Relating to Disclosure" (ICC-01/04-01/10-87)", see *supra* note 34, para. 22.

83 "Prosecution's Application for Leave to Appeal the "Decision Setting the Regime for Evidence Disclosure and Other Related Matters" (ICC-01/09-01/11-44)", see *supra* note 34, para. 6. Also, "Prosecutor's Application for Leave to Appeal "Decision Setting the Regime for Evidence Disclosure and Other Related Matters"", see *supra* note 34, para. 6; "Prosecutor's Application for Leave to Appeal the "Decision on Issues Relating to Disclosure" (ICC-01/04-01/10-87)", see *supra* note 34, para. 4.

84 "Decision on the Prosecutor's application for leave to appeal Pre-Trial Chamber III's decision on disclosure", see *supra* note 68, para. 27.

and ICC rule 134; it ensures that the confirmation hearing is properly prepared; and enables the Presiding Judge to organise the presentation of evidence and conduct of proceedings appropriately under article 64(8)(b) and rule 122(1).[85] To this effect, Pre-Trial Chamber III asserted that the sole purpose behind instructing the parties to use in-depth analysis charts is,

> to streamline the disclosure of evidence, to ensure that the defence be prepared under satisfactory conditions, to expedite proceedings and to prepare properly for the confirmation hearing. The hearing will be conducted more efficiently if the parties have duly complied with the proposed methodology in that, pursuant to rule 122(1) of the Rules, the order in which the evidence contained in the record of the proceedings is presented at the confirmation hearing follows the order of the counts set out in the document containing the charges under article 61(3) of the Statute.[86]

The issue of efficient working practices also bears significance on the rights of the accused.[87] Under articles 67(1)(c) and 60(4) of the ICC Statute, as well as all the international and regional human rights instruments, the accused is entitled to an expeditious trial with undue delay.[88] Though there seems to be a marked improvement in the expediency of pre-trial proceedings, where the accused's right to liberty has been suspended due to detention under an arrest warrant and denial of interim release, it is important that the Court continues to improve upon the length of such proceedings to limit the period of pre-trial detention.[89]

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85 *Ibid.*, para. 69. See also "Order Concerning the Presentation of Incriminating Evidence and the E-Court Protocol", see *supra* note 20, para. 8.

86 "Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties", see *supra* note 5, para. 72.

87 Article 67 of the ICC Statute, the text of which is drawn from article 14(3) ICCPR.

88 At the ECtHR, see on the length of pre-trial detention, *Wemhoff v Germany*, and the two pronged-test: (1) was it reasonable to refuse bails; (2) was the time period given the complexities of the case reasonable? This has also been applied in *Kalashnikov v Russia*.

89 For ECtHR jurisprudence on the right to have criminal charges determined within a reasonable time, see *Konig v Germany*: reasonableness of duration must be considered in light of the circumstances of the case at hand, the complexities of the case, the applicant's conduct and the manner in which it was dealt with by the administrative and judicial authorities; *Bucholz v Germany*: though there is a duty to operate effec-

International judicial proceedings are notorious for the length of time they take to complete, the costs they incur, and the level of bureaucracy that they involve.[90] The length of proceedings can affect the productivity of the Court and its ability to sustain a workload that provides value for money. The efficiency of the Court will have an important impact upon its perceived legitimacy, and consequently the degree of support and assistance, both practical as well as financial it receives.[91]

From the discussion so far, it is perhaps easy to identify those aspects of international criminal trials that lead to lengthy proceedings. In addition to the complexity of the factual situations involved, and the elements of crimes and modes of liability to be established, the developing international criminal procedure as a hybrid of the common law and civil law models, whilst drawing upon certain elements of both, can be said to be based exclusively in neither. Accordingly, with lawyers for both parties and the judges all hailing from different national legal cultures, the pace of international criminal justice is often impeded by the frequent

tive domestic judicial systems, a temporary backlog of business does not involve liability on the member State provided that they have taken reasonably prompt remedial action to deal with the situation; *Zimmerman and Steiner v Switzerland:* the efforts by the state to take remedial action must be real; reflecting a genuine willingness to tackle the problem and provide satisfactory results. For recognition of the need to minimise the length of pre-trial detention in the context of ICC proceedings, see ICC-OTP, Informal Expert Paper: "Measures Available to the International Criminal Court to Reduce the Length of Proceedings", 2003, available at http://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281982/length_of_proceedings.pdf, last accessed on 11 November 2011, para. 6.

90 On the length of proceedings generally in international criminal justice, see W. Schabas, *An Introduction to the International Criminal Court'*, Cambridge University Press, 2007, pp. 209–210; J. Galbraith, "The Pace of International Criminal Justice", in *Michigan Journal of International Law*, 2009, vol. 31, p. 79; Kwon, see *supra* note 2, at pp. 362–3; P. Robinson, "Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia", in *European Journal of International Law*, 2000, vol. 11, p. 569.

91 See articles by P. Robinson, *ibid.*; G.-J. Knoops, "The Dichotomy Between Judicial Economy and Equality of Arms Within International and Internationalized Criminal Trials: A Defense Perspective", *Fordham International Law Journal*, 2004–2005, vol. 28, p. 1566; and H.-P. Kaul, "Construction Site for More Justice: The International Criminal Court After Two Years", *American Journal of International Law*, 2005, vol. 99, p. 370. All refer to the perceptions of the wider international community as regarding the length of international proceedings.

motions for clarification or misunderstandings from all quarters.[92] As international criminal procedure ossifies, and the recognition of international criminal law as a distinct discipline is further cemented, the diversity of legal backgrounds will be less of an impediment to the efficient conduct of proceedings at the international level. Until then, however, it is imperative that methods are employed which make conducting trials as simple and clear as possible.

Nevertheless, having identified those factors that inherently will, in comparison to domestic proceedings, slow down international criminal proceedings, Heinsch also notes that 'some of the problems with regard to the enormous amount of information seem to be homemade',[93] with reference to the complexity of the disclosure regime. He further observes that the 'extensive procedural rights to challenge the admissibility of the proceedings under the complementarity principle, the scope of the investigation, and the confirmation hearing, the participation of victims, and the need to provide reparation' also contribute to protracted trials.[94]

With this in mind, the Pre-Trial Chambers have been keen to emphasise the need to focus attention upon the evidence that is necessary to substantiate the criminal charges, to avoid 'the disclosure of a bulk of evidence by excluding those pieces extraneous to any of the counts and useless for the purposes of the confirmation hearing and of the trial'.[95] In this vein, the judge-led initiative to introduce more civil law elements to the procedural regime of the ICTY through the adoption of the Rules of Procedure and Evidence,[96] demonstrates an appreciation of the weaknesses of the common law adversarial model which are compounded when

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92 Harhoff, see *supra* note 37, at p. 479; O-Gon Kwon, see *supra* note 2, p. 360; V. Tochilovsky, "The Nature and Evolution of The Rules of Procedure and Evidence", in Khan, Buisman, and Gosnell (eds.), see *supra* note 4.

93 R. Heinsch, see *supra* note 33, p. 482.

94 ICC-OTP, Informal Expert Paper: 'Measures Available to the International Criminal Court to Reduce the Length of Proceedings', see *supra* note 89, at para. 9.

95 E. Trendafilova, "Fairness and Expeditiousness in the International Criminal Court's Pre-Trial Proceedings", in Stahn and Sluiter (eds.), see *supra* note 33, p. 444. See also *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-845, "Defence Observations Concerning Prosecution Table of Disclosure", 23 January 2009, para. 6(iii).

96 Harhoff, see *supra* note 37, pp. 475–477; Tochilovsky, see *supra* note 92. I. Bonomy, see *supra* note 6, at p. 348; S. Zappala, *Human Rights in International Criminal Proceedings*, Oxford University Press, 2003.

applied to large-scale international crimes. This is its 'tendency to produce lengthy and often irrelevant exchanges between the examining party and the witness'.[97] As the in-depth analysis methodology has been adopted by the Trial Chambers in *Katanga* and *Bemba*, one can anticipate that the structure that the charts provide will help keep attention focussed on the precise factual issues each witness has been called in respect of. Furthermore, by linking each piece of evidence or witness to each element of crime or mode of liability, it will be easier at the trial for the Trial Chamber to supervise proceedings and identify when the cross-examination may be digressing. As Lord Bonomy explains, the fostering of a more proactive, and effective process of communication between the parties in the lead up to the trial is also evident at the national level in common law jurisdictions. In the context of complex cases such as fraud,[98] the Lord Chief Justice of England and Wales issued a protocol that 'envisages the prosecution providing a pre-trial brief, the defence having an opportunity to comment on it, and a real dialogue in court between the judge and all advocates for the purpose of identifying (1) the focus of the prosecution case; (2) the common ground; and (3) the real issues in the case'.[99] Lord Bonomy goes on to quote the Lord Chief Justice, who concludes that, "it cannot be in the interests of any defendant for his good points to become lost in a welter of uncontroversial or irrelevant evidence". As such, it can be seen that even within traditionally the most adversarial of legal cultures, there is a move towards adopting more transparent and co-operative pre-trial procedures.

The above analysis demonstrates the need to address issues of both the expeditiousness of proceedings and the vindication of the rights of the accused.[100] Whilst expeditious proceedings are an integral aspect the rights of the accused, caution must be taken when judicial efforts are made to improve the efficiency of proceedings, since there runs a risk that in an effort to speed up proceedings the rights of the accused may be, albeit unintentionally, sidelined.[101] The balance sought to be struck by the adoption of the analytical method of disclosure, under which the primary

97 O-Gon Kwon, see *supra* n. 2, at p. 364.

98 Heinsch, see *supra* note 33, at p. 482.

99 Bonomy, see *supra* note 6, at p. 349.

100 Zappala, see *supra* note 96, at p. 117.

101 See also Heinsch, see *supra* note 33, at pp. 479–480.

obligation to expedite proceedings is placed on the Prosecutor, appears to reconcile the realisation of both the issues that are a particular issue in international criminal proceedings.

15.4.5. Impairing Prosecutorial Discretion

An additional concern of the Prosecutor with regards to the provision of the requisite degree of analysis and linkage of evidence to the precise elements of crimes and modes of liability was that, since disclosure is an ongoing process and is indeed encouraged to occur as soon as possible, it would deprive the Prosecutor of the flexibility to build and adapt the case as and when new circumstances come up prior to the commencement of the trial and would require the Prosecution to present its case in a particular mode, 'even if the Prosecution determines that the mode is not the most effective means of assembling and presenting its case'.[102] In this respect, concern has been raised as to the appropriateness of the inclusion of witness statements in the in-depth analysis charts, since such statements are typically not evidence, and that witnesses may produce different evidence when testifying at the trial.[103]

The Prosecutor's submission that the tabular format of disclosure, and the obligation to precisely link each piece of evidence to the factual and legal points they relate to, unduly restricts the Prosecutor's discretion to adapt the case in response to changing circumstances or the unearthing of further evidence, is countered by the Chambers with the simple response that they are fully appreciative of the organic nature of trials, and to that end, there is nothing to prevent the Prosecutor from submitting further evidence or asserting that the probative value of a piece of evidence has changed, providing that any developments are charted in an updated in-depth analysis chart.[104] Similarly, the concern regarding the

[102] "Prosecution's Application for Leave to Appeal the "Order Concerning the Presentation of Incriminating Evidence and the E-Court Protocol"", see *supra* note 51, para. 32. Also, "Prosecution's Submissions on the Trial Chamber's 8 December 2009 Oral Order Requesting Updating of the In-Depth-Analysis Chart, 15 December 2009" see *supra* note 52, at para. 13.

[103] "Prosecution's Application for Leave to Appeal the "Order Concerning the Presentation of Incriminating Evidence and the E-Court Protocol"", see *supra* note 51, para. 27.

[104] "Prosecution's Submissions on the Trial Chamber's 8 December 2009 Oral Order Requesting Updating of the In-Depth-Analysis Chart", see *supra* note 52, para. 27

inclusion of witness statements has been deemed to be ill-founded, since 'it is self evident that a witness's evidence at trial may not coincide with his or her pre-trial statements or interviews'.[105]

From the above analysis it derives that all concerns raised by the Prosecution can be met with equally valid arguments that clearly demonstrate the desirability of adopting in-depth analysis charts for the investigation and prosecution of core international crimes cases more broadly.

15.5. The Future: Realising the Potential of the Methodology behind the In-Depth Analysis Charts

So far, the adoption of the in-depth analysis charts has been discussed within the strict contours of the process in which it has arisen. This regime has been designed to facilitate the fulfilment of the Prosecutor's obligations *vis-à-vis* the Chambers and the Defence, at the disclosure of evidence stage of proceedings, and in order to better assist all parties in the efficient fulfilment of their duties. However, the logic underpinning the analytical charts, if adopted from the outset of an investigation, could provide a valuable framework upon which to structure the investigation and building of a case. Should this framework be adopted from the outset, the Chambers can be seen as capitalising on the opportunity at this early stage in the Court's judicial activities to imbue efficient operational cultures within the ICC.[106]

The benefits of the adoption of in-depth analysis charts apply regardless of whether the stage of proceedings is at investigation or at pre-trial stage. As discussed above, the very challenges that underpin the prosecution of core international crimes in terms of scale, complexity of the factual situation and the potential for a high number of perpetrators

[105] *Ibid.*, para. 28.

[106] This seems to be the implicit intention of the Chamber, given its declared presumption that the Office of the Prosecutor will have scrutinised all evidence in its possession in order to determine its worth both in terms of establishing the prosecution case, and in terms of assisting the Prosecution it its duty to "establish the truth" under article 54(1)(a) of the ICC Statute. See "Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties", see *supra* note 5, reinforced by "Decision on the 'Prosecution's Submissions on the Trial Chamber's 8th December 2009 Oral Order Requesting Updating of the In-Depth-Analysis Chart'", see *supra* note 79; and "Order Concerning the Presentation of Incriminating Evidence and the E-Court Protocol", see *supra* note 20.

equally renders their investigation a complex affair. By adopting the analytical framework *ab initio*, it is possible for the prosecution team to more easily identify those areas that require further investigation or require more evidence to support the legal assertion, thus enabling the Prosecution to submit the strongest case to trial. In combination with a better equipped Defence, this can enhance the overall quality of the Court's output, since decisions of the Chambers will be based upon higher quality submissions.

Taken to an even earlier stage in investigations, an application of the logic to the cataloguing of human rights abuses and atrocities in a situation that may later give rise to criminal investigations into the alleged commission of international crimes, at the very least can help organise vast quantities of data in a logical and appropriate manner. Whilst noticing the important differences between human rights fact-finding and criminal justice fact-finding (which necessarily demand that caution be taken when utilising evidence unearthed in human rights fact-finding missions in criminal investigations and prosecutions)[107], the potential benefits to criminal investigations if prosecution services draw upon, in certain circumstances, the work of human rights fact-finding missions should be acknowledged.[108]

[107] L. Sunga, "How can UN Special Procedures Sharpen ICC Fact Finding?", in *International Journal of Human Rights*, 2011, vol. 15, p. 187 at pp. 189–90: (1) taking 'facts' out of their proper context is highly misleading therefore great care must be taken; (2) human rights fact-finding tends to focus on state responsibility for internationally wrongful acts in order to pressure governments to comply fully with their human rights and international humanitarian law obligations, whereas criminal investigations focus on individual criminal responsibility – therefore the type of evidence collected is different; (3) respective burdens of proof; special procedural requirements in criminal investigations (preservation of presumption of innocence and confidentiality of evidence and preserving the chain of custody).

[108] *Ibid.*, at p. 187. In particular, distinguishing the fact-finding experiences of the ICTY and the ICTR from the technological context that now exists, Sunga discusses the possibility of drawing upon information technology and applications that utilise the same logic as that underpinning the analytical disclosure regime, specifically referring to the manner in which those applications offer a 'highly logical and systematic and pertinent means by which to hone raw empirical data on mass violations into a sharp case against the accused', *ibid.*, at p. 200.

15.5.1. The Filter-Down Effect of Adopting the Methodology behind the In-Depth Analysis Charts Beyond the ICC

The implications of the jurisprudence on the use of an analytical framework for evidence disclosure and organisation extend beyond proceedings before the ICC. Under the principle of complementarity, the Court is but one forum of international criminal justice, and its jurisdiction over a particular situation activated only if the State concerned is either unwilling or unable genuinely to investigate or prosecute.[109] As such, the Rome Statute confirms the primary obligation of *States* to prosecute international crimes. Combined with this, the limited capacity of the Court has led to the development of policies aimed at building the capacity of national institutions to fulfil their primary obligation, reducing the number of situations in which the Court's jurisdiction is seized by virtue of the *inability* of a State to investigate a situation.[110]

On the basis of the complementarity principle, it can thus be envisaged that the jurisprudence of the Court will be of particular note to those jurisdictions facing the daunting process of investigating and prosecuting a large number of suspected perpetrators in the aftermath of mass atrocity. In this context where national capacity may be under considerable strain, it is particularly important that strategies are adopted to expedite proceedings in order to effectively respond to the case-load. Furthermore, in such circumstances, when a system is faced with such a situation, there may be a temptation or inadvertent tendency to 'cut corners' with regards to procedural safeguards, particularly those upholding the rights of the accused. Therefore, the adoption of modalities of investigation and disclosure and the utilisation of the analytical logic can serve to integrate the protection of the rights of the accused into the manner in which the prosecution conducts its activities.[111]

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[109] See tenth preambular para., articles 1 and 17 of the ICC Statute.

[110] See chapter 3 in the present volume.

[111] See, for example, the OSCE's ODIHR Final Report, *Supporting the Transition Process: Lessons Learned and Best Practices in Knowledge Transfer. Final Report*, 2009, available at http://www.icty.org/x/file/About/Reports%20and%20Publications/odihr_unicri_icty_2009report_en.pdf last acessed at 15 November 2011. After identifying the main problems in the investigation of international criminal and humanitarian law cases as pertaining to: "(1) a considerable divergence of opinion exists on key questions of substantive law; (2) only a small minority of investigators, prosecutors and investigative judges in the said jurisdictions have any experience investigating

The conduct of proceedings and the manner in which the different organs of justice operate at the ICC level are able to set an example for the wider system of criminal justice for international crimes with regards to best practices in evidence handling and criminal procedure when prosecuting core crimes cases.[112] Whilst the system of in-depth analytical disclosure was established by the Chambers in view of the unique characteristics of international proceedings, as has been demonstrated, the logic underpinning the system is highly flexible and could be of significant benefit to domestic jurisdictions both in terms of disclosure policy and as a framework for the investigation and prosecution of alleged crimes.

15.6. Conclusion

As the profile of the ICC continues to rise in the international sphere, its activities will be the subject of increasingly intense scrutiny. International criminal justice will continue to be controversial for several reasons, not least because of the length of time proceedings take. At the same time, as calls for criminal accountability for atrocities remain frequent, expectations for the Court are high. The ICC has to adopt, and be seen to adopt, strategies to alleviate inefficiencies in the judicial process and the symptoms of the challenges of prosecuting international crimes if it is to refute the criticisms levelled against it and reasonably manage expectations.[113]

The introduction of in-depth analysis charts is one of those mechanisms adopted to improve the efficiency of judicial proceedings before the Court. Of course, on their own, they cannot be a panacea for all the

(and proving) modes of liability other than direct perpetration, and (3) oftentimes insufficient capacity exists to access and manage the frequently large quantities of materials relevant in cases where core international crimes have been alleged" (at p. 10), and whilst noting the challenges faced by the judges (at p. 11), the Final Report goes on to culminate in a set of prioritised recommendations (at p. 14) which closely resemble the methodology discussed throughout this piece.

[112] See how the in-depth analysis charts could assist with terrorist cases in R. Rastan and O. Bekou, "Terrorism and Counter-Terrorist Responses – the Role of International Criminal Jurisdictions", in A.M. Salinas de Frias, K. Samuel, and N. White (eds.), *Counter Terrorism – International Law and Practice*, Oxford University Press, 2012 (forthcoming).

[113] ICC-OTP Informal Expert Paper, "Measures Available to the International Criminal Court to Reduce the Length of Proceedings", see *supra* note 89, at para. 6: "public confidence, as well as the rights of the accused and of victims could be affected by lengthy proceedings".

challenges presented in the prosecution of serious incidents of international criminality. However, the adoption of the 'in depth analysis charts' as a modality for the organisation, disclosure and presentation of evidence represents a step in the right direction. The intellectual analysis behind the methodology of the charts should be recognized as a substantial contribution to the field of international criminal justice.

It is in the logic that underpins the charts that their real significance and impact lies. By breaking down the crimes and modes of liability into their constituent parts, and linking each pieces of factual evidence to those specific parts, the analytical logic not only helps the Prosecution to present and communicate its case in the clearest and most logical manner for establishing international criminal responsibility, but it also helps the other parties to the proceedings, as well as Chambers, to process the vast amount of information that the prosecution case entails. In this improvement in the quality of communication between the parties rests the promise of enhanced respect for the rights of the accused, and strengthened integrity and legitimacy of the judicial process before the Court. As the ICC's courtrooms are perceived to be 'judicial laboratories' where the Court's procedural system is refined,[114] the impact which the adoption of the in-depth analysis charts has on other fora, be it international or national, should not be underestimated. The innovative stance taken by the ICC in that respect constitutes an important breakthrough for the future of the investigation and prosecution of core international crimes cases.

[114] Harhoff, see *supra.* note 37, at p. 472.

16

Some Remarks on the Case Matrix from the Perspective of the Norwegian Prosecution Service

Knut Kallerud[*]

I am pleased to be given an opportunity to make a few remarks on behalf of the Office of the Norwegian Director of Public Prosecutions on the occasion of this international seminar on the International Criminal Court (ICC) Legal Tools Project and the partner Programme of the Norwegian Centre for Human Rights (University of Oslo). We think this is an important gathering of resourceful persons from many countries and institutions. The fact that no less than seven institutes from five countries are co-organisers of this seminar shows the broad support for its theme and topics.

It is essential for the ongoing improvement of the cost efficiency and quality of criminal justice systems that we actively seek critical scrutiny of our work processes in criminal investigation, prosecution and adjudication with a view to identifying possible areas for improvement. This is particularly important for fact-rich and resource-demanding cases such as war crimes, crimes against humanity and genocide cases. The innovative and practical analysis of ways in which information technology can help work processes in such cases serves important public interests. This seminar is, I believe, an excellent arena to look into how we work and how we can achieve more.

We are particularly pleased to see that a Norwegian academic Centre has defined such an interesting programme together with the other ICC Legal Tools outsourcing partners. We see this as another sign that Oslo and Norway is slowly putting itself on the map of international criminal justice, a development which we welcome. The criminal justice tradition of the Nordic countries is neither Civil nor Common Law, so it

[*] **Knut Kallerud** is a Judge of the Norwegian Supreme Court. At the time of writing, he was Deputy Director of Public Prosecutions in Norway. The chapter is based on a statement given at an FICHL seminar in Oslo on 27 September 2007.

may well be in the interest of the international criminal justice discourse to hear articulations of Nordic perspectives from time to time.

The Director of Public Prosecutions of Norway, Mr. Tor-Aksel Busch, has had an interest in the ICC even before the entry into force of its Statute. He chaired the expert working group of the ICC Advance Team on the Regulations of the Office of the Prosecutor, whose draft has been on the website of the Court for several years. Mr. Busch has also been interested in the development of new systems, standards and work methodologies at the ICC. Our Office has followed the development of the Case Matrix from the sidelines since 2003. When ICC staff demonstrated the Matrix to us more than two years ago, we were immediately impressed and wanted to get to know the system better.

Our Office recently had the latest version of the Matrix installed pursuant to the conclusion of a standard "Case Matrix Understanding" with the ICC. The Matrix has also been made available to our National Authority for the Prosecution of Organized and other Serious Crime, whose head is here today; the corresponding criminal investigations unit in Kripos, several of whose members are also here; and the Office of our Judge Advocate General, whose leader is here as well.

That a case management application developed at an international criminal court – on a platform of open source components – is installed on the main servers of important Norwegian investigation and prosecution units, is significant in itself. It reflects the importance that we give to this product. It also reflects the fact that the ICC has already managed to develop systems and tools for work processes which well-established national criminal justice institutions can benefit from. It has also organised an informal community of Case Matrix users through the vehicle of the "Case Matrix Understanding". I think it is very reasonable that the Court controls access to the Matrix by requiring that users first sign such an agreement. That makes it easier for all users to be working off the same version of the application and to exchange user experience.

I know that several Case Matrix versions have been adapted to local law, for example in Cambodia and Indonesia. Customising the Matrix in this way is to serve the tool on a silver platter to the jurisdictions in question. Obviously, this is a sign of considerable will on the part of the ICC to contribute to the building of national capacity to investigate and prosecute core international crimes, such as genocide, crimes against humanity and war crimes. This will of the ICC is to be understood and

interpreted in light of the background of the complementarity principle on which the Court is based.

The main legal information services of the Case Matrix – the Elements Digest and the Means of Proof Digest – refer to the crimes and the modes of participation in the ICC Statute. Criminal justice lawyers and investigators in States which have imported the core international crimes from the ICC Statute are among the frontline, ordinary normal national users who will benefit from the Matrix. In these situations the substantive criminal law on the offences in the national legal system will correspond directly to ICC law. This is also the case if a national system has only imported, for example, the crime of genocide. With the new Norwegian legislation importing all the core international crimes into our national criminal law, effective as of early 2008, Norway should place itself and its criminal justice actors within this frontline of Case Matrix users. When the new legal framework is applicable, the legal information services of the Matrix will be exceptionally useful to anyone working on these crimes in Norway. That is clear.

As prosecutors we use commentaries and handbooks to guide us quickly to more detailed information on crimes and their elements. Having access to electronic digests – having them at your fingertips – represents a great resource for us. I gather some of you have access to your own law and jurisprudence in national databases and have – as we have in this country – instantly become addicted to them. I predict that we will experience the same with the Matrix. However, all systems need maintenance. The mechanisms established within the ICC Legal Tools Project to update the digests will therefore become important to us. Those entrusted with this responsibility have an important task. They deserve our support.

I can also see that we will benefit from further developments of the legal information services, such as linking the digests to the underlying raw documents, be they judgements or other sources.

The services will not only be useful in the actual work on core international crimes, such as when interpreting or formulating legal arguments. With new criminal offences comes a training need. I believe the Case Matrix also can play an important role in the training of prosecutors, investigators and analysts who need to work on these crimes in Norway. And, as the Matrix is ever-present in our desktop computer, so to speak, our officers can easily access the legal information it contains

when it suits their agenda and personal training preferences. This is very helpful.

Moreover, the definition of crimes and modes of participation in international criminal law may also be relevant to prosecutors and investigators in States which have not yet imported the core international crimes into their national criminal law. For example, the judgements of the *ad hoc* International Criminal Tribunal for the former Yugoslavia (ICTY) and the *ad hoc* International Criminal Tribunal for Rwanda (ICTR) are a rich source of information on how one should handle a wide range of questions of proof linked to mass violence in armed conflict. The 7,000 page Means of Proof Digest is a remarkable source for such questions.

I would also like to highlight the utility of the new "Legal Texts" functionality of the Case Matrix. Here you have an electronic library of international criminal law sources amounting to more than 1 GB of information, available at your fingertips, for free. This is a tremendous resource to have for any type of legal work involving human rights violations which may amount to core international crimes.

In addition to these Case Matrix functions of legal information, the Matrix also has an evidence database function. This functionality is customised to meet the demands of work processes involving core international crimes cases. When Norway has imported the core international crimes into our national criminal law, we should explore if this functionality of the Case Matrix may be implemented in the actual investigation of an individual case. It might be interesting to see if and how our Norwegian evidence management routines can be adapted to this new tool, for the benefit of cost efficiency and quality in our handling of core international crimes cases.

Let me end my intervention by saying a few words about the "founding father" of the Case Matrix, Mr. Morten Bergsmo. We are very proud of having an individual of such international capacity as Morten in Norway and attached to our prosecution service. I cannot go into his vital functions at the ICTY and the ICC and the many other important tasks he has taken on. Let me on this occasion just emphasise his tireless efforts to develop practical tools for practitioners working with core international crimes. It is people like Morten – and there are not many of his kind – that really takes us forward. The Case Matrix is a great example of Morten's dedication and ability to make a difference. To put it very

simple: because of Morten and the Case Matrix, more criminals will in all likelihood be brought to justice in the future. That is no small achievement.

17

Developing the Case Matrix to Assist the Prosecution and Adjudication of Core International Crimes in Bosnia and Herzegovina: Methodologies and Perspectives

Ilia Utmelidze[*]

17.1. Introduction

The scale and severity of atrocities during the Western Balkan wars in the beginning of the 1990s was monumental. Thousands of people were killed, disappeared, brutally and systematically tortured or raped, and forcefully displaced. Religious buildings were desecrated, and millions of households devastated. This mass victimization places legal, political and moral obligations on countries in the region and beyond to take action against the legacy of wartime atrocities. Dealing with such crimes is a necessity for societies in the region to overcome the past and start building sustainable peace and reconciliation.

The international community has taken a leading role and made a commitment to the victims of these mass atrocities to bring perpetrators of these crimes to justice. The creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY) was the initial institutional response to these crimes.[1]

As the work of the Tribunal evolved, the ICTY sought to deal with the worst crimes committed and "the most senior leaders suspected of being most responsible for crimes".[2] It also developed its jurisprudence in

[*] **Ilia Utmelidze** is Legal Adviser, Norwegian Centre for Human Rights; formerly Legal Adviser in the Human Rights Department of the OSCE Mission to Bosnia and Herzegovina (2004–08); Norwegian Refugee Council, Azerbaijan (2001–04); Norwegian Centre for Human Rights (2000–01).

[1] UN Security Council resolution 827 (1993), UN doc. S/Res/82 (1993), 25 May 1993. This formally created the International Tribunal.

[2] UN Security Council resolution 1503 (2003), UN doc. S/Res/1503 (2003), 28 August 2003. It took several years for the Tribunal to refine its approach and to enable it to concentrate on "the prosecution and trial of the most senior leaders suspected of being

order to consolidate a legal foundation for accountability processes.[3] The Tribunal will soon close down,[4] and, notwithstanding all its achievements and challenges, by the end of its mandate it will have prosecuted only a small number of top-level perpetrators.[5]

According to UN Security Council resolution 1503, which sets out the framework for the completion strategy of the Tribunal, after the closure of the Tribunal, the respective national authorities in the region, with the support of the international community, will have to take back primary responsibility to follow through on the commitment to accountability and justice for atrocities. Resolution 1503 highlights that "the strengthening of national judicial systems is crucially important to the rule of law in general and to the implementation of the ICTY […] Completion Strategies in particular".[6] Furthermore, the resolution, under the authority of Chapter VII of UN Charter, "calls on the international community to assist national jurisdictions, as part of the completion strategy, in improving their capacity to prosecute cases transferred from the ICTY" as well as "calls on the donor community to support the work of the High Representative to Bosnia and Herzegovina in creating a special chamber, within the State Court of Bosnia and Herzegovina, to adjudicate allegations of serious violations of international humanitarian law".[7]

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most responsible for crimes within the ICTY's jurisdiction". See also, M. Bergsmo, K. Helvig, I. Utmelidze and G. Žagovec, *The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina*, Second Edition, Torkel Opsahl Academic Epublisher, Oslo, 2010, FICHL Publication Series No. 3, available at http://www.fichl.org/publication-series/, last accessed on 12 November 2011.

3 The precedent-setting judgements and decisions on genocide, crimes against humanity and war crimes made by the Intentional Tribunal may be the most authoritative and widely quoted case-law in the field of International criminal law.

4 The UN Security Council resolution 1503 (2003), UN doc. S/Res/1503 (2003), 28 August 2003 and Security Council resolution 1534 (2004)UN doc. S/RES/1534 (2004), 26 March 2004 (UN Security Council resolutions endorsing the Tribunal's completion strategy).

5 Human Rights Watch, *Looking for Justice, The War Crimes Chamber in Bosnia and Herzegovina*, 7 February 2006, Introduction, available at http://www.hrw.org/en/reports/2006/02/07/looking-justice-0, last accessed on 14 November 2011.

6 The UN Security Council resolution 1503 (2003), UN doc. S/Res/1503 (2003), 28 August 2003, Preamble, para. 10.

7 *Ibid.*, operative paras. 1 and 5.

This transition has effectively shifted the battleground of justice for atrocities from the ICTY to national arenas and opened up a new paradigm for accountability processes in the region and perhaps beyond. "Victims of these crimes, and their families, have been waiting for more than a decade to see justice done"[8] and in the coming years it will be the Western Balkan States, especially Bosnia and Herzegovina, that will bear primary responsibility to overcome the legacy of the conflicts and address the thousands of complaints alleging grave crimes committed during the war.[9]

However, Security Council resolution 1503 draws attention to an apparent dichotomy between the ability of national jurisdictions to lead accountability processes, and the overall functionality of the rule of law, which includes both the technical and human capacity of the respective justice systems in the region to investigate, prosecute, provide defence in, adjudicate and sanction core international crimes cases.[10]

> And yet, helping war-torn societies to re-establish the rule of law and come to terms with large-scale past abuses, all within a context marked by devastated institutions, exhausted resources, diminished security and a traumatized and divided population, is a daunting, often overwhelming, task. It requires attention to myriad deficits, among which are lack of political will for reform, lack of institutional independence within the justice sector, lack of domestic technical capacity, lack of material and financial resources, lack of public confidence in government, lack of official respect for human rights and, more generally, lack of sustainable peace and security.[11]

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8 Human Rights Watch, "Still Waiting Bringing Justice for War Crimes, Crimes against Humanity, and Genocide in Bosnia and Herzegovina's Cantonal and District Courts", July 2008, available at http://www.hrw.org/sites/default/files/reports/bosnia0708_1.pdf, last accessed on 12 November 2011.

9 *National War Crimes Strategy* adopted by the Council of Ministers of Bosnia and Herzegovina on 28 December 2008, Figure 1: "Data on the number of outstanding cases".

10 The expression "core international crimes" in this chapter is intended to mean genocide, crimes against humanity, and war crimes.

11 The report of the UN Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, UN doc. S/2004/616, 23 August 2004.

17.2. Knowledge-Transfer, Legal Empowerment and Capacity-building Efforts in Bosnia and Herzegovina

The jurisprudence of the ICTY[12] and general literature on the subject suggests that Bosnia and Herzegovina was most affected by the Western Balkan wars of the 1990s. The most heinous crimes and mass victimization took place on its territory and, consequently, after the change in accountability paradigm, Bosnia and Herzegovina will be expected to be the most responsible in the pursuit of justice for victims of atrocities.[13] In this regard, enhancement of the rule of law in Bosnia and Herzegovina, including the development of an efficient, competent and impartial justice system, is a key precondition to ensuring that victims of atrocities are able to seek the truth about the past and see justice done.

For almost a decade, there have been substantial efforts by both the local authorities and the international community to carry out comprehensive reforms of the justice system of Bosnia and Herzegovina, including the strengthening of its capacity to process core international crimes cases. However, these endeavours were somewhat uneven in nature, intensity and quality, especially when it came to building a professional local capacity to process core international crimes cases.[14]

The extraordinary effort that led to establishment of the State Court and the specialized War Crimes Department of the Prosecutor's Office of Bosnia and Herzegovina, as well as the comprehensive amendment of criminal and procedural laws, is widely recognized as an important success story that has allowed the formation of necessary domestic institutional and legal capacity to process core international crimes cases.

However, these processes often required the direct intervention of the international community, both to provide vital political support and to address the immediate resource and capacity needs of justice institutions.

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[12] See "Key figures" of ICTY cases, available at http://www.icty.org/sections/TheCases/KeyFigures.

[13] However, when it comes to proving safe-havens for the alleged perpetrators of these atrocities, other countries in the former Yugoslavia that where directly involved in the war, and Serbia in particular, have a greater responsibility to co-operate and act in accordance to the principles of the international law.

[14] See the Final Report, *Supporting the Transition Process: Lessons Learned and Best Practices in Knowledge Transfer*, OSCE, ODIHR, ICTY, UNICRI, Warsaw, The Hague, Turin, September 2009.

Especially at the initial stage, the international community, to a large extent, had to substitute the missing human and material capacity of Bosnia and Herzegovina to help jumpstart accountability processes in the country.[15] The challenge that remains ahead is to design mechanisms that best facilitate knowledge-transfer, legal empowerment and capacity building with respect to local professional communities to enable the justice system of Bosnia and Herzegovina to continue accountability processes in a sustainable and self-sufficient manner.

17.3. Introduction of the Case Matrix Application and Legal Tools Database in Bosnia and Herzegovina

The ICC Legal Tools Project[16] became involved with knowledge-transfer and legal empowerment processes in Bosnia and Herzegovina with the initial intention of providing the Case Matrix application[17] to several key institutions working on the core international crimes problem within the country.

During 2007, the Case Matrix application was provided to the Registry for the War Crimes Section of the Court of Bosnia and Herzegovina and the Special Department for War Crimes of the Prosecutor's Office of Bosnia and Herzegovina,[18] the High Judicial and Prosecutorial Council of Bosnia and Herzegovina,[19] and the Criminal Defence Section of the Registry for Section I and Section II of the Court of Bosnia and Herzegovina.[20]

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[15] It is estimated that up to 30 million Euros have been directly contributed to core international crimes processes in Bosnia and Herzegovina as well as several dozens of legal professionals that have been deployed within and outside justice sector institutions for more then a decade. For more details see Bergsmo *et al.*, *supra* note 2..

[16] See "What are the ICC Legal Tools?", available at http://www.legal-tools.org/en/what-are-the-icc-legal-tools/, last accessed on 12 November 2011..

[17] See "Case Matrix", available at http://www.legal-tools.org/fileadmin/user_upload/Case_Matrix_Brochure_V._Jul09.pdf, last accessed on 12 November 2011.

[18] The principal prosecutorial and judicial bodies at the Bosnia and Herzegovina state level with primary jurisdiction for core international crime cases in the country.

[19] The centralized independent body tasked with judicial and prosecutorial administration matters, see http://hjpc.ba/.

[20] It provides support to defense counsel to represent defendants in core international crimes cases.

However, soon after this tool was introduced, the need to translate and adapt the Case Matrix for legal professionals within Bosnia and Herzegovina was acknowledged. The majority of local professionals do not use English as a working language and could not directly benefit from this tool. Its translation and further adaptation became crucially important to give local professionals involved in core international crimes the possibility to fully utilize the Case Matrix application. This would be particularly advantageous for professionals outside capital cities who often benefit less from capacity building efforts carried out in the country.

The official request to provide a local language version of the Case Matrix was initiated by the High Judicial Prosecutorial Council, and in 2008 the Royal Norwegian Ministry of Foreign Affairs provided the necessary funding to commence work on the translation of this tool. The ICC Legal Tools programme of the Norwegian Center for Human Rights[21] has been given the responsibility to implement this project, pursuant to a request from the Co-ordinator of the ICC Legal Tools Project.

17.4. Methodology of Adapting the Case Matrix to a National Jurisdiction

The Case Matrix is a law-driven case management application that provides its users with legal information services and database tools required to work effectively with international criminal law.

The core services the Case Matrix provides are: (a) a library of selected relevant legal sources such as treaties, legislation, indictments and judgments from both national and international institutions; (b) two legal Digests: one on the elements of crimes[22] of the ICC statute (the Elements Digest) and the second providing guidance on how to prove international crimes and modes of liability (the Means of Proof Digest); (c) a database system to manage information and potential evidence in

[21] See "The ICC Legal Tools", available at http://www.jus.uio.no/smr/english/about/programmes/icc/index.html, last accessed on 12 November 2011.

[22] "Elements of Crime" refers to those constituent parts of a crime that must be proved by the prosecution to sustain a conviction. It is a term used to refer to each component of the *actus reus*, causation and the *mens rea* that must be proved in order to establish that a given offence has occurred. The ICC Elements of Crime document is incorporated through article 9 of the ICC Statute to assist the Court in the interpretation and application of crimes of genocide, war crimes and crimes against humanity.

core international crime cases. The Case Matrix gives users the opportunity to have a "legal x-ray" overview of the evidentiary status of a case throughout the criminal process.[23]

The legal architecture of the Case Matrix is based on the Rome Statue[24] and the Elements of Crimes[25] document. Article 6 (genocide), article 7 (crimes against humanity), article 8 (war crimes) as well as articles 25 and 28 (modes of liability) of the Rome Statue are the main building blocks of this tool's legal structure. In addition, article 30 (mental elements) is integrated per element of crime of each offence as it is prescribed by the Rome Statue and the Elements of Crimes document.

The Case Matrix is a tool with inbuilt flexibility that can accommodate a large variety of users and their diverse needs.[26] By October 2011, there were more than 120 users of the Case Matrix worldwide. This includes institutional users such as courts, prosecutors' offices, defence teams, individual judges and other legal professionals. Depending on the capacity of a user and individual or institutional needs, the Case Matrix can, for example, be utilized as an electronic international criminal law library, a legal reference service, and/or an evidence management system.

17.4.1. Translation of the Case Matrix Tool

Understanding user needs is a first important step that determines the ultimate necessity and scope of both translation and adaptation of the Case Matrix to national users. For example, if the primary need of the users is to have a specialized case management system to assist with work on complex legal requirements and evidentiary materials of core international crimes cases, priority will be given to the translation of the legal requirements structure and the core functions of the tool. However, if the users also have a need to get access to legal resource materials, so as to build the capacity and knowledge necessary to process core international crimes cases in accordance with international standards and

[23] Evidence is easily included through hyperlinks and text. The database can be customized to meet the needs of various user groups.

[24] Rome Statute of the International Criminal Court, A/CONF.183/9 of 17 July 1998.

[25] Elements of Crimes, ICC-ASP/1/3(part II-B) of 9 September 2002.

[26] See "The Users of Network Services", available at http://www.casematrixnetwork.org/case-matrix-users/, last accessed on 12 November 2011.

norms, then the legal services of the Case Matrix application (Elements Digest and Means of Proof Digest) should also be translated.

Experience working with Case Matrix users worldwide demonstrates that jurisdictions with fewer resources, which are often confronted with more core international crimes cases, frequently need both these services. Additionally, consideration should be given to other factors such as long term interests, the actual number of users and their respective case volumes, as well as the availability of funding for translation. The totality of these factors will ultimately determine if and how extensively, the translation and adaptation process should be conducted.

So far, two essential models have been developed for the translation and adaptation of the Case Matrix:

a) Translation of the information structure of the database system and its core functions with the possibility to adapt the tool to local legislation.[27] The planning and implementation of this model of translation requires only some degree of additional resources and is a relatively swift process.

b) Translation of the information structure of the database system as well as the legal digests of the Case Matrix application (Elements Digest and Means of Proof Digest). The realization of this second model of translation requires both additional funding and longer timeframes for its planning and implementation.

The principal difference that makes the second model of translation more expensive and time demanding is the volume of the two Digests that, together, amount to more than 7,500 pages of legal text.[28]

The content of these digests makes the Case Matrix a unique knowledge-transfer, legal empowerment and capacity building tool. This

[27] For example translation of the information structure of Case Matrix have been down into French, Khmer for the Extraordinary Chambers in the Courts of Cambodia (ECCC), and Bahasa Indonesia

[28] The Elements Commentary is designed as a classical legal commentary and contains up to 900 pages (A4 format) of legal text. The Means of Proof on other hand is a digest of the relevant international and domestic jurisprudence that provides users with the guidelines how evidence is used to apple substantive law and it is over 6,500 pages (A4 format) of legal text and quotations of relevant case-law.

universe of conceptual and practical information provided to users, especially in countries with limited resources, often represents the only avenue by which local practitioners may access necessary knowledge. Moreover, in comparison to *ad hoc* training and seminars, the Case Matrix provides a self-learning tool that can be used for continuous skills- and knowledge-development within working environments and processes.

Once the model of translation of the Case Matrix is chosen, the key priority is to ensure the high quality of translation. The challenges linked to ensuring such quality translation of these legal texts differ. For example, it is not always easy to identify interpreters with specialised skills, experience and who are familiar with international criminal law, its terminology and legal concepts. Furthermore, within some jurisdictions, the local language might still lack certain well-established vocabulary in this field of law.

Translation of the two Digests is a two stage process. First, the initial translation and editing that can be outsourced to several interpreters, and, second, quality control that should be performed by one individual with outstanding language skills and familiarity with international criminal law vocabulary.

After the translation process is completed, the entire text will be integrated into the Case Matrix and the tool will be ready for deployment to users.

It should be taken into consideration that the Case Matrix and its legal services are periodically updated in the original language; new jurisprudence as well as relevant new legal concepts can be incorporated as they arise. Based on the needs of the users, such substantive updates will have to be translated into the relevant language and provided to the users. These additional efforts are less challenging and less resource consuming.

17.4.2. Customisation and Integration of the Case Matrix in the Local Legal System

Alongside its primary purpose to provide users with legal information and case management functionalities, the Case Matrix application offers a unique methodology to address some complexities in the application of the law and the use of evidence in the international criminal law field.

Once the tool has been introduced, especially when it is fully translated into the local language, there is the possibility of further customising and integrating the Case Matrix into the local legal system. As discussed above, the Case Matrix is built on the Rome Statute and the Elements of Crimes document. It can, however, be customised to the needs of local law in the given country.

The architecture of the Case Matrix offers an advanced methodology of work with law and evidence, encouraging efficiency and accountability. This approach helps to deconstruct legal concepts into more easily understandable and manageable elements of legal requirements and its components. The advantage of this approach is that users are getting a complete overview, "a virtual legal map", of the relevant legal and factual matters in the given case at any stage of the criminal proceedings. Practitioners at the national level with less experience dealing with these types of cases can particularly benefit from such an advanced guide into the labyrinth of international criminal law.

Experience shows that some local legislation does not always accurately define the standards of international criminal law. Traditional domestic commentaries may not set out the level of detail necessary to understand and apply these legal standards. Such lack of clarity can be an obstacle in strengthening the knowledge and competence of the relevant practitioners. Such failures often result in unnecessary delays of criminal proceedings and poorly drafted legal decisions, which can lead to criticism from local and international observers.

Customisation of the legal structure of the Case Matrix is an intellectual process that should be conducted by leading local experts in this field. Based on the methodology of the Case Matrix, they can, with appropriate guidance, adapt the legal structure to relevant domestic law. The output of this process is a detailed catalogue of legal requirements and its components that resembles the Elements of Crimes document. This analysis of applicable law can contribute to further clarification of domestic standards and their interplay with international norms.

The availability of such a detailed structure of domestic law to practitioners, through the Case Matrix tool as well as possibly in a more formalized manner, contributes to the increased capacity of the local justice system to deal with international crimes.

The second important element of customization and integration of the Case Matrix is the development of a digest of relevant local jurisprudence that can improve the understanding of the relevant justice actors.

Core international crimes cases, especially in territorial States, are usually politically sensitive and legally complex, triggering significant interest among victims and the general public. Cases are closely watched and compared. These factors put an additional burden on any justice system to process these cases in an impartial and fair manner that reassures the public.

The methodology of compiling the two Case Matrix Digests can also be used to produce a digest of relevant case law for the local jurisdiction that would reflect local practice in the interpretation and application of the law. Normally jurisdictions with resource constraints are not able to provide practitioners with such specialised digests in this field.

Giving local practitioners access to the Case Matrix Digests can contribute to the uniform application of the law, increase legal certainty, and enhance the overall legal quality of the process.

Here, too, the process of developing a local digest has to be closely co-ordinated with national experts in the field who have a first-hand understanding and knowledge of relevant local jurisprudence. It is important that the process of designing such digests aims to create a sustainable model for the follow-up of these activities, which empowers and encourages local professionals and the relevant authorities to further maintain and update the digests.

17.4.3. Training and Coaching Case Matrix Users

After the translation or customization work on the Case Matrix application has been completed, targeted training conducted in a sustainable manner is key to the successful deployment of this tool. This step ensures that the relevant users are introduced and educated in the functionalities of the Case Matrix.

The Case Matrix has specially designed training modules for its core functions. In a situation where the application has been translated and customized to local legal systems, there will be a need to design special training modules for particular groups of users.

Sspecially assigned Case Matrix Advisers provide the necessary initial training, coaching and individual follow-up of the users, on behalf of the Co-ordinator of the Legal Tools Project and through the Case Matrix Network platform.[29] It is important to establish partnerships with local training institutions, preferably specialized institutions that target legal professionals.

If the training and support needs are expected to be high, a team of resource persons can be prepared within user institutions. These focal points will provide the necessary day-to-day support for the benefit of the individual users as well as facilitate the development of long-term user capacity within these institutions.

A main advantage of the Case Matrix tool is that it provides possibilities for self-education by its users. Conceptual material that can be found in the legal services of the tool, as well as methodologies built into the application, can also provide great resources for the design of more academic programmes in the field of international criminal law. It is therefore encouraged to use the Case Matrix application to develop educational material and courses in substantive international criminal law.

17.5. Implementation of the Case Matrix in Bosnia and Herzegovina and Beyond

On the basis of a careful assessment of core international crimes processes in Bosnia and Herzegovina and neighbouring Croatia and Serbia, it was decided to make a full translation of the information structure of the database system and the Case Matrix Digests.

As the National War Crimes Strategy adopted by the Council of Ministers of Bosnia and Herzegovina on 28 December 2008 indicates, there are potentially thousands of core international crimes cases[30] that different justice institutions within the country will have to deal with in the years to come. It is courts, prosecutors' offices and defence teams at both the State and institutional levels that have to make a common effort to ensure visible progress in addressing the thousands of outstanding complaints related to atrocities of the past war.

[29] See the Case Matrix Network website at, at http://www.casematrixnetwork.org.

[30] For more details regarding issue of caseload See Bergsmo *et al*., see *supra* note 2.

This objective implies that considerable capacity building efforts have to be provided in order to strengthen the ability of the Bosnia and Herzegovina justice system as a whole to deal with core international crimes cases. However, there are a number of challenges to achieving this objective, including limited resources and existing competing demands within the justice sector, not to mention the complex political environment within the country.

To assist Bosnia and Herzegovina in addressing these difficult tasks, targeted and qualitative capacity building efforts should be a priority for both the donor community and the specialized agencies working on these issues. These efforts should complement and support the process of capacity building within the country, and help overcome both objective and subjective challenges. This would be in the spirit of UN Security Council resolution 1503.

The Case Matrix application is a unique tool for knowledge-transfer and legal empowerment. It is one of a kind within the field of the international criminal law. It provides several distinct legal services that are essential for any capacity-building process. The full translation of this tool into the local languages (Bosnian/Croatian/Serbian (B/C/S))[31] will give an opportunity to all relevant practitioners within this field to directly and continuously benefit from the Legal Tools Project.

The translation work was outsourced to a team of former ICTY translators with leading international expertise. They were selected through an open tender procedure that identified the best candidates for this assignment.

The 7,500 pages of text in the Case Matrix Digests contain a considerable amount of quotations from ICTY jurisprudence. Interpreters used official translations where available, preserving the maximum authenticity of the text. This method ensured the overall high-quality of the translation.

An important element of the B/C/S Case Matrix implementation plan is a special introductory training for potential users of the tool in the

[31] The translation of material into Bosnian/Croatian/Serbian is a practice used by the ICTY as well as other international agencies operating in the region. For the purpose of the Case Matrix, the intention is to make the tool available regionally. Professionals form Croatia and Serbia or any other country in the region will be given full access.

justice system of Bosnia and Herzegovina. Building close co-operation with leading actors, both national and international, and working on the capacity building issues in Bosnia and Herzegovina is another priority. There is also an awareness of the need to customise the Case Matrix to further accommodate the local legal system. In co-operation with other international agencies in this field, it may become possible to support the development of specialised digests for the legal community in Bosnia and Herzegovina, as well as thorough analysis of applicable legal standards. This work should be organised with relevant experts from Bosnia and Herzegovina who specialise in international criminal law.

With such co-operation with other capacity building actors, the Case Matrix has the potential to significantly contribute to the training of local professionals and their empowerment.

17.6. Conclusion

Societies that survive the brutality of armed conflict or despotic regimes, and are on their path to peace and justice, live with the legacy of criminal atrocities and their consequences. Overcoming that legacy is a precondition for a democratic future for these societies, based on principles of rule of law and human rights.

The time span required for the formation of political will to make changes is always difficult to predict. It can come immediately or be considerably delayed. However, the development of the capacity of relevant domestic institutions to deal with the challenges of past atrocities is a long-term and hard process. It is therefore necessary that sustainable and advanced methods of knowledge-transfer, legal empowerment and capacity building are promoted.

The Case Matrix application and the methodology of its operation is a unique competence building tool in the field of international criminal law. The principles of self-education and in-service training make knowledge- and skills-transfer sustainable, efficient and affordable. The focus of this tool on delivering high quality knowledge and operational skills required to effectively work on core international crimes cases gives it an advantage over other models of capacity building.

The targeting of users with less material and technical resources makes this tool particularly useful in developing countries. Experience shows, however, that well-established jurisdictions also find it useful to

operate the Case Matrix application to process complex core international crimes cases.

18

The Use of the Case Matrix at the Iraqi High Tribunal, 2006–2008

William H. Wiley[*]

18.1. Introduction

The Iraqi High Tribunal (hereinafter IHT) is known principally as the institution that tried Saddam Hussein and other high-ranking figures associated with the former Baathist regime. The accused brought before the IHT have included Tariq Aziz, an English-speaking Christian, erstwhile Iraqi Foreign Minister and close friend of Saddam who first came to the attention of western television audiences in the wake of Iraq's 1990 invasion of Kuwait. A still more high-profile and infamous suspect tried by the IHT was Ali Hasan Al-Majid, known in Iraq and internationally as "Chemical Ali". Ali Hasan was a cousin of Saddam who, despite his evident (at least to this author) criminal-psychopathic tendencies, frequently ridiculed privately his nickname on the grounds that he had, in fact, held neither *de jure* nor *de facto* authority to order strikes with chemical munitions.[1] In the event, Ali Hasan was executed in

[*] Dr. **William Wiley** is Director of Tsamota Ltd., a UK-based consultancy that specialises in the delivery of, *inter alia*, justice- and security-sector reform projects in conflict and post-conflict States. In April 2006, he was retained as International Law Advisor to the Iraqi High Tribunal, where he was assigned by the President of the Tribunal to the Defence Office in an advisory role. He retained this post until 2008, when the programme of funding for international support to the IHT was brought to an end. Prior to joining the IHT, Dr. Wiley had been employed in the field of international(ised) criminal justice for a period totalling nearly ten years, initially with the Crimes Against Humanity and War Crimes Section of the Department of Justice of Canada, and subsequently with the Offices of the Prosecutor of both United Nations *ad hoc* Tribunals as well as at the International Criminal Court. He first arrived in Iraq in October 2005, where he served with the United Nations Assistance Mission monitoring, amongst other things, Iraqi High Tribunal proceedings.

[1] In the context of the Anfal trial, and in keeping with his formal duties as an employee of the IHT, this author explored in considerable detail the question of command authority over the use of chemical weapons during the period 1987–1988. The examination in question was undertaken over a period of several weeks and was based upon a reading of tens of thousands of pages of documentation generated internally by the

January 2010 principally on the strength of the finding by an IHT trial chamber that he had engineered the gassing of civilians at Halabja in March 1988 – a finding of highly-dubious factual merit.[2]

Baathist regime before, during and after the Halabja attack. The key conclusions of this detailed study were as follows: (1) chemical weapons were a tightly-controlled resource that could be used only on the authority of Saddam Hussein following, in each instance, a highly-structured target-acquisition and strike-recommendation process; and (2) Ali Hasan Al-Majid was not part of this formalised process. Whilst this author does not preclude the possibility that Ali Hasan was able to secure by informal means the deployment of chemical weapons, no documentary evidence was found by this author or IHT officials that indicated that this was the case in practice, at Halabja or anywhere else during the period 1987–1988. Of particular importance here is the fact that whereas Ali Hasan was then (that is, in 1987–1988) overseeing an utterly ruthless security operation in the northern Iraqi governorates, he does not appear to have been involved in the military operations being undertaken concurrently in the region. The voluminous documentary evidence available to the IHT (and this author) seems to point to the conclusion that the military operation code-named Anfal, which included the unlawful attack on Halabja, should not be seen in the context of the security operation led by Ali Hasan. Rather, the military campaign was clearly linked, at least in the minds of the senior military officers directing it, amongst them Saddam Hussein, to the ongoing conflict with Iran, the prosecution of which, in contrast to the Iraqi military campaigns of 1990–1991 and 2003, was not characterised by the undue influence of members of Saddam's extended family. At the same time, it will be noted that Ali Hasan claimed credit for initiating or otherwise ordering the use of chemical weapons, during the 1980s and later. He subsequently retracted these claims at trial, as well as in several private conversations with this author. In light of the preparedness of Ali Hasan to concede at trial – and occasionally revel in – his responsibility for other very serious offences, albeit not involving the use of chemical weapons, the balance of probabilities would appear to support an argument that the earlier claims of responsibility by Ali Hasan for the initiation of chemical strikes were nothing more than bluster designed to intimidate his political enemies.

[2] *Ibid*. Halabja is a town situated in the ethnic-Kurdish region of Iraq. It sits amidst mountainous terrain, several kilometres from the Iranian border and roughly 250 kilometres north of Baghdad. In March 1988, during the Iran-Iraq war, Halabja and the surrounding region was overrun by several Iranian Revolutionary Guard divisions operating with the support of ethnic-Kurdish fighters opposed to the regime of Saddam Hussein. On 16 March, the Iraqi Air Force responded to the loss of this strategically-significant territory by dropping chemical weapons on the town, resulting in the death of several thousand (Iraqi) civilians. The precise objective of the attack remains in dispute; Kurdish nationalists insist that the attack was directed at the Kurdish civilian population and amounted to the crime of genocide. The view taken here is that this argument is tempered by, *inter alia*, copies of documentary evidence in the possession of this author, generated internally by the military and intelligence organs of the Baathist regime at the time of chemical strike. Taken together, these materials suggest

The most famous of the accused brought before the IHT was Saddam Hussein, who was sentenced to death by Trial Chamber I at the conclusion of the first IHT trial in November 2006. Students of international criminal law will recall that the execution of Saddam, for crimes against humanity and other offences, took place the following month, in the immediate wake of an appellate process that might be described charitably as having been perfunctory. What is beyond any doubt is the fact that Iraqi disregard for its own criminal-procedural law led to the transformation of the Saddam execution into a semi-public event before a braying mob assembled in the execution chamber. Cinegraphic representations of the hanging, made with mobile telephones, first appeared on worldwide television only hours after the event, and these images can still be found easily on the Internet. Likewise, anyone with internet access can view a visual recording of the joyous celebrations convened several hours after the execution of Saddam at the offices of Iraqi Prime Minister Nouri Al-Maliki, in the presence of Saddam's remains, resting in an ambulance parked just outside the front entrance.[3]

The brazen disrespect for Iraqi law shown by the Prime Minister and his staff at the execution of Saddam should be seen as reflective of the uneasy relationship that then existed between senior Iraqi governmental officials and the principle of the rule of law. The failure of the Iraqi political leadership in this regard had the effect of undermining, in turn, respect for the law within Iraqi state institutions, including the judicial system. At the IHT, the tendency to disregard Iraqi and international law where it was expedient to do so led to the condemnation

strongly that the principal target of the attack was the Iranian troops then in the town, a large number of whom would appear to have been killed and wounded by the nerve agent dropped on Halabja. Additionally, this documentation and related contemporaneous materials point away from the involvement of Ali Hasan Al-Majid in what is here believed should be characterised as a crime against humanity, rather than an act of genocide. For the general reader less concerned about such legal niceties, by far the best account of the Halabja attack, its aftermath, and the wider socio-cultural as well as political significance of the assault is to be found in, J.R. Hilterman, *A Poisonous Affair: America, Iraq, and the Gassing of Halabja*, Cambridge University Press, 2007.

[3] For a detailed overview of the legal and factual circumstances surrounding the execution of Saddam, see E. Blinderman, "The Conviction of Saddam Hussein for the Crime Against Humanity of "Other Inhumane Acts", in *University of Pennsylvania Journal of International Law*, 2009, vol. 30, p. 1239.

of several accused on shaky legal as well as factual grounds.[4] In the main, these and other problems encountered by the IHT during the period 2006–2008, and indeed later, were a function of the high degree of Iraqi-political interference in the administration of justice by the investigative, trial, and appellate chambers of the IHT. The difficulties created by political interference in such a highly-unstable (that is, violent) environment compounded, in turn, the inability of the Tribunal to investigate as well as adjudicate properly cases arising from the perpetration of core international crimes, owing to the IHT judges' near-complete ignorance of the substantive law that the tribunal was mandated to apply. Any assessment of the utility of the Case Matrix at the IHT – where it was employed in support of the defence during the *Dujayl*[5] and *Anfal*[6] trials – must be seen in this context.

In an effort to understand how the Case Matrix was used – and not used – in Baghdad during 2006–2008, this chapter will start with an examination of the legal foundations upon which the IHT operated. In turn, certain of the problems plaguing the administration of justice during *Dujayl* and *Anfal* will be explored, as will the manner in which these

4 A detailed overview of the problems plaguing the IHT can be found in W.H. Wiley, "The Case of Taha Yaseen Ramadan before the Iraqi High Tribunal: An Insider's Perspective", in *Yearbook of International Humanitarian Law*, 2006, vol. 9, p. 181.

5 Case 1/J First/2005 (Dujayl). The Dujayl trial commenced in October 2005; the trial judgement was rendered in November 2006 and the appellate judgement in December 2006 (with the first execution – of Saddam Hussein – taking place that same month). During the trial, eight accused (including Saddam) were accused of perpetrating numerous crimes against humanity during the course of security operations undertaken at Dujayl following a failed attempt to assassinate Saddam during a July 1982 visit to the city; subsequent offences were alleged in the indictment to have been perpetrated in Baghdad and elsewhere in the wake of the initial wave of repression witnessed at Dujayl. Seven of the accused were convicted of various offences; four of the seven were executed.

6 Case 1/J Second/2006 (Anfal). The Anfal trial commenced in August 2006; the trial judgement was rendered in June 2007 and the appellate judgement in September 2007. During the trial, seven accused (the number of accused was reduced to six following the execution of Saddam) were alleged to have perpetrated genocide, crimes against humanity, and war crimes during the course of military and security operations undertaken in the Kurdish region of Iraq during the period February through August 1988. The highest-profile accused in Anfal, following the execution of Saddam Hussein (who was a defendant in Anfal), was Ali Hasan Al-Majid. Five of the six accused who survived the trial were convicted of various offences, including genocide, and three of those convicted were awarded a capital sentence.

difficulties necessarily shaped the way in which the Case Matrix could be employed by the IHT Defence Office, that is, the only arm of the Tribunal where the application was used. Finally, this chapter will set out a number of the lessons that might be drawn from the IHT experience with respect to the utility of the Case Matrix in an operational environment and the prospects for its future use in the Middle East.

18.2. Background

18.2.1. Substantive Law

The IHT has its own Statute[7] (hereinafter IHT Statute) and Rules of Procedure[8] (hereinafter IHT Rules). Article 1 of the IHT Statute affords the Tribunal jurisdiction over Iraqi as well as non-Iraqi residents of Iraq who are alleged to have perpetrated one or more of the crimes enumerated in articles 11, 12, 13 and 14 of the IHT Statute. Articles 11, 12 and 13 of the IHT Statute proscribe, respectively, genocide, crimes against humanity, and war crimes. With limited exceptions, articles 11, 12 and 13 of the IHT Statute are structured and worded identically to articles 6, 7 and 8 of the Rome Statute of the International Criminal Court (hereinafter ICC). Article 15 of the IHT Statute sets forth the modes of individual criminal responsibility provided for by international criminal law (hereinafter ICL), including command and superior responsibility, and article 15 does not deviate substantially from the law codified at articles 25 and 28 of the ICC Statute. Article 14 of the IHT Statute, which is not derived from any international legal instrument nor related to customary international law, affords the Tribunal the authority to investigate and prosecute acts proscribed elsewhere by Iraqi penal law at the time of their commission. In the event, the first two cases that the IHT investigated and heard – that is, *Dujayl* and *Anfal* – did not give rise to allegations of offences beyond those found in articles 11, 12 and 13.

During the course of all of the IHT trials conducted to date, the Iraqi judges, prosecutors, and defence counsel have struggled mightily with the substantive law found in articles 11, 12, 13 and (most especially)

[7] Official Gazette of the Republic of Iraq, Law of the Iraqi High Tribunal, 18 October 2005.

[8] Official Gazette of the Republic of Iraq, Rules of Procedure and Gathering of Evidence with Regard to the Iraqi High Tribunal, 18 October 2005.

15 of the IHT Statute. Problems of a much less severe, albeit similar qualitative nature, were witnessed during the formative years of the International Criminal Tribunal for the former Yugoslavia (hereinafter ICTY) as well as at the International Criminal Tribunal for Rwanda (hereinafter ICTR) . In The Hague and Arusha, the collective ignorance witnessed most especially during the second half of the 1990s owed much to the fact that judges, prosecutors, investigators and defence counsel with considerable domestic experience were largely unfamiliar with international-criminal offences and modes of liability. Notwithstanding several notable exceptions, most ICTY and ICTR investigative and prosecutorial staff, along with counsel for the accused, did not grasp the particular legal requirements of the substantive law set out in the ICTY and ICTR Statutes, nor was there a widespread understanding of the sort of evidence that had been adduced in earlier trials (for example, at Nuremberg) to satisfy these legal requirements. Over time, these institutions (less a large proportion of the investigative personnel) surmounted this collective ignorance, and a rich body of jurisprudence emerged. Alas, at the establishment of the IHT in 2004, the work of the *ad hoc* Tribunals was for all intents and purposes unknown in Iraq. Prior to the fall of the Baathist regime, Iraqi law faculties offered no instruction in ICL. Indeed, seen from a Middle-Eastern perspective, ICL was almost unknown throughout the region, the exceptions being the Kingdom of Jordan, an early supporter of the ICC, and the State of Israel, which was not.

During the period 2004–2008, American-led efforts to improve the levels of ICL-knowledge within the legal profession in Iraq, geared specifically towards the proper functioning of the IHT, came largely to grief, despite considerable expenditures of time and money. These efforts were undermined by four major difficulties:

1. A large collection of jurisprudence, amounting to approximately 10,000 pages, was translated for the Iraqi judicial actors. Most of the materials were taken from the ICTY and, to a lesser extent, the ICTR. In the event, this resource was for all intents and purposes ignored by the IHT. This disregard is explicable in terms of (a) the minor role afforded to jurisprudence in Iraqi domestic criminal praxis and (b) the difficulties of finding answers to specific legal problems within large collections of jurisprudence that have not been indexed.

2. Junior counsel employed by the Tribunal as well as a number of defence counsel showed themselves to be well disposed towards learning about the theory and application of ICL. In the event, both groups received little, if any, ICL-training opportunities.
3. The first IHT case (that is, *Dujayl*) was forced to trial prematurely, and against the objections of the United States Embassy, by then Prime Minister Ibrahim Al-Jafari. This rush to justice (driven by the then Iraqi government's maniacal desire to dispose of Saddam) necessitated in principle an on-the-job-learning approach to ICL for both judges and trial counsel. In practice, the working environment proved to be entirely non-conducive to on-the-job learning owing to the severe stresses weighing upon the principal actors, in particular, the all-pervading violence in Baghdad and elsewhere, the immense public and media pressure, and the constant Iraqi-political interference in the work of the Tribunal.
4. Throughout the American-led trial-support programme, which concluded in March 2008, there was a severe shortage of international advisors with experience applying ICL.[9] Indeed, most of the advisors sent to the Tribunal were regional United States Department of Justice (hereinafter USDOJ) prosecutors who lacked even a theoretical familiarity with the substantive law. The contri-

[9] The IHT Rules provide at rule 21 (amongst other junctures) for the appointment of non-Iraqi advisors and experts to the investigative judges, the trial chambers, the appellate chamber, the prosecution, and the defence office. Through the Dujayl (October 2005 to November 2006) and Anfal (August 2006 to June 2007) trials, three foreign experts with experience in the field of ICL agreed at various times to assist the IHT on a full-time basis in Baghdad: two of the three advisors had been employed by, or had otherwise appeared before, the ICTY and the ICTR. The third had at different times been employed by both of the *ad hoc* Tribunals and the ICC. Two of the three experts were assigned to the Trial Chambers; the third (that is, the author of this chapter) worked exclusively with defence counsel. No experts with substantial ICL experience were ever made available on a full-time basis to the investigative judges, the appellate chamber, or the prosecution. At no time during Dujayl and Anfal were more than two foreign advisors employed at any one time. For months at a time, there was frequently only one ICL expert on hand to assist the IHT. Aside from budgetary constraints, the shortage of expert ICL advisors tended to reflect the difficulties of living and working in Baghdad under the prevailing security conditions as well as the preference of the United States Embassy-funded international-assistance programme for seconded United States Department of Justice personnel.

bution that could be made by the USDOJ counsel was further limited by the short (that is, six-month) duration of their tours.

Taken together, these factors harmed irrevocably the administration of justice by the IHT.

Widespread Iraqi distrust in the fairness of IHT proceedings has been informed in part by the belittling of the impartiality of IHT proceedings by the Iraqi legal profession as a whole. In turn, the perception and reality of the maladministration of justice by the IHT has served to dampen the enthusiasm for the study of ICL that was in evidence in Iraq and elsewhere in the Middle East during the formative phase of the Tribunal's development. More specifically, the (ostensible) application of ICL by the IHT has called into question the appropriateness of ICL as a tool of impartial justice, leaving ICL with an image problem in Iraq and elsewhere in the Middle East. It seems likely that any future efforts to foster an understanding of ICL in Iraq as well as within the wider region will have to start again, taking particular care to avoid references to the inadequate legal reasoning found in IHT trial and (most especially) appellate judgements. As will be touched upon near the conclusion of this chapter, an Arabic-language version of the Case Matrix would be an exceedingly useful tool in any campaign to rehabilitate ICL within the Arab region.

18.2.2. Procedural Context

Iraqi law governing investigations and other criminal proceedings was taken, by way of Egypt, from the equivalent French law of the 1950s; notwithstanding subsequent amendments, along with a handful of what might be termed Islamic flourishes, the Iraqi law remains largely unchanged. Whilst the IHT has its own Statute and Rules of Procedure, for the most part the investigative and adjudicative proceedings at the Tribunal have conformed to the more expansive provisions of the amended 1969 Penal Code[10] and most especially the amended 1971 Law on Criminal Proceedings.[11] The preference of IHT judges and counsel for long-established legal norms reflects an apparent resistance to change as well as the fact that the procedural provisions of the legal instruments unique to the IHT are, in and of themselves, an insufficient foundation

[10] Iraq, Penal Code, Law No. 111, 1969.

[11] Iraq, Law on Criminal Proceedings, Law No. 23, 1971.

upon which to conduct an investigation and trial. In practice, the IHT trial and appellate judges have tended to grapple with the substantive law found in the IHT Statute whilst for the most part ignoring the other provisions of that law. For all the attention paid by the Tribunal to the IHT Rules, they might not exist.

The prevailing Iraqi interpretation of the 1971 Procedural Law affords considerable influence and authority to the judge(s) hearing a particular case. In practice, complainants, witnesses and the accused can be questioned and cross-examined only by and through the presiding judge, notwithstanding the fact that the law as drafted does not appear to preclude the direct examination of witnesses by prosecution and defence counsel.[12] For their part, the judges presiding over IHT trials have shown no hesitancy to question, sometimes forcefully, persons appearing on the witness stand or in the prisoners' box. Where others (that is, complainant, prosecution and defence counsel) posed questions through the judges presiding during *Dujayl* and *Anfal*, the presiding judges frequently reformulated and even rejected outright those questions that the judges deemed to be irrelevant or otherwise unfruitful.[13] Affording judges arbitrary powers to ensure timely and orderly proceedings is unremarkable. However, during *Dujayl* and *Anfal*, the exercise of these powers by the judges presiding frequently proved to be problematical owing to the judges' imperfect grasp of the legal requirements of the offences and modes of liability set out in the IHT Statute. Of special concern and considerable frustration, at least to the defence advisor, was the seeming inability of those on the Bench to grasp the importance of contextual evidence relevant to the modes of liability, above all, command responsibility.

The initial phase of an Iraqi criminal trial is only superficially analogous to a prosecution case-in-chief. At the outset of the trial, the

[12] Iraqi law provides:

> The witness gives his testimony orally and it is permissible to interrupt him during its delivery. […] The court may ask any questions necessary in order to clarify the facts after completion of the testimony. The public prosecutor, complainant, civil plaintiff, a civil official and the defendant may discuss the testimony via the court and ask questions and request clarifications to establish facts (para. 168(b), 1971 Procedural Law).

[13] "The court may prevent the parties and their representatives [from] speaking at undue length or speaking outside the subject of the case […]" (para. 154, 1971 Procedural Law). Presiding Judges at the IHT tended to apply this provision liberally during the two-year tenure of this author at the Tribunal.

judge presiding asks the prisoner to state whether he or she is guilty of the offence(s) alleged in the order of referral prepared by the chief investigative magistrate assigned to the case. This is not a plea as it would be understood in a common-law jurisdiction. Rather, it is something more akin to an invitation to confess to the crimes alleged, notwithstanding the absence at this point in the proceedings of formal charges. Where accused decline to confess, the proceedings continue with an enquiry phase, the purpose of which is to assist the trial judge(s), who will have already reviewed the referral file, in determining whether formal charges are warranted. This determination is made on the strength of the evidence that the prosecution presents from the referral file and other sources, and after the court hears from the accused, should the latter choose to waive the right to silence.

Iraqi procedural law provides that where "it appears to the court […] that the evidence indicates that the defendant has committed the offence being considered, then he is charged [by the court] as appropriate".[14] Conversely, the court may order the release of the accused where the evidence supporting the accusations of the investigative chamber is deemed to be inadequate.[15] Where the court determines that one or more charges are warranted, the court prepares an indictment that it then reads to the accused. In turn, the court asks the accused to enter a formal plea.[16] Where accused persons choose to enter a plea of not guilty to the charge(s), the trial resumes with the hearing of witnesses for the defence. Following the presentation of the defence case, the prosecution and the defence make closing arguments, and the accused is given a final opportunity to address the court. In accordance with the 1971 Procedural Code, "[t]he end of the trial is then announced and the court issues its verdict in the same session or in another session held soon afterwards".[17] In its judgement, a court may find an accused guilty of the offence(s) as charged, not guilty, and not guilty by reason of diminished responsibility.[18]

[14] Para. 181(c), 1971 Procedural Law.

[15] *Ibid*., para. 181(b).

[16] *Ibid*., para. 181(c).

[17] *Ibid*., para. 181(d) and (e). In the event, the Dujayl trial judgement was handed down approximately three months after the presentation of final arguments.

[18] *Ibid*., para. 182.

18.2.3. Indictments

The manner in which the Case Matrix was used – and not used – during the *Dujayl* and *Anfal* trials reflected above all the defective form and content of the indictments rather than the specific allegations made therein.

Seven months after the start of *Dujayl*, the Trial Chamber alleged that Saddam Hussein and the other seven suspects perpetrated various crimes against humanity proscribed by article 12 of the IHT Statute. For instance, the indictment of Saddam alleged that he was criminally responsible for acts contrary to article 12(1)(a), (d), (e), (f), (i) and (j), that is, the crimes against humanity of wilful killing, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental norms of international law, torture, enforced disappearance of persons, and other inhumane acts of a similar character intentionally causing great suffering or serious injury to the body or to the mental and physical health. Trial Chamber I further alleged that Saddam was individually criminally liable for the aforementioned offences under the provisions of article 15(2)(a) (individual or joint perpetration), 15(2)(b) (ordering), 15(2)(d) (common purpose), and 15(4) (command or superior responsibility).[19]

The indictment of Saddam Hussein and the indictments charging his co-accused followed a common format. In each instance, a short narrative set out the position that the accused had held in July 1982 before proceeding to refer to the key elements of the crime base, that is, the preliminary findings of the Trial Chamber with respect to underlying acts such as the assassination attempt upon Saddam Hussein, the subsequent mass arrests, the torture of many of those arrested by the State security organs, the death in custody of a large number of the detainees, the forcible relocation of hundreds of others, the trial and execution of still more victims, and the seizure as well as destruction by the State of agricultural lands. In the event, the indictments did not contain counts as such. Hence, in the absence of specific counts, it proved very difficult for the defence to determine whether the Trial Chamber considered the contents of the opening narratives to be of the nature of material facts or factual allegations. Worse still, the Trial Chamber did not link these facts

[19] Indictment, Saddam Hussein, issued by IHT Trial Chamber I, 15 May 2006.

(be they of a material or evidentiary nature) to (1) the article 12 charges and (2) the claims of individual criminal liability made pursuant to article 15 of the IHT Statute. Rather, the *Dujayl* panel inserted the articles 12 and 15 allegations at the end of each indictment, almost by way of a conclusion or even an afterthought. In the absence of a clear enunciation of the points at which the Trial Chamber believed that material fact, evidence, and law intersected, it was very difficult, and in many respects impossible, for the accused to determine the case(s) to be answered. As will be explained later in this chapter, the disassociation of evidence, material fact, and law had the knock-on effect of limiting the utility of the Case Matrix in the hands of the defence.

The indictments issued during the *Anfal* trial were arguably even more prejudicial to the right of the accused to be informed clearly of the case(s) to be answered. During *Anfal*, each of the six accused who had survived to that point in the trial (that is, Saddam had been executed three months into the proceedings) was charged by Trial Chamber II with various offences found in articles 11 (genocide), 12 (crimes against humanity), and 13 (war crimes) of the IHT Statute. Whilst a derisory handful of material facts and factual allegations were pleaded in the context of articles 11, 12 and 13, in each indictment the number of offences charged was disproportionately greater than the enunciations of material and alleged fact. This deficiency was compounded by hopelessly vague references to the alleged grounds of individual criminal responsibility set forth in each indictment.

The indictment of Ali Hasan Al-Majid (that is, Chemical Ali) was representative of all the indictments issued during *Anfal*. With respect to this accused, the Trial Chamber alleged:

> During the period prior to the Anfal operation, in June 1987, and during the Anfal operations of 1988, you issued orders to military units, the security, intelligence, and military-intelligence agencies, and the organisations of the (defunct) Ba'ath Party, to launch a widespread and systematic attack against the civilian Kurds in northern Iraq using weapons such as aircraft and artillery, in order to kill civilians, to burn and destroy their villages, to displace forcibly and remove them from their areas, and to arrest and detain them (for instance, at Tawb Zawah, al-Debis and Nugrat al-Salman). From your position on the Northern Affairs Committee in Kirkuk, you directly supervised the interrogation, torture,

> and subsequent execution of detainees. Many of the detainees faced inhumane treatment; many of them died as a result, or disappeared and were buried in mass graves which have been discovered in places such as the al-Hadar mass grave in Ninewa province, the mass grave in Al-Muthanna province, and other mass graves located throughout Iraq. The fate of many of the Kurdish citizens is still unknown. All of this was intended to exterminate the Kurdish population, and as such you have committed crimes pursuant to paragraphs (a, b, c, d, e, f, h, i, and j) of Article 12 [of the IHT Statute].

Put in other words, on the basis of the narrative set out above – the IHT judges having conflated (as during *Dujayl*) material facts and factual allegations – Ali Hasan was alleged in the indictment to have perpetrated the crimes against humanity of wilful killing, extermination, enslavement, deportation, imprisonment, torture, persecution, enforced disappearance, and other inhumane acts. All modes of liability set out in the IHT Statute (and, indeed, in ICL) were alleged by simple reference to articles 15(2) and 15(4) of the Statute, without further specificity.[20]

The defence appealed at length the form and content of this and the other five *Anfal* indictments on various grounds relating to the non-conformity of the indictments with international as well as Iraqi law.[21] In the event, the Trial Chamber ignored the appeal. However, the lead *Anfal* prosecutor did invite the IHT defence advisor (that is, the author of the appeal as well as this chapter) for an informal chat over cups of sweet tea, during which he explained that the prosecution had, in fact, drafted the indictments on behalf of Trial Chamber II – a rather surprising concession, in light of the clear requirement of the 1971 Procedure Code that indictments be drafted by the judge(s) hearing a case.[22] During the same meeting, the prosecutor defended his work at some length, arguing in particular that the defence appeal had failed to take into account differences between the common- and continental-legal traditions. Put another way, the *Anfal* prosecutor dismissed the said appeal as being of

[20] Indictment, Ali Hasan Al-Majid, issued by IHT Trial Chamber II, 20 February 2007.

[21] Case 1/J Second/2006 (Anfal), Defence Motion Challenging the Legality of the Indictments issued by Trial Chamber Two on 20 February 2007, dated 14 March 2007.

[22] See *supra* note 16.

no account, notwithstanding the fact that the appeal was, properly speaking, a matter between defence counsel and the Trial Chamber.

18.3. Use of the Case Matrix during *Dujayl* and *Anfal*

The blurring of the lines of authority between Trial Chamber II and the *Anfal* prosecutor aside, the appeal of the form and content of the *Anfal* indictments was likely to be ill-fated on a number of purely legal grounds, not the least of which was that the drafters of the IHT Statute and Rules had failed to make clear provision for international procedural practice to guide or otherwise influence IHT proceedings. The no-doubt-unintended result of this oversight was that the defence in both *Dujayl* and *Anfal* was forced to answer deeply-flawed indictments and, in each case, the inadequate form and content of the indictments logically established the parameters within which the Case Matrix could be employed by the defence team(s). In the event, notwithstanding the myriad problems plaguing *Dujayl* and *Anfal*, during both trials, the Case Matrix proved to be central to the defence effort.

In the course of his tenure with the Investigation Division of the ICC from 2003 to 2005, this author had observed, if only from a distance, the conceptualisation and development of the Case Matrix. He regarded the Case Matrix initiative as being a potentially extraordinarily-important corrective to the frequently shoddy investigative practices witnessed earlier at the *ad hoc* United Nations Tribunals. As this author was largely familiar with the Case Matrix by the time he joined the IHT as the first (and only) defence advisor midway through the *Dujayl* proceedings, he recognised immediately the potential benefits of the application to the defence as well as the Tribunal as a whole.

The principal responsibility of this author during his 2006–2008 tenure with the IHT was to advise privately-retained as well as IHT-appointed defence counsel on questions of ICL; the defence advisory position, along with similar international-advisory posts established alongside the prosecution, trial, and appellate chambers of the Tribunal, reflected the fact that (as noted at the outset of this chapter) the substantive law applied by the IHT was taken almost *verbatim* from the Rome Statute. That the IHT was (and remains) a domestic court applying ICL, combined with the limited internet connectivity and the absence of printed ICL resources of almost any sort in Baghdad at that time,

rendered the Case Matrix an important tool to the defence team(s) where defence counsel chose to collaborate with the defence advisor. Employed under considerable temporal and manpower constraints by the author of this chapter in the course of capital cases, the Case Matrix demonstrated time and again its considerable value during the preparation of coherent defence arguments under very challenging working conditions.

18.3.1. Dujayl

The IHT Rules at once establish the position of defence advisor and expressly prohibit the individual holding the post from entering into an "attorney-client relationship" with any IHT suspect or accused.[23] Rather, the international advisor assigned to the IHT Defence Office is (or was) expected to provide "impartial, confidential, non-binding advice and recommendations" to court-appointed as well as retained counsel representing suspects and accused persons.[24]

When the author of this chapter was retained as the first (and only) incumbent, midway through the *Dujayl* trial, it was anticipated by the persons doing the hiring as well as the defence advisor himself that any and all advice would concern itself with the substantive law found in the IHT Statute and the sort of evidence that would or would not satisfy the corresponding legal requirements. In practice, it quickly became apparent that all of the retained counsel were voluntarily pursuing, or being forced by threats to pursue, the political objectives of Saddam Hussein. Hence, the fact that during *Dujayl* retained counsel had no grasp of the substantive law was in some respects a moot point, to the extent that the domination by Saddam of all retained counsel rendered a knowledge of ICL the least of their concerns in the climate of utter lawlessness that had seized Iraq (and to an extent the Tribunal) by 2005, when the trial started. The IHT duty counsel were likewise intimidated by Saddam and were equally fearful of offending the Prime Minister's office by offering too vigorous a defence.[25] Additionally, the IHT duty counsel were as

[23] Rule 21(3), IHT Rules.

[24] Rule 21(4), IHT Rules.

[25] This point was made by the Iraqi head of the IHT Defence Office, in the presence of the other duty counsel, during Anfal, when the group was questioned rather pointedly by the author of this chapter, in his capacity of defence advisor, on the question of the poor effort being made in the courtroom.

unfamiliar with ICL as their retained peers. More generally, from the start of the trial in October 2006, the proceedings were undertaken by the various Iraqi parties to the process – judges, prosecution and defence counsel – without systematic reference to the requirements of the substantive law that ostensibly rested at the centre of the proceedings. The collective ignorance of both retained and duty defence counsel revealed itself in utterly hopeless cross-examinations of prosecution witnesses, the calling of defence witnesses who had little if any meaningful relevance to the case, an amateurish effort by counsel retained by Saddam to suborn perjury, resulting in the arrest of four manifestly-fraudulent defence witnesses, and an inability on the part of defence counsel to exploit during trial the obvious (to the defence advisor) exculpatory qualities of a number of key prosecution exhibits – qualities that had clearly not been recognised by either the IHT prosecutors or the generally equally-unqualified American advisors sent from regional USDOJ offices to assist the prosecution.

The aforementioned deficiencies in the proceedings were exacerbated by the deleterious security situation, which saw a number of attacks directed at defence counsel. In total, four of the eight accused would each see one member of their legal team killed during the combined trial and appellate phases of *Dujayl*. In particular, following the second day of the trial, Sa'doon Enter Al-Jenabi, counsel for Awad Hamad, the erstwhile President of the Revolutionary Court, was kidnapped from his office on a crowded street. His body was recovered on 21 October 2005; it appeared that a power tool had been used to drill holes through parts of the victim, presumably prior to his execution.[26] On 8 November 2005, unknown gunmen ambushed two of the three lawyers defending Taha Yaseen Ramadan, the former Vice-President of Iraq, whilst the victims were travelling in a car near the premises of the Iraqi Bar Association. The attack killed Adel Al-Zubeidi; a bullet struck his colleague, Thamer Al-Kahazai, in the head. A Shia death squad kidnapped and killed a lawyer representing Saddam Hussein later in the trial, that is, in June 2006; the perpetrators filmed at least part of the crime, and the said film can be found on the Internet. During the appellate phase of *Dujayl* (that is, in November 2006), persons unknown kidnapped

[26] Morgue photographs of Sa'doon Enter (provided by the victim's son to this author prior to the son's assassination).

and presumably killed – a body has never been found – a fourth lawyer. Finally, in 2007, the wife of one of the duty counsel appointed to assist Saddam in the absence of retained counsel, was kidnapped and executed on the grounds of her husband's participation in Saddam's defence. For understandable reasons, many of the retained and court-appointed counsel involved in the *Dujayl* trial have either sought asylum outside of Iraq or attempted to do so, notwithstanding the relative improvements in the security situation since 2008.

Retained counsel used the pretext of the June 2006 killing to initiate yet another boycott of the *Dujayl* proceedings, that is, on the eve of the final arguments. The defence advisor was subsequently informed by Saddam that he (Saddam) had ordered the boycott, albeit for reasons that Saddam did not explain.[27] The upshot of this latest of several boycotts of *Dujayl* by retained counsel was to place the burden for a last-ditch defence upon duty counsel in a trial where retained counsel had failed to advance on behalf of their clients any coherent arguments rooted in ICL. A decision was correspondingly taken by the defence advisor to use the Case Matrix to draft, to the extent possible in the limited time available, closing arguments on behalf of the eight accused. The idea was that the arguments would be prepared for duty counsel who could (1) accept them *in toto*, (2) make amendments, or (3) reject the arguments entirely.

It was a safe bet from the start that duty counsel would accept anything that they were given on the grounds that duty counsel had already appealed to the defence advisor for assistance and were clearly at a loss as to how to proceed. Under these circumstances, the decision by the defence advisor to prepare closing arguments in the knowledge that they would be used was a controversial one, to the extent that all of the accused had refused, albeit on Saddam's orders, the assistance of duty counsel. The ethical issues arising from the forcible appointment of counsel might have been side-stepped if the duty counsel had been styled *amici curiae* by the Trial Chamber. In the event, an attempt by the American advisors to the *Dujayl* panel to convince the presiding judge to afford duty counsel this designation was refused by the said judge on the grounds that such a concept had no basis in Iraqi law. As far as the defence advisor could determine, the forcible appointment of counsel lacked a similar foundation in Iraqi law, although for whatever reason the

[27] Meeting between Saddam Hussein Al-Tikriti and the author, 26 November 2006.

Trial Chamber was not bothered by this course of action, and it rejected in turn the subsequent complaints of the accused on this score.

Over a period of six weeks, the defence advisor was able to draft legal arguments on behalf of seven of the eight accused;[28] the total length of these arguments was in excess of 100,000 words. The problems experienced in drafting the individual arguments were similar in each case, and these difficulties were tied directly to the deficiencies in the form and content of the indictments. Succinctly stated, it was for the most part not feasible to discuss the inculpatory and exculpatory evidence relating to each accused in the context of the law, principally because relevant fact and law had not been clearly linked in the indictments. The result was that each closing argument considered the evidence and the law separately.

The argument prepared on behalf of Saddam Hussein, whilst much longer than those drafted for any of the other accused, was typical. It opened with a restatement of the allegations made in the indictment of Saddam, followed by a lengthy overview of the crime base. The decision to review the latter reflected the decision of the defence advisor that it would be wise for assigned counsel to distance themselves from the self-defeating occasional claims of retained counsel that the underlying acts (for example, arrests, beatings, killings, deportations, and so forth) had not taken place.[29] Of far more importance to the defence of Saddam and the other accused was the question of whether the underlying acts could be effectively linked to the accused. Ideally, this examination would have been undertaken on an offence-by-offence, or count-by-count basis. In the event, this was not possible, because individual criminal liability had not been alleged in relation to particular offences, and the indictment(s) contained no counts *per se*. Hence, a quasi-juridical approach was taken

[28] No argument was prepared for the accused Awad Hamad. The inculpatory evidence in his case was deemed by the defence advisor to be exceedingly strong and, in light of the limited time and resources available, his case was made a lower priority. In the event, no time remained to prepare an argument on Awad's behalf, although his counsel sought, and was provided with, legal advice throughout the trial by the defence advisor – advice that was (the defence advisor was informed by an impeccable source) consistently rejected when put to the accused.

[29] A variation on this theme played by retained counsel was that the underlying acts had taken place, but that these acts had been justified by, and were a proportionate response to, the assassination attempt made on the life of Saddam at Dujayl.

to the evidence in the defence argument(s), that is, the prosecution allegations were considered alongside what the relevant witnesses and (especially) documentary evidence suggested had (or had not) been the role of Saddam Hussein where the underlying acts were concerned. Finally, the law was considered separately. The multiplicity of charges and alleged modes of liability, not clearly linked to one another, forced the defence advisor to write something akin to a lengthy law lecture setting out the legal requirements of the alleged offences and modes of liability. Some of the evidence considered earlier in the argument was revisited at this point, with an eye to suggesting that it was insufficient to support such-and-such an offence or mode of liability.

Taken as a whole, the argument prepared for Saddam, along with the arguments prepared for the other accused, was unsatisfying from a defence point of view. Somewhat paradoxically, whereas the prosecution arguments and supporting evidence had been for the most part highly deficient, at the same time the form and content of the indictment of Saddam (and the other accused) did not serve as the necessary foundation for the refutation of the inadequate prosecution case.[30] This would appear to support the view, adopted by this author during the course of his tenure with the ICTR, that a sloppy prosecution, combined with judicial ignorance of the law, will together place a defence team at an insurmountable disadvantage.

That the accused had any defence at all during *Dujayl* – however unsatisfactory the wider context in which the trial was held – must be ascribed largely to the availability of the Case Matrix. Put another way, the Case Matrix, even in the less-developed form than currently exists, did much to alleviate the pressure placed upon the defence advisor as well as duty counsel by (1) the near-total absence of ICL resources in Baghdad, (2) the 11-hour boycott of the proceedings by retained counsel, and (3) the refusal of the Trial Chamber to extend sufficiently the time available to prepare defence closing arguments. All things considered, a cynic would suggest that the Case Matrix helped immeasurably to lend *Dujayl* a veneer of legitimacy that the process did not deserve; an optimist

[30] It was and remains the view of this author that a compelling case might have been made against Saddam Hussein on the grounds of command and superior responsibility. In the event, the ignorance of the prosecution of the legal requirements of this mode of liability – and of ICL more generally – led to the prosecution missing this opportunity to craft and argue a cogent case against Saddam.

would point out that the Case Matrix proved itself to be, amongst other things, a very useful legal tool in international(ised) criminal proceedings, most especially where a wider array of traditional resources (for example, complete collections of jurisprudence) were not available. In this case, both the optimist and the pessimist would be correct in their respective views.

18.3.2. Anfal

The *Anfal* trial ought to have proceeded more smoothly than *Dujayl* for a number of reasons, not the least of which was that the evidentiary base was better (although not well) organised, genuine care was taken with the disclosure, and the quality of ICL support improved markedly with the arrival of a long-time ICTR prosecutor to assist the Trial Chamber. Additionally, the defence effort was more coherent from the start: the incumbent defence advisor (who had only been recruited to the IHT midway through *Dujayl*) remained in place; a legal assistant to the advisor was recruited from the ICC; and the more disruptive privately-retained counsel boycotted *Anfal* early on, whereupon they did not return. Whilst the professional commitment of the duty counsel was invariably uneven, a small coterie of newly-retained counsel appeared and, notwithstanding the unfamiliarity of the recently-arrived counsel with substantive ICL, the retained counsel attempted to address factual, rather than political, issues. In the event, *Anfal* proved to be even more egregious than *Dujayl* from a due-process point of view.

The principal problem from the start of *Anfal* was naked Iraqi-political interference in the trial. During the first month of the proceedings, the office of Prime Minister Al-Maliki intervened to replace the presiding judge on the grounds he (the judge) was being insufficiently firm with Saddam Hussein, whose fate had yet to be determined by the *Dujayl* panel. The success of this attack on judicial independence – which the United States Embassy in Baghdad had been in a position to thwart but did not – opened the floodgates to political interference from which *Anfal*, and the Tribunal as a whole, never recovered. The replacement for the sacked judge quickly demonstrated himself to be legally uninformed but committed fully to a firm line *vis-à-vis* the accused and, more especially, their counsel. More specifically, during *Anfal* and a subsequent trial (that is, *1991 Uprising*), over which the same judge presided, the said judge engineered the arrest of several counsel retained

privately by the accused. Sensibly convinced that falling into the custody of the Shia militia-dominated Ministry of the Interior would constitute a sentence of death, the three defence lawyers in question opted to go into exile outside of Iraq; in one case, the threatened lawyer was smuggled out of the country by United States advisors to the Tribunal.[31] Succinctly stated, *Anfal* was a travesty of justice that cheated the accused of a full defence. Concomitantly, the focus of the Trial Chamber on the crime base,[32] combined with the same panel's inability – for reasons of disinterest and incompetence – to deal with questions of individual criminal responsibility, offered the victims of Anfal vengeance, but not justice.[33] With specific respect to the Case Matrix, the utility of the application turned out to be much the same as that which had been witnessed during *Dujayl*, that is, the Case Matrix proved to be central to whatever defence could be offered under the highly-unfavourable circumstances.

During *Anfal*, as at the time of writing, the Case Matrix was not available in the Arabic language. This precluded its direct use by defence counsel, that is, the Case Matrix was employed by the defence advisory team on behalf of counsel for the accused. The complexity of *Anfal*, combined with the limited resources available to the defence advisor's office (however much improved since *Dujayl*), necessitated a measure of triage in the assignation of advisory resources to counsel for the individual accused. Whilst all of the counsel received some measure of assistance, the principal focus of the defence effort was on three erstwhile

[31] As of mid-2010, the three lawyers in question remained in exile owing to lingering concerns for their safety.

[32] Roughly 90 prosecution witnesses were called during Anfal. Every one of these individuals was a crime-base witness, that is, not one of the prosecution witnesses were of relevance to the question of the alleged individual criminal responsibility of the accused.

[33] A lengthy assessment of the trial judgement in Anfal can be found in J. Trahan, "A Critical Guide to the Iraqi High Tribunal's Anfal Judgement: Genocide Against the Kurds", in *Michigan Journal of International Law*, 2009, vol. 30, p. 305. The perhaps unavoidable weakness of the Trahan article stems from the fact that the author did not (through no fault of her own) have access to the relevant evidentiary materials and she was, for instance, unaware of the fact that not a single prosecution witness addressed the allegations of individual criminal responsibility. As a result, Trahan was not in a position to assess whether the findings of the Anfal Trial Chamber had any basis in the evidence submitted at trial, most especially where the findings of the panel dealt with questions of individual criminal responsibility.

senior military officers: Sultan Hashim, a divisional commander during the Anfal campaign; Hussein Rashid, the then chief of military operations; and Sabir ʻAbd-al-Aziz, the head of military intelligence through the second half of the 1980s. None of these accused denied having played a role in the Anfal campaign. What they did dispute were the criminal allegations made against them. Broadly speaking, the central thrust of their defence was that the 1988 Anfal campaign had consisted of two mutually-exclusive parts: a security operation, led by Ali Hasan Al-Majid, which was directed principally against allegedly-disloyal elements of the ethnic-Kurdish civilian population; and a purely military operation, directed at Kurdish opposition fighters (known as *peshmerga*) who were allied to Iranian forces. In the view of Sultan Hashim, Hussein Rashid, and Sabir ʻAbd-al-Aziz, the eight operations that together constituted the Anfal military campaign were inexorably linked to the long-running war with Iran. After reviewing the voluminous collection of contemporaneously-generated documentation relating to the campaign, the defence advisor adopted a broadly similar view. Whilst in the first instance the defence advisor would have been inclined to sympathise with the argument of the *Anfal* prosecution that the military and security campaigns were linked to one another, the extant evidence did not establish these linkages. What is more, the defence advisor was anxious not to be caught off guard during the trial by evidence that pointed to collaboration between the State-security organs and the armed forces, and he made his own exhaustive search for evidence of such co-operation. In the event, no such evidence was uncovered; the only hint of security service-military collaboration was at levels so highly-localised that a wide-ranging policy of civil-military co-operation in the repression of the civilian population could not be inferred from this evidence, at least in the view of the defence advisor.

The procedural peculiarities of Iraqi penal law will be recalled, in particular, the fact that suspects are not formally charged until the conclusion of something akin to the prosecution phase of a trial. This nicety compels defence counsel in complex cases to anticipate what the charges are likely to be, because Iraqi courts are not accustomed to recessing between the prosecution-like and defence phases of a trial, save to give the judge(s) sufficient time to draft an indictment for each suspect. This was one of the hard lessons learned by the defence advisor during *Dujayl*, with the result that work was started on crafting the defence(s) in

Anfal several months before any formal charges had been laid – and therefore well before the horrendously-poor indictments (see above) were handed down by the *Anfal* panel – or rather by the *Anfal* prosecutor, through the *Anfal* panel.

Early in the trial, the defence-advisory team concluded (based on its review of the documentary evidence as well as the line-up of likely prosecution witnesses) that it was a safe assumption that no evidence was likely to be forthcoming to the effect that the three senior military leaders were involved in the security operation. More specifically, there was no evidence of Sultan Hashim issuing anything other than routine operational orders, and Sabir ʻAbd-al-Aziz and Hussein Rashid, as staff officers, were in no position to exercise executive authority over troops in the field. These facts logically limited the range of modes of individual criminal liability that could be alleged; from the start, the defence focussed on the potential modes of liability suggested by the evidence – aiding and abetting as well as command responsibility, in particular – with an eye to their legal requirements as well as the sort of evidence found by international(ised) courts and tribunals to have satisfied these requirements in other cases. The thinking in the defence advisor's office was that the defence could chip away at the logical prosecution theories of individual criminal responsibility as – or even before – they were advanced.

The Case Matrix, which is in many respects a quick-reference (or even an "idiot's") guide to applied ICL, was indispensible to these preparations. In the event, this part of the defence campaign was held back in the first instance by the failure of the prosecution to produce a single "linkage" witnesses, that is, one or more witnesses who would speak not to the underlying acts connected to the crime base, but rather to the authority held as well as exercised by the individual accused. Later, the Trial Chamber itself dealt a further blow to this particular thrust of the defence effort when most of the defence witness list was rejected by the presiding judge. Stated succinctly, the defence had identified a large number of erstwhile senior Iraqi officers, virtually all of them in exile, who were prepared to present what was expected to be exculpatory evidence relevant to the individual criminal responsibility (or lack thereof) of Sabir ʻAbd-al-Aziz, Hussein Rashid and Sultan Hashim. For understandable reasons of personal security, none of these witnesses were prepared to travel to Baghdad, where it was a near certainty that the Prime

Minister's office and, or in the alternative, the IHT would have engineered their arrest. Whilst the rules of the IHT permit testimony to be heard by electronic means (for example, video), and the Americans were prepared to set up the necessary links in Jordan, Syria and, or in the alternative, Lebanon, in the event, the *Anfal* presiding judge refused to take testimony by these means or to hear the defence witnesses in other ways provided for by Iraqi law (for example, by sending an investigative judge to take their statements).[34] The presiding judge explained to the American advisors to the IHT who had made the request that he could not permit, for instance, video testimony on the grounds that "the witnesses might say something bad about the Tribunal and I would not be able to have them arrested".

In measuring the utility of the Case Matrix, *Anfal* was very similar to *Dujayl*, that is, various deficiencies in the respective proceedings forced whatever defence infrastructure was in place as the trials neared their end to rely disproportionately on closing arguments in advancing the causes of the individual accused. In *Anfal* (as in *Dujayl*), the serious deficiencies in the form and content of the indictments – the *Anfal* indictments being significantly worse than those issued during *Dujayl* – created a situation where the factual and legal arguments were in the main advanced by the defence independently of one another in the closing arguments. More to the point, the defence advisory effort was limited largely to two submissions, totalling approximately 120,000 words, which focussed on the cases of Hussein Rashid, Sabir 'Abd-al-Aziz and Sultan Hashim.[35] These arguments were initially drafted in English by the defence advisory team; in turn, they were translated into Arabic, vetted by the relevant defence counsel, and, save for some very minor amendments on factual issues, filed as they had been drafted (albeit in the Arabic language). For better or worse, the arguments constituted the best effort of the defence advisors; and, whilst the Case Matrix Digests cannot be blamed for any deficiencies in this effort, there can be no doubt that whatever strengths were shown in the defence submissions (in particular

[34] Rule 2, IHT Rules. The authority of IHT judges to collect evidence outside of Iraq was made extremely expansive by virtue of this rule.

[35] Case 1/J Second/2006 (*Anfal*), Closing Defence Factual Submission on Behalf of the Accused Sabir 'Abd-al-Aziz, Sultan Hashim and Hussein Rashid, 6 May 2007; Case 1/J Second/2006 (*Anfal*), Closing Defence Legal Submissions on Behalf of the Accused Sabir 'Abd-al-Aziz, Sultan Hashim and Hussein Rashid, 6 May 2007.

in the legal argument) ought to be ascribed in large part to the said legal tool. Simply stated, the Digests proved to be (once again) an indispensible quick-reference guide to substantive ICL in a situation where inadequate indictments had forced the defence to draft something akin to lengthy law lectures.

In the event, these law lectures had little if any discernible effect on the *Anfal* Trial Chamber – Sultan Hashim and Hussein Rashid were both sentenced to death, whilst the capital sentence awarded to Sabir ʻAbd-al-Aziz was commuted to life imprisonment on the grounds of his post-Anfal campaign good conduct as a provincial governor in a Shia-dominated governorate. Indeed, the absence of reference to the defence arguments in the voluminous trial judgement would suggest that the said arguments had not been read by the Trial Chamber. In the event, the defence advisor had learned a valuable lesson in the wake of *Dujayl*, that is, political interference is best answered with counter-balancing political initiatives backed by coherent legal arguments. Hence, where the defence legal arguments found the most resonance was not at the IHT, but rather in the Presidency of the Republic of Iraq. Shortly after the aforementioned capital sentences were handed down, the defence advisor visited the legal advisors to the Iraqi Presidency, explained the deficiencies in the trial, distributed copies of the defence arguments, and asked that the Presidency not confirm the death sentences when the warrants arrived from the Prime Minister's office. Whilst the author of this chapter doubts very much that the defence arguments were read *in toto* by the Presidency officials, they did lend an all-important legal justification to the decision of the Presidency to refuse to ratify any of the death sentences handed down by the *Anfal* panel. In this paradoxical manner, the Case Matrix was, in *Anfal*, instrumental in saving at least two men from the gallows.

18.4. Lessons Learned

The severe deficiencies plaguing the *Dujayl* and *Anfal* trials served to highlight certain of the strengths of the Case Matrix and, at the same time, mitigate against the use of the legal tool in a manner that would test the full capacity of the application. With this caveat, a number of lessons might be drawn from the experience in Baghdad during 2006–2008:

1. The Case Matrix is an invaluable tool in the hands of practitioners, including defence counsel.
2. The means of proof component of the application would benefit from more references to international(ised) judgements where prosecution evidence was found to be insufficient to satisfy a particular legal requirement.
3. Where there is an unshakeable commitment to due process by all parties to a given trial, the Case Matrix will nonetheless be of limited utility if all of the said parties are not employing the Case Matrix, or, as a minimum, where the trial and appellate chambers are not otherwise fully conversant with substantive ICL. Put in other words, brilliantly-crafted legal arguments based upon a detailed grasp of ICL, whether made by prosecution or defence counsel, will be of no account in the face of judicial ignorance.
4. The Case Matrix is a tool; like all tools, it is only as good in the final analysis as the craftsman using it. The Case Matrix was very well suited to the physical conditions in Baghdad: the software proved itself to be user friendly as well as easily installed in computers with dated hardware for use in physically-difficult (that is, very sandy) conditions. At the same time, the Case Matrix was not well configured for the language profile of the Iraqi participants (judicial, defence, and prosecutorial) in *Dujayl* and *Anfal*; that is, even the speakers of English were not sufficiently fluent in that language to use the application. Simply stated, the content of the Case Matrix Digests is conceptually complex where users are unfamiliar with substantive ICL. As a result, a very high level of English-language proficiency is required to benefit from the application and, in most cases, native-language versions will be required if the Case Matrix is to have a wide-ranging impact within a particular institution.
5. Arguments advanced with the aid of the Case Matrix can do nothing against determined judicial misconduct and, or in the alternative, political meddling in the administration of justice. The exception to this rule is where those involved in political meddling are anxious to justify their interference in the process of justice on sound legal and factual grounds.

6. An Arabic-language version of the Case Matrix is required. Whilst it is understandable that an Arabic version did not exist in 2006–2008, an argument could be made to the effect that the existence of an Arabic-language Case Matrix would have made it more difficult for the IHT trial and appellate chambers to ride roughshod over the substantive law. If nothing else, an Arabic-language version of the Case Matrix would have proved to be a valuable teaching tool for IHT staff and defence counsel, most especially prior to the point (that is, September 2006) when Iraqi-political interference undermined irretrievably the belief of all the IHT actors (that is, prosecution, defence, judges, and international advisors) that IHT proceedings, however flawed, might nonetheless seek to achieve a measure of justice.
7. Owing to the widely-recognised failure of the IHT to dispense impartial justice and the manner in which this failure has compromised the standing of ICL in the Arab world by virtue of its association with the IHT, something akin to a programme of rehabilitation – that is, a programme of ICL education and dissemination – would be highly advisable in Iraq and elsewhere in the Middle East. The Case Matrix, employed alongside Arabic-language documentation seized from the Baathist regime and now in the public domain, would constitute an ideal teaching platform for legal professionals – if and when an Arabic version of the Case Matrix becomes available.

18.5. Conclusions

Tested as the Case Matrix was in a high-pressure, operational environment, both the Case Matrix technology as well as the substantive contents of the application lent themselves well to the drafting of defence arguments. For the most part, the effect of these arguments upon the administration of justice by the IHT was minimal – although the position taken here is that this state of affairs stemmed from Iraqi-political interference as well as the IHT judges' collective ignorance of ICL, that is, the problem was not by any means the Case Matrix *per se* and the means of its employment. Notwithstanding these setbacks – which were admittedly of a rather deleterious nature for those sentenced harshly by

the IHT in the absence of a proper understanding of the requirements of the substantive law – this early experiment in the use of the Case Matrix in a Middle-Eastern context suggests that, properly used, the Case Matrix has immense potential in the Arab-speaking region not only as a case-management tool, but also as a pedagogical instrument for the dissemination of ICL in a part of the world that remains almost wholly unfamiliar with this area of law.

ANNEX I:
LEGAL TOOLS PROJECT
METADATA MANUAL

Adopted by the Legal Tools Advisory Committee on

17 October 2008

Version 1.2 with additional clarifications
as of October 2009

This version supersedes the Metadata Manual
of 29 October 2008 – for further information
see Annex III

1. Introduction

The purpose of the present Metadata Manual ("Manual") is to provide an overview of the metadata that are being collected for resources in the Legal Tools collections. A definition is provided for each metadata field. Furthermore, specific information is provided regarding the field type, the scope of application of the piece of metadata, and whether multiple entries are possible. This information is based on columns C, F, and H of the table listing the metadata for Legal Tools project. This table is enclosed as Annex I.

Additionally, based on the practical experience with the collection of metadata thus far, the Manual contains tips and examples for the collection of some of the metadata. It is envisaged that the Manual will be further expanded in the future.

The following field types exist:

- **Free text** – information is entered freely, in accordance with the definition of the metadata field in question.
- **Validated values (closed list)** – information is entered by choosing one of the pre-set values from a list. The person entering the metadata cannot add new values to the list or leave the field blank. If it appears as if none of the values on the list fit, this must be communicated to the Legal Tools Advisory Committee, which will then take a decision on the matter.
- **Validated values (open list)** – information is entered by choosing one of the pre-set values from a list. If the information needed is not already on the list, the person entering the metadata may add a new value to the list and then use that value. However, the adding of new values must be documented and communicated to the Legal Tools Advisory Committee.
- **Binary** – choose "yes" or "no" from a list.
- **Date field** – information is entered in the DD/MM/YYYY format (but see the metadata field *LT-Approximate Date*, for which different rules apply).

- **Hyperlinked text only** – this field type is to be used in order to map relations of a resource to another resource. It has yet to be determined how the Partners will be able to use this field type.
- **Free text (numerical)** – the text entered is a number.

Please note that the information regarding the "scope of application" will have to be further refined. It presently only gives a first indication as to the resources for which the metadata field is relevant.

2. General Rules regarding the Entry of Metadata

The following general rules regarding the entry of metadata must be respected:

- **Names of persons** are to be entered in the following format: SURNAME, First Name(s). The first name is to be typed in capital letters. If the names of more than one person are to be entered in the same metadata field (for example, in the *LT- Accused/Defendant*-field, if there are more than one accused), separate the names with a semi-colon. Currently, all name-related fields are free-text-fields. The field-type may be changed to validated values (open list), to enhance coherency.

  NB: This format does not apply to LT-Source, LT-Case name (ICC naming convention), LT-Case name (ICC naming convention) (EN), LT-Case name (ICC naming convention) (FR), LT-Alternative and/or short case name, LT-Alternative and/or short case name (EN) and LT-Alternative and/or short case name (FR).

- Do **not** use **diacritics** (accents) anywhere in the metadata except those contained in the list of accepted characters *(Character Set Accepted by TRIM.doc)*; the standard French and Spanish accents (é, è, à, ñ) may be used (a full list of diacritics that may be used will be supplied shortly). Other diacritics get lost in the Court's database for technical reasons and under certain conditions turn into a different character altogether. This affects in particular case names, *et cetera,* of the ICTY.

- **Dates** are to be entered in the DD/MM/YYYY format.
- If you **add text** to a metadata field that does not appear in the resource, even though text in that field normally only reflects text from the resource (for example, the *Title*-field), the added text that does not appear in the resource must be put in **square brackets** ([ ]). Make sure that you leave a space between both, the opening and the closing brackets. This is necessary because some search engines do not recognise a word if it is directly preceded or followed by brackets.
- Some metadata fields allow **multiple entries.** Separate multiple entries by using a semi-colon (;). A different technical solution may be found for metadata fields that use validated values.
- Fields should **never be left blank**. If a given metadata field is irrelevant for certain resources (for instance, for non-judicial documents those metadata fields relating only to judicial documents), then the text **"Not applicable"** should be entered. If the metadata field generally would be relevant for the document in question, but the information cannot be obtained from the document itself and through reasonable efforts, the text **"Not available"** should be entered. If the information is currently not available, but may become available later – for example, through further research, the words **"TO BE COMPLETED"** should be entered.

3. Metadata Collection for ICC Court Records

When collecting metadata for ICC Court Records, certain metadata fields will already be filled. These metadata stem from the Court's Court Management System and were uploaded into the Legal Tools Database. Nevertheless, the person collecting the metadata for an ICC Court Record must not only fill in the additional fields, but also check that the metadata entries that already exist are correct.

If any errors (typos, wrong numbers, *et cetera*) in the metadata are identified, they must be corrected in the Legal Tools Database.

In addition, every such error should be communicated to the following email address: volker.nerlich@icc-cpi.int. Please indicate the ICC document number (contained in the field LT-External Identifier; for example, ICC-01/04-01/06-123) and which error has been made. This is very important because the error must also be corrected in the Court's metadata.

4. Basic Information Describing the Resource

4.1. Information Relating to the Title of the Resource

4.1.1. Title

Name given to the resource by its creator and as it is apparent from the resource.

Field type: free text	
Scope: All resources	**Multiple entries:** No

Comment:

The title of the resource as is appears within the resource. The title should be entered **in the original language** and exactly as it appears is in the resource.

However, in cases where the resource does not have a title or the title is incomplete, the person inputting the metadata should come up with a meaningful name, based on the content of the resource. To indicate in such cases that the title is not the original title, the text should be put in square brackets ([ ]), with a space between the brackets and the text.

To ensure accuracy, use the "copy" and "paste" editing options when transferring the title of the resource to the spreadsheet, and then match the destination formatting of the Excel spreadsheet. Take care when copy-and-pasting from pdf-files, especially those of poor visual quality, as the depiction is not always accurate and words/letters are lost. In some cases, it may be useful to copy/paste the title into a Word document *before* transferring it to the spreadsheet, to benefit from the Word spell-check function. This promotes accuracy and precision, especially in cases where titles are lengthy.

If the title appears all in capital letters in the resource, use capital letters in the metadata *only* for the first word of the title and for names *et cetera*. (thus, "DECISION ON THE PROSECUTOR'S APPEAL" should become "Decision on the Prosecutor's appeal"). Otherwise, follow the use of capital letters in the resource (thus, "Decision on the Prosecutor's Appeal" would remain as is).

Take care not to include extra spaces, or full-stops (periods) that might appear at the end of the resource when cutting and pasting the title from the resource to the spreadsheet.

In case of obvious spelling mistakes in titles (and elsewhere in the metadata) the following should be done: the mistake should be corrected in the metadata field (that is, the title *et cetera*, entered with the correct spelling). The entire corrected word should be placed in square brackets, with a space before and after the word and the bracket. The correction should also be mentioned in the Notes metadata field (for example, "The word XX, which is misspelt in the title of the document, has been corrected in the metadata").

If the title is longer than 256 characters (including spaces), stop with the last word before the limit of 256 characters is reached and enter "[…]" (these count for the maximum length. In the Notes metadata field, enter the full title. To avoid that titles that are too long are entered, in MS Excel use the data validation function for the title column (Data/Validation… Text length equal to or less than 256 characters").

Remember to distinguish the "Title" from the ""LT-Case Name (Official)" field – they are not the same! (Example: Seselj, ICTY AC Decision on Extension of Word Limits: Title: *Decision on Extension of Word Limits*; Case Name: *Prosecutor v. Vojislav Seselj*

Examples:

Where a decision on admissibility decision is simply titled "Admissibility", then add "[Decision on]" as a pre-fix for this to make sense.

4.1.2. LT-Translated Title (EN)

The title of the document translated into English, if it is not in English.

Field type: free text	
Scope: All resources (if *Title* NOT in EN)	**Multiple entries:** No

Comment:

Make sure this translation is accurate. If available, the official translation must be used. Otherwise, the person inputting the metadata should translate the title him- or herself. In order to indicate that the translation of the title is not the official one, put the translated title in square brackets ([ ]), leaving a space between the square bracket and the text.

If the title is longer than 256 characters (including spaces), stop with the last word before the limit of 256 characters is reached and enter "[…]" (these count for the maximum length. In the Notes metadata field, enter the full title. To avoid that titles that are too long are entered, in MS Excel use the data validation function for the title column (Data/Validation… Text length equal to or less than 256 characters").

Currently, only titles that have been translated officially should be used. If no such title is available, enter "TO BE COMPLETED" in the metadata field.

Examples:

Resource title: *Décision relative à la prorogation du délai de dépôt d'une réponse*

LT-Translated Title (EN): *Decision on Extension of Time to File a Response*

N.B.: The question of who will provide the translations of titles is still under discussion. Accordingly, the working method set out above regarding translated titles if no official translation is available, is subject to change.

4.1.3. LT-Translated title (FR)

The title of the document translated into French, if it is not in French.

Field type: free text	
Scope: All resources (if *Title* NOT	**Multiple entries:** No

in FR)	

Comment:

Make sure this translation is accurate. If available, the official translation must be used. Otherwise, the person inputting the metadata should translate the title his- or herself. In order to indicate that the translation of the title is not an official one, put the translated title in square brackets ([ ]), leaving a space between the square bracket and the text.

If the title is longer than 256 characters (including spaces), stop with the last word before the limit of 256 characters is reached and enter "[…]" (these count for the maximum length. In the Notes metadata field, enter the full title. To avoid that titles that are too long are entered, in MS Excel use the data validation function for the title column (Data/Validation… Text length equal to or less than 256 characters").

Currently, only titles that have been translated officially should be used. If no such title is available, enter "TO BE COMPLETED" in the metadata field.

Examples:

Resource Title: *Decision on Extension of Time to File a Response*

LT-Translated Title (FR): *Décision relative à la prorogation du délai de dépôt d'une réponse*

N.B.: The question of who will provide the translations of titles is still under discussion. Accordingly, the working method set out above regarding translated titles if no official translation is available is subject to change.

4.1.4. LT-Short Title

Any form of the title used as a (widely known) substitute or alternative to the formal title of the resource.

Field type: free text	
Scope: All resources that have a short title; if that is not the case,	**Multiple entries:** No

enter "Not applicable".	

Comment:

As a rule, resources will not have a short title. However, insert a short title if it is widely known, perhaps better than the original full title.

Examples:

Nuremberg Judgment for the judgment of the International Military Tribunal.

4.1.5. LT-Short Title (EN)

Translation of the short title into English when the short title is not in English.

Field type: free text	
Scope: All resources (if *LT-Short Title* is NOT in EN) for resources that have a short title; if that is not the case, enter "Not applicable"	**Multiple entries:** No

Comment:

As a rule, resources will not have a short title. However, insert a short title if it is widely known, perhaps better than the original full title.

Currently, only titles that have been translated officially should be used. If no such title is available, enter "TO BE COMPLETED" in the metadata field.

4.1.6. LT-Short Title (FR)

Translation of the short title into French when the short title is not in French.

Field type: free text	
Scope: All resources (if *LT-Short Title* is NOT in FR) for resources that have a short title; if that is not the case, enter "Not applicable"	**Multiple entries:** No

Comment:

As a rule, resources will not have a short title. However, insert a short title if it is widely known, perhaps better than the original full title.

Currently, only titles that have been translated officially should be used. If no such title is available, enter "TO BE COMPLETED" in the metadata field.

4.1.7. LT-External Identifier

The unique identifier given to the resource by its source.

Field type: free text	
Scope: All resources; for resources that do not have an external identifier, enter "Not applicable".	**Multiple entries:** No

Comment:

This is the identification number given to a resource, for external or outside purposes. It must be a **unique** identifier. Therefore, the case number is generally not an external identifier, as all documents pertaining to the case will have the same number. If there is no identifiable external identifier, then this field is to be marked "None". For the ICC judicial decisions and documents, the document number pursuant to regulation 27 of the Regulations of the Registry is the external identifier. This number can be found in the stamp of ICC judicial documents, which is normally located in the upper-right corner of the document. The stamp consists of the document number, the phase of the proceedings (PT [pre-trial], T [trial] or A [appeal]), the acronym of the person who registered the document, and the interlocutory appeal number, if any. Only use the document number itself, not the other information.

Examples:

For all United Nations documents, the external identifier is the number at the top of the resource. For legislation, the external identifier is the official reference number of the particular act/statute/regulation, for example 2006 No. 1234**.** For ICC judicial documents, the external identifier is the registration number pursuant to regulation 27 of the Regulations of the Registry, including all suffixes (for example, 01/04-01/06-126-Corr).

Note that for decisions, *et cetera*, of the ICTY and ICTR, the external identifier is not the case number (as this number is mentioned on all documents pertaining to the same case and therefore is not unique), but the case number plus the page number of the file. The page number, however, is often not available. In such cases, the words "Not available" (and not "Not applicable") should be entered.

4.2. Metadata Relating to the Source of the Resource

4.2.1. LT-Source

The entity primarily responsible for the making of the content of the resource.

Field type: Validated values (open list)	
Scope: All resources; if the source is unknown, enter "Not available"	**Multiple entries:** Yes

Comment:

This field refers to the entity, body or individual responsible for the creation of the content of the resource. The "source" should reflect the *organ*/*organisational unit* of the organisation or state of the source. It is not necessary to identify the organisation to which the organ belongs, as this information will be captured by the field LT-Organisation/State of Source.

The text is entered with validated values; however, the person inputting the source will be able to enter new values to the list, if necessary.

Thus far, the list consists of the following:

- Parliament
- Prosecutor
- Trial Chamber
- Trial Chamber I
- Trial Chamber II
- Trial Chamber III

- Appeals Chamber
- Secretariat
- Council
- Presidency
- Bureau
- Defence
- Commission
- Home Office
- Prosecutor/Defence
- Registrar/Registry
- Security Council
- Chamber
- Pre-Trial Chamber I
- Pre-Trial Chamber II
- Pre-Trial Chamber III

As of July 2009, only supervisors have the right to register new source names. If another source should be listed than those already included in the source-list, please refer to your supervisor who will then make the additional changes in the list.

Examples:

Seselj; ICTY Trial Chamber Order for Detention on Remand. LT-Source: *Trial Chamber II*.

Simatovic, ICTY Registry Decision. LT-Source: *Registry.*

Simsic, BWCC Indictment. LT-Source: *Prosecutor.*

4.2.2. LT-Source Type

The type of the entity primarily responsible for the making of the content of the resource. If the described resource has more than one source, the source type has to be defined for each of them.

Field type: Validated values (closed list)	
Scope: All resources	**Multiple entries:** Yes

Comment:

This field flows from the LT-Source metadata field and indicates the type of the source. Choose from the following controlled-text list:

- **Judicial body -** A domestic or international court of law, or an individual or organisation that has powers resembling those of a court of law or judiciary.
- **Prosecution service -** Applies to resources originating from the prosecution or prosecutor.
- **Defence service -** Applies to resources originating from the defence, including individual defence lawyers and entities such as the Office of Public Counsel for the Defence.
- **State (legislative branch) -** Applies to resources originating from the legislature of a state – the domestic body of a country which makes and creates laws.
- **State (executive branch) -** Applies to resources which originate from the executive branch of a state – the entity which is responsible for the enforcement of laws made by the legislative branch.
- **International organisation -** Applies to resources originating from organisations with international membership and presence, established by states, by way of treaty/charter.
- **International diplomatic conference** – Applies to resources adopted at or produced by an international diplomatic conference, such as the ICC Statute at the Rome Conference.
- **Non-governmental organisation -** Applies to resources originating from legally constituted organisations created by private persons, or organisations which do not include governments among their members.
- **Publicist -** Applies to resources originating from academic or educational institutions, including academic writings, reports, dissertations and teaching materials.

- **Court reporter** - Applies to resources originating from institutions or individuals providing official reports of judicial documents. Example: cases reported by the United Nations War Crimes Commission between 1945 and 1950.
- **Press -** Applies to articles, transcripts, pictures or documents which are published in the media – be it in the form of print, electronic media, new media, recording media (that is, transcripts of recorded interviews).
- **Participating victim -** Applies to any resource which is filed by victims in the proceedings of a particular case. A Victim Impact Statement would fall into this category.
- **Other -** If the source type falls into a category that is not listed above.
- **Unknown -** If the source type cannot be determined or is not known.

Note that the Presidency/President, Bureau and Registrar of the ICC and other international(ised) courts and tribunals are considered "Judicial Bodies" when they exercise (quasi-)judicial functions. This is normally the case when the document is filed in the context of proceedings and therefore is a "judicial document". On the other hand, for, for example, the annual report of the President of the ICC to the United Nations General Assembly, use "international organisation" as source type because the President is not reporting in his judicial capacity.

For judicial documents of the Office of Public Counsel for Victims of the ICC (hereinafter OPCV), use "participating victim" as source type, even if the OPCV is not representing a specific victim. Similarly, assign always "defence service" to judicial documents emanating from the ICC's Office of Public Counsel for the Defence (hereinafter OPCD).

4.2.3. LT-Organisation/State of Source

The state or international organisation to which the entity primarily responsible for the making of the content of the resource belongs.

Field type: Validated values (open list)	

Scope: All resources	**Multiple entries:** Yes

Comment:

This is the state or organisation of the source from which the resource originates – there is a controlled text list to choose from, however this is not exhaustive. Ensure that the format is in the manner of the controlled-text list. In the case of United Nations agencies, missions or other structurally independent sub-organisations, the Organisation should reflect that entity. Accordingly, for the purpose of this metadata field, resources emanating from the organs of the ad hoc international tribunals, the ICTY and ICTR, and not the United Nations, are considered as the "Organisation of Source". Similarly, the Cambodian Extraordinary Chambers, the Iraqi High Tribunal and the Special Panels in East Timor are considered the "Organisation of Source", and not Cambodia, Iraq or East Timor. While this is, legally speaking, incorrect, it is necessary for the specific research needs of the Legal Tools.

As of July 2009, only supervisors have the right to register new names in the list of organisation/state of source. If another source should be listed than those already included in the list, please refer to your supervisor who will then make the additional changes in the list.

Examples:

For an Administrative Direction of the United Nations Mission in Kosovo (UNMIK), the LT-Organisation/State of Source is "United Nations Mission in Kosovo (UNMIK)". The LT-Source Type is "International Organisation".

For a Resolution of the United Nations General Assembly, the LT-Organisation/State of Source is "United Nations", and the LT-Source is "General Assembly".

For a decision of the ICTR, the LT-Organisation/State of Source is "International Criminal Tribunal for the former Yugoslavia (ICTY)", and the LT-Source is, for example, "Trial Chamber I".

For resources that are domestic legislation, the LT-Organisation/State of Source is the state from which the legislation originates. For cases within national jurisdictions, the LT-Organisation/State of Source is the state of that jurisdiction.

4.3. Metadata Relating to the Language of the Resource

4.3.1. LT-Language

The language of the content of the resource.

Field type: Validated values (closed list)	
Scope: All resources	**Multiple entries:** Yes

Comment:

The language of the resource (note: although it may be a translation, this field relates to the language of the resource in its present form).

4.3.2. LT-Original Language

Whether the described resource is the original language version.

Field type: Binary (yes/no)	
Scope: All resources	**Multiple entries:** No

Comment:

Is the resource in its original language? In cases where the resource was created in two languages, with one being authoritative, it is still possible that *two* languages are "original". The authoritative language has a separate metadata field.

Examples:

ICTY documents "done in English and French" – the resources in both languages are in the original language.

4.4. Metadata Relating to the Date of the Resource

4.4.1. LT-Date Created

Date of the creation of the resource as it appears on the resource. For international legal instruments, the date of adoption is to be used.

Field type: Date format (dd/mm/yyyy)	

Scope: All resources	**Multiple entries:** No

Comment:

For **judicial documents**, this is the date indicated on the resource.

Judgments: the date the judgment was handed down.

Verdict: the date the verdict is handed down

Indictments: the date noted on the indictment

Redacted indictment: the date of filing the redacted indictment. This may be indicated by a stamp or other manner – please note to distinguish with the *original* indictment as that date may also still appear on the resource.

For **domestic legislation**, this is the date the legislation was passed in parliament, or "laid before parliament" as with UK legislation. Please note that in some instances this will be different to the date of entry into force (there is a separate metadata field for that information).

For **international legal instruments**, this is the date of adoption.

For **position papers, news and academic writings** this is the date that the resource is published.

If there is mention of a month or a year, **do not** enter the information in this field, as the date must be correct and precise, and in the format of dd/mm/yyyy. Note that an alternate metadata field labelled "LT-Approximate Date" has been created to accommodate more general information (month or year or both) if the precise date is unavailable.

4.4.2. LT-Approximate Date

Year and/or month of the creation of the resource as it appears on the resource, if the exact date is unknown.

Field type: (00/mm/yyyy or 00/00/YYYY	
Scope: All resources	**Multiple entries:** No

Only enter information in this field if the exact date of the resource is unknown (day and/or month are missing). If the day is missing, enter month and year as follows: 00/MM/YYYY. If both, day and month are missing, enter the year as follows: 00/00/YYYY. If the metadata are entered into an Excel table, make sure that the relevant field in the table is

not formatted as a date-field, as this may automatically change the 00 to 01 or not accept the entry.

N.B.: The reason for the introduction of the LT-Approximate Date field is a technical issue with TRIM. It may be resolved at a later stage.

4.4.3. LT-Date of Expiry

Date when the resource expired.

Field type: Date format (dd/mm/yyyy)	
Scope: Only if "LT-Content Type" is "Domestic legal instrument" or "International legal instrument". For all other resources, enter: "Not applicable".	**Multiple entries:** No

4.4.4. LT-Entry into Force

Date when the resource entered into force.

Field type: Date format (dd/mm/yyyy)	
Scope: Only if "LT-Content Type" is "Domestic legal instrument" or "International legal instrument". For all other resources, enter: "Not applicable".	**Multiple entries:** No

4.5. Information on the Content of the Resource

4.5.1. LT-Content Type

The nature or genre of the content of the resource.

Field type: Validated values (closed list)	
Scope: All resources	**Multiple entries:** No

Comment:

Within the following controlled-text list, choose the label which best summarises the resource content.

- **Academic writing**: A resource from an academic source such as a university or other form higher education or research institution.
- **Domestic legal instrument:** Applies to any legally binding legislation, rules, statute and protocol existing at a national state level except legislation implementing the Rome Statute.
- **ICC Preparatory works:** Documents pertaining to the negotiations and drafting of the Rome Statute and the Rules of Procedure and Evidence and Elements of Crimes.
- **Implementing legislation:** Domestic legislation implementing the Rome Statute of the International Criminal Court.
- **International legal instrument:** This label applies to international treaties, charters, conventions, resolutions *et cetera*. Examples: UN Charter, Rome Statute, Regulations made by UNMIK, Resolutions adopted by the UN Security Council.
- **Judicial document:** Refers to any resource pertaining to judicial proceedings in either domestic or international jurisdictions. These resources include, but are not limited to, indictments, motions, submissions, decisions and judgments. Resources from any court falling under the LT-Source Type category of "Judicial Body" are classified as judicial documents, as are documents filed before judicial bodies. Also court reports done by academic writers (source type: Publicists) are considered judicial documents.
- **News**: Applies to documents which record current events and current affairs adopting a journalistic approach. Example: newspaper article.

- **Publication:** Applies to any resource that is issued by an institution or an individual that does not fall within any of the previous categories.
- **Website:** A link to a website.

4.5.2. LT-Abstract

A summary of the content of the resource.

Field type: free text	
Scope: All resources	**Multiple entries:** Yes

N.B.: The discussion as to whether there should be abstracts in the Legal Tools and which types of resources should be covered is still ongoing.

4.5.3. Notes

Any peculiarities of the resource.

Field type: free text	
Scope: All resources	**Multiple entries:** Yes

Comment:

Note, for example, discrepancies entailed in the resource which would be important for the reader to note.

Examples:

Where a resource is incomplete, difficult to decipher, has an incorrect date, misspelled names or obvious errors, a note of this is to be made in this metadata field. Do not use this field as a means of recording problems you have encountering in entering information in other fields. This field aims to provide the user with information which could not be entered anywhere else, and which is thought to be of some use.

5. Relations of the Resource with other Resources or Entities

5.1. LT-Related Organisation/State

Name of the organisation or entity to which the resource relates. For example, if the described resource is a filing by a state participating in proceedings before the ICC, the related organisation would be the ICC.

Field type: Validated values (open list)	
Scope: All resources	**Multiple entries:** Yes

Comment:

If the document relates to, say, the ICC, and the ICC is also the LT-Organisation/State of Source, please also enter "International Criminal Court (ICC)" in the LT-Related Organisation/State field. The same applies for all other such cases.

As of July 2009, only supervisors have the right to register new names in the list of related organisation/state. If another source should be listed than those already included in the list, please refer to your supervisor who will then make the additional changes in the list.

5.2. LT-Organisation/State of Judicial Body

The state or international organisation of the judicial entity to which the resource is addressed or which is responsible for the issuance of the resource. Additionally, for international judicial bodies this field captures the judicial body of which the described resource is a constituting document (for example, statute of a tribunal).

Field type: Validated values (open list)	
Scope: Only if *LT-Document Type* is "Judicial Document". For all other resources, enter "Not applicable"	**Multiple entries:** Yes

Comment:

This metadata field is necessary because certain judicial institutions are considered to be the LT-Organisation/State of Source or the LT-Related Organisation/State of Source (notably, the ICTY, the ICTR, the ECCC, and the IHT). In order to reflect that these institutions also are part of the United Nations or of a state, information must be entered here.

If the LT-Organisation/State of Source or LT-Related Organisation/State of Source is the same as the LT-Organisation/State of Judicial Body, enter the name of the organisation or state in the field LT-Organisation/State of Judicial Body once again, even though it is a repetition.

As of July 2009, only supervisors have the right to register new names to the list of organisations/state of juridical body. If another source should be listed than those already included in the list, please refer to your supervisor who will then make the additional changes in the list.

5.3. LT-Related Resource Link

A link to a related resource that is also contained in the Legal Tools. A resource is related if its content is the same, but in a different language or same language, but in a different translation, or in a different electronic format, or if it is a corrigendum or annex to or of the described resource. It also is used for different versions of legislation.

Field type: Hyperlinked text only	
Scope: All resources.	**Multiple entries:** Yes

Comment:

Currently, this metadata field is only used to identify different language versions of the same resource (that is, the resource is in English and there is also a French translation in the collection), different electronic versions (for example, the resource is available as a Word-document and also as a PDF-file), and annexes and corrigenda, and different versions of legislation (for example, if legislation was amended later and both versions of the act are in the Legal Tools Database) or different translations of a given text.

N.B.: Decision of the LTAC pending whether also other relations should be registered.

5.4. LT-ICC Case(s) Cited

ICC judicial decisions referred to in the content of the described resource.

Field type: Validated values (open list) – enter the ICC external identifier (the registration number pursuant to regulation 27 of the Regulations of the Registry)	
Scope: Only if *LT-Content Type* is "Judicial Document" and [*LT-Organisation/State of Source* is "International Criminal Court (ICC)" or "LT-Related Organisation /State" is "International Criminal Court (ICC)"]; for all other resources enter "Not applicable"	**Multiple entries:** Yes

Comment:

This metadata field only applies to judicial documents emanating from or relating to the ICC. Enter the registration number pursuant to regulation 27 of the Regulations of the Registry, for example, ICC-01/04-01/06-233, of the document referred to.

5.5. LT-Legislation Cited

International or domestic legislation referred to in the content of the described resource. Does not include references to the Rome Statute, the ICC Rules of Procedure and Evidence, the Elements of Crimes, the Regulations of the Court or the Regulations of the Registry.

Field type: validated values (open list)	
Scope: Only if *LT-Content Type* is "Judicial Document" and *LT-Organisation/State of Source* is "International Criminal Court (ICC)"; for all other resources enter "Not applicable"	**Multiple entries:** Yes

Comment:

This metadata field is only relevant for ICC judicial documents. Enter, for example, references to national codes of criminal law or international

treaties to which reference is made in the submissions. Use the Legal Tools Citation Guide to refer to the legislation.

Do not enter references to the core legal instruments of the ICC, namely the Rome Statute, the ICC Rules of Procedure and Evidence, the Elements of Crimes, the Regulations of the Court or the Regulations of the Registry – they are covered by the key words.

6. Information Specific to Judicial Documents

6.1. LT-Case Name (ICC Naming Convention) (EN)

Name of the case in English, according to the ICC Naming Convention, for which the described resource was produced.

Field type: validated values (open list)	
Scope: Only if *LT-Content Type* is "Judicial Document"; for all other resources enter "Not applicable"	**Multiple entries:** Yes

Comment:

The name of the case as it should be named according to the ICC Naming Convention. This will be different and distinct to that which appears in the "Title" field.

As a rule, case names are to be in the format of *[Party 1] v. [Party 2]*. It is important to standardise the case name, particularly where there are many resources pertaining to the one case. Where resources are in a language other than English, the case name is still to be entered in **English.** As a rule, do not use an alias or "a.k.a." in the case name. For names of natural persons, use indicate the first name followed by the family name, if both names are available. For multiple accused, list the first (by alphabetical order of the family names), followed by "et al.). The case name must include the full name of the accused or party to the proceedings. It is not sufficient to enter just the surname.

The rules for the UN Human Rights Committee, ECHR, IACHR, African Commission on Human and Peoples' Rights, ICC, ICTY, ICTR and SCSL may be summarised as follows:

UN Human Rights Committee, ECHR, IACHR, African Commission on Human and Peoples' Rights

English: [Family name of complainant(s)] v. [Name of State]

French: [Nom du réquerant(s)] c. [Nom du pays]

Note: If there is more than one complainant/defendant, please use the name of the first complainant/defendant and add "et al".

ICJ and PICJ

[Name of the case as given on the ICJ website] ([Name of complaining State] v. [Name of defending State])

ICC, ICTY, ICTR, SCSL, Special Panels on Serious Crime

English: P. v. [first name family name]

French: P. c/ [prénom nom de famille]

Note: If there is more than one complainant/defendant, please use the name of the first (meaning alphabetically speaking the first, by family name) complainant/defendant and add "et al".

For cases of the ICC, ICTY, ICTR and SCSL, the case names will be on a drop-down list from which the relevant case name can be chosen.

This format should also be used for national cases. Disregard the ICC Naming Convention with respect to naming national cases.

Currently, the following case names can be used for the ICC Court Records:

- P. v. Thomas Lubanga Dyilo
- P. v. Bosco Ntaganda
- P. v. Germain Katanga et al.
- P. v. Joseph Kony et al.
- P. v. Jean-Pierre Bemba Gombo
- P. v. Ahmad Muhammad Harun et al.
- Situation in the Democratic Republic of the Congo
- Situation in Darfur, Sudan
- Situation in Uganda
- Situation in the Central African Republic

For ICC Court Records that do not relate to a specific case but to a situation only, assign the respective situation name.

Please note that applications by the Prosecutor for warrants of arrest are sometimes first registered in the situation file. A case file is currently only opened once the Pre-Trial Chamber issues a warrant of arrest. The relevant court records are then transferred to the newly created case file. In such a case, the metadata for the relevant court records in the Legal Tools Database will have to be adjusted (case name and document number).

N.B.: Enter names without diacritics or characters that fall outside the basic Latin alphabet.

N.B.: This explanation does not yet cater for jurisdictions in which the names of the parties are not reported.

6.2. LT-Case Name (ICC Naming Convention) (FR)

Name of the case in French, according to the ICC Naming Convention, for which the described resource was produced.

Field type: validated values (open list)	
Scope: Only if *LT-Content Type* is "Judicial Document"; for all other resources enter "Not applicable"	**Multiple entries:** Yes

Comment:

See the explanations under LT-Case Name (ICC Naming Convention) (EN), LT-Case name (ICC Naming Convention) (other language)

Name of the case in the original language, if that language is not English or French, according to the ICC Naming Convention, for which the described resource was produced.

Field type: validated values (open list)	
Scope: Only if *LT-Content Type* is "Judicial Document"; for all other resources enter "Not applicable"	**Multiple entries:** Yes

Comment:

See the explanations under LT-Case Name (ICC Naming Convention) (EN)

6.3. LT-Alternative or Short Case Title

Name of the case as it is named by the court/tribunal itself (official case title) in addition to alternative case title used as a (widely known) substitute or alternative to the official name of the case for which the described resource was produced. If case title is in another language than English, register the case title in the original language to keep the case title identical to the official name given to the case, also on national level. Use ";" to separate multiple entries.

Field type: free text	
Scope: Only if *LT-Content Type* is "Judicial Document"	**Multiple entries:** Yes

Comment:

As a rule, resources will not have a short case title. However, insert a short case title if it is widely known, perhaps better than the original full case title.

6.4. LT-Alternative or Short Case Title (EN)

Translation of the official, alternative and/or short case title into English when such title is not in English.

Field type: free text	
Scope: Only if *LT-Content Type* is "Judicial Document" and not *LT-Alternative or Short Case Title* not EN	**Multiple entries:** Yes

Comment:

As a rule, resources will not have a short case title. However, insert a short case title if it is widely known, perhaps better than the original full case title.

6.5. LT-Alternative or Short Case Title (FR)

Translation of the official, alternative and/or short case title into French when such title is not in French.

Field type: free text	
Scope: Only if *LT-Content Type* is "Judicial Document" and not *LT-Alternative or Short Case Title* not FR	**Multiple entries:** Yes

Comment:

As a rule, resources will not have a short case title. However, insert a short case title if it is widely known, perhaps better than the original full case title.

6.6. LT-Case Number

Official number of the case for which the described resource was produced.

Field type: Validated values (open list)	
Scope: Only if *LT-Content Type* is "Judicial Document"	**Multiple entries:** Yes

Comment:

This field applies to resources which fall into the "LT-Content Type" category of "Judicial Document". This is the identification number attributed to the particular case. Note that this will often, but not always, be different to the external identifier given to the resource.

If a resource deals with two separate matters or cases within that one resource, enter both case numbers in this field, separated by a comma (,).

Examples:

For the ICTY, ICTR and SCSL, the case number will remain the same throughout proceedings for each case. For example, the case number for *Prosecutor v. Jovica Stanisic & Franko Simatovic* is IT-03-69. This

remains unchanged, no matter what phase the case may be at. At the ICC, the case number must be distinguished from the document number, which is an external identifier: for example, 01/04-01/06 is the case number of the case against Mr. Lubanga, the external identifier 01/04-01/06-1124 refers to document 1124 in that case.

For the European Court of Human Rights, the case number is the application number which appears at the top of the resource.

For ICC Court Records that relate not to a case but only to a situation, the format of the number is as follows: situation number (for example, 01/04 for the situation in the Democratic Republic of the Congo) followed by -00/00.

6.7. LT-Related Case

Name of the case that is related because of joinder, severance, change in title, et cetera, to the case for which the described resource was produced

.

Field type: Validated values (open list)	
Scope: Only if *LT-Content Type* is "Judicial Document"	**Multiple entries:** Yes

Comment:

This metadata field is to be used to identify related cases. A case is related if it was severed from or joined with the case to which the described resource relates or if the name of the case has changed. Refer to the related case in the way used for the metadata field LT-Case Name (Official).

Examples:

A document relates to the case of *Prosecutor v. Jones*. Originally, the prosecution had brought a joint case against Jones and Smith, but the joined case was later severed. In that example, the related cases for *Prosecutor v. Jones* would be *Prosecutor v. Smith* and *Prosecutor v. Jones & Smith*.

6.8. LT Related Case Number

Number of the case that is related because of joinder, severance, change in title, et cetera, to the case for which the described resource was produced.

Field type: Validated values (open list)	
Scope: Only if *LT-Content Type* is "Judicial Document"	**Multiple entries:** Yes

Comment:

This metadata field is to be used to identify related cases. A case is related if it was severed from or joined with the case to which the described resource relates or if the name of the case has changed. Refer to the related case number in the way used for the metadata field LT-Case number.

6.9. LT-Key Judicial Document

Particularly relevant types of decision pursuant the controlled text list: 58, 61(7), 74, 75, 76, 83, (83 and rule 158), (83 and rule 153), 84, 110 and the corresponding documents in other tribunals.

Field type: Validated values (closed list)	**Mandatory:**
Scope: Only if *LT-Content Type* is "Judicial Document" and *LT-Source Type* is "Judicial Body"	**Multiple entries:** Yes

Comment:

This metadata fields identifies certain judicial decisions and other documents that are of particular interest and importance, such as final judgments of a Trial Chamber, judgments on appeal, *et cetera*. The below list is based on the ICC's procedural law. For other jurisdictions, try to identify the closest equivalent. Note that not all decisions by judicial bodies will be key judicial decisions.

If a decision fulfils more than one value (for example, a judgment of a court which decides on guilt at the same time as on sentence), assign all relevant values.

The following validated values can be used:

- Application for arrest warrant or summons to appear (article 58)
- Decision of acquittal or conviction (article 74)
- Decision on application for arrest warrant or summons to appear application (article 58) (no equivalent at the ICTY, ICTR and SCSL)
- Decision on confirmation of charges (article 61.(7)) (no equivalent at the ICTY, ICTR and SCSL)
- Decision on request for authorisation of investigation (article 15.4 and 15.5)
- Decision on Rreview concerning reduction of sentence (article 110)
- Decision on revision of conviction or sentence (article 84)
- Decision on sentence (article 76)
- Document containing the charges (regulation 52)
- Judgement on appeal against decision of acquittal or conviction or against sentence (article 83 and rule 150)
- Judgement on appeal against other decisions (article 83 and rule 158)
- Judgement on appeal against reparation orders (article 83 and rule 153)
- Reparation order (article 75) (no equivalent at the ICTY, ICTR and SCSL)
- Request for authorisation of investigation (article 15.3 and regulation 49)
- Not available
- Not applicable
- TO BE DETERMINED

6.10. LT-Outcome of Trial

Describes the outcome of the trial which the described resource concluded.

Field type: Validated values (closed list)	**Mandatory:**
Scope: Only if *LT-Key judicial document* is "Decision of acquittal or conviction", "Judgement on appeal against decision of acquittal or conviction or against sentence (article 83 and rule 150)", or "Decision on revision of conviction or sentence (article 84)"	**Multiple entries:** No

Comment:

This field only applies to certain final decisions of first and second instance courts and only if there is a determination on the merits of an appeal or revision (article 84) is allowed. Use any of the following values:

- Acquittal (full)
- Conviction (full)
- Conviction (partial)
- New trial ordered
- Revision allowed
- Other
- Not available
- Not applicable
- TO BE DETERMINED

6.11. LT-Phase of Case

The phase of the proceedings to which the resource relates.

Field type: Validated values (closed list)	
Scope: Only if *LT-Content Type* is "Judicial Document"; for other documents enter "Not applicable"	**Multiple entries:** No

Comment:

As a general rule, at the **ICTY, ICTR,** and **SCSL**, the phase of case will be determined by the initial which appears after the case number. For both, the initial *I* (Indictment) and *PT* (Pre-Trial), choose the metadata *Pre-Trial* from the controlled text list. The initial *T* stands for Trial, A for Appeal, and R for Review. Choose the according values from the list.

For ICC judicial documents, the phase of the case can be found in the stamp of ICC judicial documents, which is normally located in the upper-right corner of the document. The stamp consists of the document number, the phase of the proceedings (PT [pre-trial], T [trial] or A [appeal]), the acronym of the person who registered the document, and the interlocutory appeal number, if any.

The values in the list are currently the following:

- **Pre-Trial** (this refers to a phase in the proceedings prior to the commencement of the trial)
- **Trial** (this includes the sentencing phase and, where applicable, the reparations phase)
- **Interlocutory appeal** (this includes interlocutory appeals arising from decisions of both, the pre-trial and trial phases of the proceedings).
- **Appeal** (this refers to a phase during which the correctness of a final decision of a lower court on conviction, sentence, *et cetera*. is assessed by a higher court)
- **Review** (this refers to a phase during the proceedings in which it is assessed whether the length of the sentence should be reduced; typically, this phase commences only once the person concerned has served part of the sentence)
- **Revision** (this refers to a phase during the proceedings in which a closed case is reopened, for example because new evidence has been discovered)
- **Admissibility** (this is to be used for the admissibility stage at the ECHR [where decisions are rendered], *not* for admissibility proceedings before the ICC)

- **Merits** (this is to be used for the merits stage at the ECHR [where judgments are rendered]. If the admissibility stage is combined with the merits stage, enter "Merits")
- **[Remedy/compensation] / [Satisfaction]** (this is to be used *inter alia* for the just satisfaction stage at the ECHR. If the just satisfaction stage is combined with the merits stage [this is often the case], enter "Merits").
- **Advisory opinion** (this refers to advisory opinion proceedings before the ICJ)
- **Interpretation** (this is to be used for ICJ proceedings pursuant to article 60 of the ICJ Statute)
- **Striking out**
- **Friendly settlement**
- **Not applicable**
- **Not available**
- **To be determined**

Examples:

IT-03-67-I – the phase of the case is Pre-Trial

IT-03-67-PT, the Phase of the case is Pre-Trial

IT-03-67-T – the phase of the case is Trial

For National cases (criminal and civil jurisdiction):

Pre-Trial – any aspect of the proceedings pertaining to a trial/case/matter/hearing **preceding** the opening statements/submissions. This will include Indictments, amended Indictments and pre-trial arrangements.

Trial – applies to all resources relating to proceedings in a case/trial/matter/hearing **during and after** opening statements/submissions. This also includes verdicts/judgments/decisions/outcomes of a trial. [Beautify.]

Appeal – applies to all resources relating to an appeal process, after the delivery of judgment and including any resources *before* the appeal begins. This would include written appeal submissions and documents pertaining to grounds of appeal, before the appeal is heard. This category also includes the decision/verdict/outcome of the appeal.

For ICC Cases

Pre-Trial – Any resources relating to proceedings *up to and including* the decision on confirmation of the charges before the Court (pursuant to Article 61 of the *Rome Statute*).

Trial – Any resources relating to proceedings after the decision on confirmation of the charges.

Interlocutory appeals – Any resource relating to proceedings under article 82 (1) and (2) and article 81 (3) (c) (ii) of the Statute.

The phase of the proceedings can be derived from the abbreviation used in the stamp of the ICC document, which is normally located in the upper right hand corner. The following abbreviations are used there: PT for pre-trial phase, T for trial phase, A for appeals phase, OA for interlocutory appeals, RN for revision phase and RW for review. Please note that the stamp for documents relating to interlocutory appeals will also contain a reference to the phase of the proceedings from which the appeal is arising (normally PT or T). Nevertheless, whenever OA appears in the stamp, assign only Interlocutory Appeal to the resource.

6.12. LT-Composition of Chamber

Name of the judges composing the chamber seized with the matter for which the described resource was produced.

Field type: Validated values (open list)	
Scope: Only if *LT-Source Type* is "Judicial Body". For all other resources, enter "Not applicable". If the composition of the chamber is unknown, enter "Not available".	**Multiple entries:** Yes

Comment:

The field must list the entire chamber present. For bodies such as the European Court of Human Rights, list all those present in the Chamber. Where only the surname, or surname and initial are available in the resource, it is sufficient to list them as they appear in the resource.

Do not include official titles in this field, just the names per se.

Enter names in the order of SURNAME (,) First and Further names (;).

That is, the surname in capital letters followed by a comma, then the first name and any other names respectively (*without* a comma between them), followed by a semi-colon.

N.B.: Enter names without diacritics or characters that fall outside the basic Latin alphabet. This is due to technical difficulties, and at this stage just a temporary measure. Partners will be notified when this rule is revised.

Examples:

AGIUS, Carmel; MUMBA, Florence Ndepele Mwachande; ANTONETTI, Jean-Claude

6.13. LT-Presiding Judge

Name of the judge presiding the chamber seized with the matter in relation to which the described resource was produced.

Field type: Validated values (open list)	
Scope: Only if *LT-Content Type* is "Judicial Document". For other resources enter "Not applicable". If the name of the presiding judge is unknown, enter "Not available".	**Multiple entries:** No

Comment:

In most cases, the resource will identify the presiding judge of the chamber. For bodies such as the European Court of Human Rights, this label refers to president of the chamber. Do not include official titles, just the first name and the surname of the judge. This is to be field is to be entered in the order of SURNAME, First name and subsequent names.

N.B.: Enter names without diacritics or characters that fall outside the basic Latin alphabet. This is due to technical difficulties, and at this stage just a temporary measure. Partners will be notified when this rule is revised.

Example:

For the Chamber of: AGIUS, Carmel; MUMBA, Florence Ndepele Mwachande; ANTONETTI, Jean-Claude the presiding judge is AGIUS, Carmel, as indicated by the resource. Include this name in the category "LT-Composition of Chamber" **and** "Presiding Judge".

6.14. LT-Place of Court

The geographical place where the court, to which the described resource relates, was sitting.

Field type: validated values (open list)	
Scope: Only if *LT-Content Type* is "Judicial Document"	**Multiple entries:** Yes

Comment:

Enter both the name of the city and the name of the country where the court was sitting, separated by a comma. Use the English language version of a city's or country's name.

Example:

The Hague, The Netherlands; Nuremberg, Germany.

6.15. LT-Type of Court

The type of the court to which the described resource relates.

Field type: validated values (closed list)	
Scope: Only if *LT-Content Type* is "Judicial Document"	**Multiple entries:** Yes

Comment:

Use this metadata field to describe whether a court exercises military or civil jurisdiction or is an international(ised) jurisdiction.

The following values may be used:

- Ordinary jurisdiction
- Military jurisdiction

- International(ised) jurisdiction
- Not available
- Not applicable
- TO BE COMPLETED

For the purpose of this metadata field, the IMT, ICC, ICTY, ICTR, SCSL, ECCC and the Special Panels for Serious Crimes in the Dili District Court are considered international(ised) jurisdictions. The Nuremberg follow-up trials before US military tribunals are considered military jurisdictions.

6.16. LT-Accused/Defendant

Name of the accused person(s) in the case for which the described resource was produced. In civil jurisdiction, the name of the Defendant party to the proceedings.

Field type: validated values (open list)	
Scope: Only if *LT-Content Type* is "Judicial Document"	**Multiple entries:** Yes

Comment:

In criminal jurisdiction, be it domestic or international, this applies to the name of the accused person(s) in the particular case as listed in the court document.

In civil jurisdiction, the party who is the **Defendant** to a proceeding, as is indicated within the resource.

In public international litigation (for example, before the International Court of Justice), the state which is opposing the action.

Note that in some cases, the accused or defendant will also be an Appellant. If this situation arises, "Appeal" should be chosen under "LT-Phase of Case".

For multiple accused persons or defendants, enter names in the order of SURNAME (,) First and Further names (;). That is, the surname in capital letters followed by a comma, then the first name and any other names respectively (*without* a comma between them), followed by a semi-colon.

N.B.: Enter names without diacritics or characters that fall outside the basic Latin alphabet. This is due to technical difficulties, and at this stage just a temporary measure. Partners will be notified when this rule is revised.

Examples:

MARTIC, Milan; STANISIC, Jovica; SIMATOVIC, Franko; SESELJ, Vojislav

6.17. LT-Alias of Accused's Name

The alias name by which the accused person is also known.

Field type: validated values (open list)	
Scope: Only if *LT-Content Type* is "Judicial Document"	**Multiple entries:** Yes

Comment:

This field can be used if an accused person has an alias or if the name of the accused person is different in different languages (for example, in relation to some World War II cases the Chinese version of the name of a Japanese accused person).

6.18. LT-Prosecutor's Team/Claimant

*Name(s) of the member(s) of the Prosecution team, as indicated in the described resource **or** the claimant party to a civil proceeding. The information is to be collected only if the described resource stem from the prosecution/claimant.*

Field type: Validated values (open list)	
Scope: Only if *LT-Content Type* is "Judicial Document"; for all other resources or if no prosecution team is appearing, enter "Not applicable". If the names of the prosecution team is unknown, enter "Not available"	**Multiple entries:** Yes

Comment:

In criminal jurisdiction – domestic or international - list the name(s) of prosecutor/s appearing in the particular case as listed in the court document.

In civil jurisdiction – the name of the claimant to a proceeding. This may be an individual, corporation or State.

Ensure correct spelling, and reflect the name or names as they appear in the body of the resource.

Do not include titles, just the SURNAME divided by a comma (,) followed by the first name(s) of the prosecutor(s) or claimant(s).

For multiple persons, enter names in the order of SURNAME (,) First and further names (;). That is, the surname in capital letters followed by a comma, then the first name and any other names respectively (*without* a comma between them), followed by a semi-colon.

N.B.: Enter names without diacritics or characters that fall outside the basic Latin alphabet. This is due to technical difficulties, and at this stage just a temporary measure. Partners will be notified when this rule is revised.

6.19. LT Counsel for Defence

Name of the members of the defence team (appointed or chosen), as indicated in the described resource. The information is to be collected only if the described resource stem from the defence.

Field type: Validated values (open list)	
Scope: Only if *LT-Content Type* is "Judicial Document"; for all other resources or if no counsel for the defence is appearing, enter "Not applicable". If the name of counsel for the defence is unknown, enter "Not available"	**Multiple entries:** Yes

Comment:

This field applies to resources which fall under the "LT-Content Type" category of "Judicial Documents". Ensure correct spelling, and reflect the

name or names of defence counsel as they appear in the body of the resource. Names of counsel are to be entered exactly as they appear in the court document. Do not include titles, just the SURNAME divided by a comma (,) followed by the first name(s) of the Defence counsel.

For multiple persons, enter names in the order of SURNAME (,) First and further names (;). That is, the surname in capital letters followed by a comma, then the first name and any other names respectively (*without* a comma between them), followed by a semi-colon.

N.B.: Enter names without diacritics or characters that fall outside the basic Latin alphabet. This is due to technical difficulties, and at this stage just a temporary measure. Partners will be notified when this rule is revised.

6.20. LT-Participating States

Whether state(s) participated in the proceedings for which the described resource was produced.

Field type: Binary (yes/no)	
Scope: Only if *LT-Content Type* is "Judicial Document"; for all other resources, enter "Not applicable"	**Multiple entries:** No

Comment:

This field applies to resources which fall into the "LT-Content Type" category of "Judicial Documents", and does not apply to domestic jurisdictions. This field is only relevant to cases where a state is actually a participant in the case. However, the state in question does not have to be the source of described resource (for example: state participated in proceedings, but described resource is the judgment of the court).

6.20.1. LT-Victims Participation

Whether victim(s) participated in the proceedings for which the described resource was produced.

Field type: Binary (yes/no)	
Scope: Only if *LT-Content Type* is "Judicial Document"; for all other	**Multiple entries:** No

resources, enter "No"	

6.20.2. LT-Counsel for Victims

Name of the person(s) serving as counsel for the victims, as indicated in the described resource. The information is to be collected only if the described resource stem from victims' counsel.

Field type: Validated values (open list)	
Scope: Only if *LT-Content Type* is "Judicial Document"; for all other resources or if no counsel for victims is appearing, enter "Not applicable"	**Multiple entries:** Yes

Comment:

The names of the counsel for victims will be listed in the resource if one is appearing in a case or hearing. Ensure correct spelling, and reflect the name or names as they appear in the body of the resource.

Names are to be entered exactly as they appear in the court document. Do not include titles, just the SURNAME divided by a comma (,) followed by the first name(s) of the Amicus Curiae.

For multiple persons, enter names in the order of SURNAME (,) First and further names (;). That is, the surname in capital letters followed by a comma, then the first name and any other names respectively (*without* a comma between them), followed by a semi-colon.

N.B.: Enter names without diacritics or characters that fall outside the basic Latin alphabet. This is due to technical difficulties, and at this stage just a temporary measure. Partners will be notified when this rule is revised.

6.20.3. LT-*Amicus Curiae*

Name of the person(s) serving as amicus curiae, as indicated in the described resource.

Field type: Validated values (open	

list)	
Scope: Only if *LT-Content Type* is "Judicial Document"	**Multiple entries:** Yes

Comment:

The *Amicus Curiae* will be listed in the resource if one is allocated to a case or hearing. Ensure correct spelling, and reflect the name or names as they appear in the body of the resource.

Names are to be entered exactly as they appear in the court document. Do not include titles, just the SURNAME divided by a comma (,) followed by the first name(s) of the *Amicus Curiae*.

For multiple persons, enter names in the order of SURNAME (,) First and further names (;). That is, the surname in capital letters followed by a comma, then the first name and any other names respectively (*without* a comma between them), followed by a semi-colon.

N.B.: Decision of the LTAC pending.

N.B.: Enter names without diacritics or characters that fall outside the basic Latin alphabet. This is due to technical difficulties, and at this stage just a temporary measure. Partners will be notified when this rule is revised.

7. Information Specific to ICC Documents (Including Preparatory Works)

7.1. LT-Is Court Record

Whether the described resource is part of the official judicial records of the Court.

Field type: Binary (yes/no)	
Scope: Enter "yes" if *LT-Content Type* is "Judicial Document" and *LT-Organisation/State of Source* or *LT-Related Organisation State* is "International Criminal Court (ICC)"; for all other resources enter	**Multiple entries:** No

"no".	

7.2. LT-ICC TRIM Number

The record number that the Court's TRIM system automatically assigns to court records.

Field type: Automatic.	
Scope: LT-Origin is "ICC CMS"	**Multiple entries:** No

Comment:

This number will be supplied by the Court for all Court Records that are automatically extracted from the Court Management System. If Court Records are obtained differently, for example, by downloading them from the Court's website, the number is not known.

7.3. LT-ICC Situation Name

Name of the situation dealt with by the ICC for which the described resource has been produced.

Field type: Validated value (closed list)	
Scope: Only if *LT-Content Type* is "Judicial Document" and *LT-Organisation/State of Source* or *LT-Related Organisation State* is "International Criminal Court (ICC)"; for all other resources, enter "Not applicable"	**Multiple entries:** Yes

Comment:

Enter the situation name also for case-related documents within a situation. For example, for resources relating to the case of Mr. Lubanga Dyilo, enter "Situation in the Democratic Republic of the Congo.

Currently, the following values can be used:

- Situation in the Democratic Republic of the Congo
- Situation in the Central African Republic

- Situation in Darfur/Sudan
- Situation in Uganda
- Not applicable

7.4. LT-Interlocutory Appeal No.

Number of the interlocutory appeal in the situation/case according to the Regulations of the Registry

Field type: Validated Value (closed list)	
Scope: Only if *LT-Content Type* is "Judicial Document" and *LT-Organisation/State of Source* or *LT-Related Organisation State* is "International Criminal Court (ICC)"; for all other resources, enter "Not applicable"	**Multiple entries:** Yes

Comment:

This number can be found in the stamp of ICC judicial documents, which is normally located in the upper-right corner of the document. The stamp consists of the document number, the phase of the proceedings (PT, T or A), the acronym of the person who registered the document, and the interlocutory appeal number, if any. The interlocutory appeal number is preceded by the letters OA. If the is no number after the letters OA, this indicates that this is the first interlocutory appeal in this case or situation. Therefore, the interlocutory appeal number 1 should be assigned to such documents.

The list from which the values can be chosen consists of the pre-fix OA followed by a number, and "not applicable". The value OA 1 does not exist. Instead, OA is used, denoting that this is the first interlocutory appeal in the case or situation.

- OA
- OA 2
- OA 3
- OA 4
- *et cetera*.

– Not applicable

7.5. LT-Is Official Document

Whether the described resource is the official expression of the views of its source or not.

Field type:	**Mandatory:**
Scope: Only for resources in the preparatory works collection	**Multiple entries:**

NB: This metadata field is only relevant for resources in the Preparatory Works collection.

8. Access Rights

8.1. LT-Level of Confidentiality

Information about who can access the described resource. It is intended that only public information will be available through Legal Tools. However in order to allow for future inclusion of classified information, this metadata element should be used from the outset.

Field type: Validated value (closed list)	
Scope: All Resources	**Multiple entries:** No

Comment:

Unless the resource specifies "confidential", or words to that effect, the resource is to be regarded as public. In principle, all resource in the Legal Tools collections will be public resources. It is nevertheless important to populate this metadata field now, should non-public resources be included at a later stage (for example, for internal use at the ICC). Please note that for resources that originally were classified as, for example, under seal, but that have been reclassified as public since, the entry should be "public".

8.2. LT-Copyright Authorisation

Whether the full text of the resource can be made public through the ICC website under the latest terms and conditions of use of the Legal Tools published therein.

Field type: Binary (yes/no)	
Scope: All Resources	**Multiple entries:** No

Comment:

This metadata field is important, as the field will ultimately determine whether the resource can be released to the public. When the resource is sent to TRIM, if "Yes" is detected in the importation process, the resource is automatically pushed to the website. If "No" is detected in the importation process, only the title is sent to the website; the resource itself cannot be accessed through the website.

Do not enter 'yes' unless 100% sure that copyright is authorised.

Be careful with translated resources – for UN documents, translated documents can be marked as "Yes" but for other organisations this may not be the case, even if the *original* resource has copyright authorisation.

Examples:

Legislation/judicial decisions: when obtained from original source, the resources are generally not subject to copyright, but note that summaries/comments/ hyperlinks/ metadata attached to such resources might be copyrighted.

International Treaties: Not copyrighted, but again comments/summaries/ hyperlinks are.

Academic works: in most cases **are** copyrighted.

NGO and IGO resources: sometimes such resources are copyrighted, sometimes not.

Press releases/news reports: generally speaking, such resources are copyrighted. Accordingly choose "No" for Copyright Authorisation.

9. Bibliographical Information

9.1. LT-Resource Citation (EN)

Full citation of the resource according to the English Legal Tools Citation Guide.

Field type: Free text	
Scope: All Resources	**Multiple entries:** No

Comment:

The resource citation is to be entered in accordance with the English Legal Tools Citation Guide, version of 24 November 2008.

9.2. LT-Resource Citation (FR)

Full citation of the resource according to the French citation guide of the Court.

Field type: Discussion on-going	
Scope: All Resources	**Multiple entries:** No

N.B.: The French Legal Tools Citation Guide has not been finalised yet. Until further notice, enter "To be completed".

10. Subject Levels

N.B.: The subject levels will be constructed, for the most part, on the basis of other metadata information. Therefore, only in certain circumstances will subject levels be created.

10.1. LT-Subject

The subject to which the resource relates; the subject levels are based on the Legal Tools classifications. A described resource may be relevant to more than one subject, for example, where an academic article discusses both the ICC and the ICTY.

Field type: Validated value (closed list)	
Scope: Only if *LT-Content Type* is "International legal instrument", "academic writing", "publication", or "website". For all other resources, enter "Not applicable".	**Multiple entries:** Yes

Comment:

The LT-Subject metadata field is only relevant for a limited number of resources, as stated above. For all other resources, the subject can be constructed through a combination of other metadata fields. For such resources, enter "Not applicable".

The following values can be chosen:

- International criminal law
- International human rights law
- International humanitarian law
- Other public international law
- Law of international organisations
- Law of the sea
- Peace agreements
- Not applicable

10.2. LT-Phase of Preparatory Works

When the resource is part of preparatory works for a treaty, agreement or arrangement, or, for example, a SC resolution (et cetera), the phase of the preparatory works to which the document belongs has to be inserted.

Field type: Validated value (closed list)	
Scope: All resources	**Multiple entries:** No

Comment:

The validated values are the following:

- Early Initiatives
- International Law Commission

- Ad Hoc Committee
- Preparatory Committee
- Rome Conference
- Preparatory Commission
- Preparatory works (Genocide Convention)

The list will have to be amended as soon as preparatory works of other treaties, resolutions, *et cetera*, will be included in the Legal Tools. The amendment has to be approved by representatives of the LTAC.

Preparatory works of national legal documents will not be marked by this keyword.

11. Administration and Quality Control

11.1. LT-Date Accessed/Downloaded

Date when the resource was accessed through and/or downloaded from the Internet.

Field type: Date format (dd/mm/yyyy)	
Scope: All Resources	**Multiple entries:** No

Comment:

This information is to be entered by the Outsourcing Partners if they have obtained the resource in question themselves (that is, the resource was not provided by the ICC).

11.2. LT-Number of Pages

The number of pages contained in the resource.

Field type: Free text (numerical)	
Scope: All Resources	**Multiple entries:** No

Comment:

The number of pages of the resource. With pdf-files, this will be self-evident owing to the numerical tally at the top of the screen. Do not confuse the page count with numbered pages within the resource itself. This field relates to the number of pages of the resource **as a whole.** In

the case of files in htm-format, determining page-length is more cumbersome. Go to "Print Preview" and the number of pages will appear at the top of the screen.

11.3. Document Type

Format of the file of the described resource.

Field type: Validated value (closed list)	
Scope: All Resources	**Multiple entries:** No

Comment:

The electronic format in which the resource is available. The following values can be used:

- Word-document
- PDF-document
- Excel-table
- Html-document
- TXT-file
- RTF
- TIFF (for telefax)
- JPEG
- GIF (old graphics format)
- PNG (portable network graphics)

11.4. LT-Responsible Outsourcing Partner

The Outsourcing Partner responsible for the collection of the metadata for the resource.

Field type: Validated value (closed list)	
Scope: All Resources	**Multiple entries:** No

Comment:

This information will be necessary for quality control, *et cetera*. It will have to be entered by the Outsourcing Partner. The following values can be used:

- Asser Institute
- HiiL
- International War Crimes Research Center
- Norwegian Centre for Human Rights
- TRIAL
- University of Graz
- University of Nottingham
- University of Saarbrücken

11.5. LT-Metadata Collected by

Name of the staff member within outsourcing agency that has collected the metadata for the described resource.

Field type: Free text	
Scope: All Resources	**Multiple entries:** No

Comment:

This information will be necessary for quality control *et cetera*. It will have to be entered by the Outsourcing Partner.

11.6. LT-Metadata Finalised on

Date when the outsourcing agency finalised the collection of metadata for the described resource.

Field type: Date format (dd/mm/yyyy)	
Scope: All Resources	**Multiple entries:** No

Comment:

This information will be necessary for quality control, *et cetera*. It will have to be entered by the Outsourcing Partner.

11.6.1. LT-Date Published in Legal Tools

Date when the described resource was made public through the ICC website.

Field type: Date format (dd/mm/yyyy)	
Scope: All Resources	**Multiple entries:** No

Comment:

This information will be entered by the agency publishing the Legal Tools.

11.7. LT-URL

Internet address of the resource, when available.

Field type: Hyperlinked text only	
Scope: Only if *LT-Origin* is "Internet download" or "ICC Legal Tools Project"	**Multiple entries:** No

Comment:

If an Outsourcing Partner collects new documents from the internet, the URL should also be collected and entered in the LT-URL field.

For resources that have already been collected by the Court and for which the metadata are collected as part of the "backlog project", the Outsourcing Partner should find the resource on the internet and add the URL of the resource.

11.8. Container

Number and name of the TRIM folder within which the file of the described resource has been stored.

Field type: Validated value (closed list)	
Scope: All Resources	**Multiple entries:** No

Comment:

This metadata field is automatically filled in by TRIM at the ICC. The Outsourcing Partners do not have to fill in this field.

11.9. Date Registered

Date when the resource was registered into TRIM.

Field type: Date format (dd/mm/yyyy)	
Scope: All Resources	**Multiple entries:** No

Comment:

This metadata field is automatically filled in by TRIM at the ICC. The Outsourcing Partners do not have to fill in this field.

11.10. Record Number

Identity number accorded automatically to any record created in TRIM.

Field type: Validated Values (closed list)	
Scope: All Resources	**Multiple entries:** No

Comment:

This metadata field is automatically filled in by TRIM at the ICC. This number would only become relevant if it were decided that all the Legal Tools resources will also be saved in TRIM as Legal Tools Records. Currently, this is only the case for the preparatory works collection. In any event, the Outsourcing Partners do not have to fill in this field.

11.11. LT-Path Name

Path to the folder on the network within which the file of the described resource has been stored.

Field type: Free text	
Scope: All Resources	**Multiple entries:** No

Comment:

The pathname will be automatically generated. The Outsourcing Partners do not have to enter anything here.

11.12. LT-File Name

Name given to the file of the described resource.

Field type: Free text	
Scope: All Resources	**Multiple entries:** No

Comment:

The Outsourcing Partner collecting the resource will have to give the electronic file a meaningful name. It is the responsibility of each Outsourcing Partner to establish and maintain a system for naming the documents.

11.13. LT-Origin

The means through which the resource was originally obtained.

Field type: Validated values (closed list)	
Scope: All Resources	**Multiple entries:** No

Comment:

In most cases this will be **Internet download** – a resource which is downloaded by the Outsourcing Partner.

Scanned document only applies to a resource that is actually physically scanned by the collecting agency or partner. It is important to be sure of this, as it will be necessary to determine how reliable that resource is, or how accurate the depiction of the original it is.

Live internet link refers to actual live links – which lead to a LIVE website (this does not include htm-files which are still in internet format but not actually live).

11.14. LT-Display as

The file name of the document according to the ICC naming convention.

Field type: Free text	
Scope: All Resources	**Multiple entries:** No

Comment:

Insert the name of the document as per the ICC naming convention. The Legal Tools Database will propose a name when the metadata are entered. The Outsourcing Partner will have to check the correctness of the name against the ICC Naming Convention.

11.15. LT-Database Record Number

The unique number of the resource automatically generated by the Legal Tools Database

Field type: Free text	
Scope: All Resources	**Multiple entries:** No

Comment:

The number will be automatically generated and therefore does not have to be entered by the Outsourcing Partners.

FIRST ANNEX: ICC NAMING CONVENTION[1]

1. General Rules

1. Save the document as a WORD or PDF file, if possible.

2. If the document is in HTML format, save it as Web-Page, HTML only (*.htm, *.html)! Do not save it as Web-Page complete. This is to prevent irrelevant parts (for example, images, symbols, *et cetera*) being included too.

3. Filenames must not be longer than 255 characters. Note: the filename includes the path of the file, for example, "…\LEGAL TOOLS\International(ised) criminal judgements\3. ICTY\Blaskic (IT-95-14)\Blaskic, ICTY AC Judgement (29-07-2004)(E).htm" is 126 characters long .

4. Documents must be downloaded in both the English and French versions. Documents from the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights must also be downloaded in Spanish, if available. The filename of English and French documents must be in the original language of the documents, with an indication of the document language in brackets at the end of the filename. For documents in languages other than English or French, the filename must be in English, with an indication of the document language in brackets at the end of the filename.

- Example: "Loizidou v. Turkey, Merits (GC)(18-12-1996)(E).html"
- Example: "Loizidou c. Turquie, Principal (GC)(18-12-1996)(F).html"

[1] Source: Annex III to the Draft operational protocol for the intention agreement on the Legal Tools Project between the Norwegian Centre for Human Rights and the Office of the Prosecutor of the International Criminal Court (LT2007/000001890). Annexes I–IV to the ICC Naming Convention have been omitted for the purposes of the present publication.

5. Certain punctuation marks cannot be used in the filename (/, \, :, *, ?, ", <, >, |). Instead use an underscore ("_") to replace the relevant punctuation mark.

6. Whenever the original title of a document is modified in any way, please indicate the additions or ellipsis with square brackets and three dots. The purpose is to indicate that the title copyrighted by the document's author is different from the one we provide. Therefore the brackets indicating any modification to the title are only necessary when such title may be copyrighted: modifications in academic articles and reports must be indicated with square brackets; brackets are however not necessary when the document is a treaty, a piece of legislation, a judgement, *et cetera*.

- Example:

Original title: International Convention for the Suppression of the Financing of Terrorism > not necessary: "[…] Convention for the Suppression of the Financing of Terrorism (1999)(E).doc"

Original title: Prosecutorial Discretion within the International Criminal Court: necessary > "Brubacher, M., Prosecutorial Discretion within the [ICC] (2004)(E).doc"

7. In terms of spacing, please leave one space between the title of the document and the indication of the date. No space should be left between the date and the language of the document.

- *Example*: "Brubacher, M., Prosecutorial Discretion within the [ICC] (2004)(E).doc"

8. If the file does not contain the full text of the document but a summary (that is, a text with the main features of the document in short), this is indicated between brackets immediately after the title of the document as in the example below:

English:

summary

French:

sommaire

- *Example*: "Iraq, Law on Criminal Proceedings (summary) (1971)(E).pdf"

– *Example*: "Brdjanin et al., ICTY TC Public Version of the Confidentiality Decision on Alleged Illegality of Rule 70 (summary) (23-05-2002)(E).doc"

2. Particular Rules For Specific Documents

2.1. ICC Decisions

As named by the ICC Registry, but also adding the language of the document, namely:

Situation number-decision number (dd-mm-yyyy)(language)

– *Example*: "ICC-01_04-21 (26-04-2005)(E).pdf"

Please note that the "/" in the decision number must be replaced with an underscore ("_"), pursuant to general rule 5 above.

2.2. ICC Preparatory Works

The file name follows this pattern:

date_document symbol(language)

– *Example*: "19980615_ACONF.183WGPML.5(E).pdf"

The **date** of a document is recorded in the file name as "YYYYMMDD". The first four numbers of the date identify the year (YYYY); the two numbers in the middle, the month (MM); and the last two digits refer to the date within the month (DD).

The **document symbol** appears in the file name after the date. Please note that for technical reasons, the backslashes in the symbol "/" are not reproduced in the file name. The symbols used by UN documents can be found in Annex I.

For example, this **UN document** in its six official language versions:

Date	Official Documer	Document Symbol	Document Title in English
1998-07-17	Official	A/CONF.183/C.1/L.92/CORR.1	DRAFT REPORT OF THE COMMITTEE OF THE WHOLE : UNITED NATIONS DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT, ROME, ITALY, 15 JUNE-17 JULY1998 : CORRIGENDUM

can be found in the files named:

"19980717_ACONF.183C.1L.92CORR.1(A)",
"19980717_ACONF.183C.1L.92CORR.1(C)",
"19980717_ACONF.183C.1L.92CORR.1(E)",
"19980717_ACONF.183C.1L.92CORR.1(F)",
"19980717_ACONF.183C.1L.92CORR.1(R)",
"19980717_ACONF.183C.1L.92CORR.1(S)", for each official language version. The UN symbols used for ICC preparatory works can be found in Annex I.

In the file names of the **NGO documents,** the date is followed by the document symbol, if any, preceded by the initials "NGO" and the acronym of the specific NGO that produced the document. The acronyms of NGOs used for this purpose can be found in Annex II.

For example, the following document from Amnesty International,

Date	Official Documer	Document Symbol	Document Title in English
1999-07-01	Official	IOR 40/10/99	THE INTERNATIONAL CRIMINAL COURT : Ensuring an effective role for victims

can be found in the file named: "19990701_NGO_AI_IOR401099(E).pdf".

The file names of **IGO documents** follow the same naming convention as NGO documents: the symbol in the file name of documents, if any, is preceded by the initials "IGO" and the acronym of the organisation. The acronyms used for IGOs can be found in Annex III.

For example, the following document from the ICTY,

Date	Official Documer	Document Symbol	Document Title in English
1999-07-30	Official		Remarks to the Preparatory Commission for the International Criminal Court - Her Excellency, Judge Gabrielle Kirk McDonald, President of the International Criminal Tribunal for the former Yugoslavia

without any symbol on its face, can be found in the file named "19990730_IGO_ICTY(E).pdf".

For **State documents** the date in the file name is followed by a document symbol, if any, preceded by the initials "ST" and the name of the State of origin of the document.

For example, the following document from the US,

Date	Official Documer	Document Symbol	Document Title in English
1995-07-14	Unofficial		United States Government informal comments on extradition/surrender approach of ILC draft of a Statute for an International Criminal Court

without any UN symbol on its face, can be found in the file named "19950714_ST_UNITEDSTATES(E).pdf".

Please note that if the documents have been produced by more than one State, NGO, IGO or Other Sources, this is indicated by the expression "etal" in the file name.

The file name of documents from **Other Source** is built in a similar way: **"**YYYYMMDD_OS_Acronym (Language Symbol)"**,** where "OS" stands for "Other Source". The list of acronyms for Other Sources can be found in Annex IV.

The **language symbol** of the document is indicated at the end of the file name as (A) for Arabic, (C) for Chinese, (E) for English, (F) for French, (R) for Russian and (S) for Spanish.

2.3. Treaties

Title (yyyy)(language)

- *Example*: "Convention for the Suppression of the Financing of Terrorism (1999)(E).doc"
- *Example*: "Convention pour la Répression du Financement du Terrorisme (1999)(F).doc"

2.4. Other International Instruments/Documents from Inter-Governmental Organisations or Non-Governmental Organisations

1. For UN Documents, start with the agency or sub-body that adopted the resolution or document. Following that, for GA and SC resolutions use only the symbol of the resolution or document. All other documents, use a shortened title of the resolution or document.

The backslash ("/") in the symbol is replaced with an underscore ("_").

Body, Document symbol (dd-mm-yyyy)(language) (ONLY for General Assembly and SC resolutions) – OR – Body, Title (dd-mm-yyyy)(language)

– *Example*: a UN Security Council Resolution is named in the following way: "SC, S_RES_1593(2005) (31-03-2005)(E).pdf"

Please note that no space should be left within the document symbol (ex. "S_RES_1593(2005)" and not "S_RES_1593 (2005)").

Please note that the year may be part of the UN document symbol (such as in the example above). In such a case, the full date of the document must still be provided after the document symbol.

2. For other Inter-Governmental Organisations or for Non-Governmental Organisations, start with acronym of that organisation (list of acronyms found in Annexes III and II, respectively), followed by the shortened title of the document

Body, Title (dd-mm-yyyy)(language)

– *Example*: an Amnesty International report is named in the following way:

"AI, Briefing on the current human rights situation in Indonesia (31-01-2001)(E).pdf"

If you do not have the exact date of the document, at least indicate the year.

2.5. Decisions of International Human Rights Bodies

2.5.1. UN Human Rights Committee

1. Documents from the Committee may belong to the "jurisprudence" (cases) category or to the "other decisions" category.

2. For the cases, use this approach:

Name of the complainant v. State (dd-mm-yyyy)(E or language other than French)

Name of the complainant c. State (dd-mm-yyyy)(F)

For the language, please use the following acronyms:

E - English

F - French

Note: If there is more than one complainant/defendant, please use the name of the first complainant/defendant and add "et al".

– *Example*: "Fillastre et al. c. Bolivie (05-11-1991)(F).htm"

3. For other documents, such as concluding observations, general comments or reports, use this approach:

HRC, Concl.obs. Country (dd-mm-yyyy)(E or language other than French) HRC, Obs.final. Pays (dd-mm-yyyy)(F) HRC, Report Country (dd-mm-yyyy)(E or language other than French) HRC, Rapport Pays (dd-mm-yyyy)(F)

– *Example*:
"HRC, Concl.obs. Argentina (05-04-1995)(E).htm"

– *Example*:
"HRC, Obs.final. Argentine (05-04-1995)(F).htm"

– *Example*: "HRC, Report Belgium (06-09-1994)(E).htm"

– *Example*: "HRC, Rapport Belgique (06-09-1994)(F).htm"

HRC, Gen.com. No. X (dd-mm-yyyy)(E or language other than French) HRC, Obs.génerale No. X (dd-mm-yyyy)(F)

– *Example*: "HRC, Gen.com. No. 6 (30-04-1984)(E).htm"

– *Example*:
"HRC, Obs.génerale No. 6 (30-04-1984)(F).htm"

2.5.2. European Court of Human Rights and European Commission of Human Rights

Last name of the complainant(s) v. State, Type of decision/judgment (for example, Admissibility, Merits) (dd-mm-yyyy)(E or language other than French) Nom du réquerant(s) c. Pays, sorte de décision/arrêt (for example, Recevabilité, Au principal) (dd-mm-yyyy)(F)

For types of decisions, please use the following abbreviations:

English:

Merits - judgment on the merits

Adm. - decision on admissibility

Prel.obj. - judgment concerning only preliminary objections

Satisf. - judgment concerning only just satisfaction

Revision - judgment concerning revision

Interp. - judgment concerning interpretation

Strikingout - judgment striking the case out

Friendlyset. - judgment concerning a friendly settlement

GC - added between brackets if the judgment or decision is rendered by the Grand Chamber of the Court

French:

Principal - judgment on the merits

Recev. - decision on admissibility

Except.prélim. - judgment concerning only preliminary objections

Satisf. - judgment concerning only just satisfaction

Révision - judgment concerning revision

Interp. - judgment concerning interpretation

Radiation - judgment striking the case out

Règl.amiable - judgment concerning a friendly settlement

GC - added between brackets if the judgment or decision is rendered by the Grand Chamber of the Court

For languages, please use the following acronyms:

E - English

F - French

Note: If there is more than one complainant/defendant, please use the name of the first complainant/defendant and add "et al.".

- *Example*: "Loizidou v. Turkey, Merits (GC)(18-12-1996)(E).html"
- *Example*: "Loizidou c. Turquie, Principal (GC)(18-12-1996)(F).html"

2.5.3. Inter-American Court of Human Rights and Inter-American Commission on Human Rights

Last name of the complainant(s) v. State, Type of decision/judgment (for example, Admissibility, Merits) (dd-mm-yyyy)(language)

If the name of an already downloaded file contains the same last name as the one in the name-to-be of the file you have just downloaded, the latter filename must include also the initial of the first name of the complainant.

For the language, please use the following acronyms:

E - English

S - Spanish

For types of decision, please use the following abbreviations:

Merits - judgment on the merits

Adm. - decision on admissibility

Strikingout - decision striking the case out

Friendlyset. - decision concerning a friendly settlement

Note: If there is more than one complainant/defendant, please use the name of the first complainant/defendant and add "et al.".

– *Example*: "Giménez v. Argentina, Merits (01-03-1996)(E).htm"

2.5.4. African Commission on Human and Peoples' Rights

Last name of the complainant(s) v. State, Type of decision/judgment (for example, Admissibility, Merits) (dd-mm-yyyy)(E or language other than French) Nom du réquerant(s) c. Pays, sorte de décision/arrêt (for example, Recevabilité, Au principal) (dd-mm-yyyy)(F)

If the name of an already downloaded file contains the same last name as the one in the name-to-be of the file you have just downloaded, the latter filename must include also the initial of the first name of the complainant.

For the language, please use the following acronyms:

E - English

F - French

For types of decision, please use the following abbreviations:

English:

Merits - judgment on the merits

Adm. - decision on admissibility

Strikingout - decision striking the case out

Friendlyset. - decision concerning a friendly settlement

French:

Principal - judgment on the merits

Recev. - decision on admissibility

Radiation - judgment striking the case out

Règl.amiable - judgment concerning a friendly settlement

Note: If there is more than one complainant/defendant, please use the name of the first complainant/defendant and add "et al.".

- *Example*: "Achuthan et al. v. Malawi, Merits (14-10-1992)(E).htm"
- *Example*: "Achuthan et al. c. Malawi, Principal (14-10-1992)(F).htm"

2.6. Permanent Court of International Justice/International Court of Justice Decisions

Name of the case as given on the ICJ website (Name of complaining State v. Name of defending State), Type of decision/judgment (for example, Preliminary objections, Merits) (dd-mm-yyyy) (E or language other than French) Pays requerrant c. Pays, sorte de décision/arrêt (for example, Objections préliminaires, Au principal) (dd-mm-yyyy)(F)

For the language, please use the following acronyms:

E - English

F - French

For types of decision, please use the following abbreviations:

English:

Prov.meas. - judgment concerning provisional measures

Prel.obj. - judgment concerning only preliminary objections (challenge to jurisdiction)

Merits - judgment on the merits

Revision - judgment concerning revision

Adv.op. - advisory opinion

French:

Mes.conserv. - judgment concerning provisional measures

Except.prélim. - judgment concerning only preliminary objections

Principal - judgment on the merits

Révision - judgment concerning revision

Avis - advisory opinion

- *Example*: "United Kingdom v. Albania (Corfu Channel), Merits (09-04-1949)(E).pdf"
- *Example*: "Royaume Unie c. Albanie (Détroit de Corfou), Principal (09-04-1949)(F).pdf"

For the opinions and declarations of individual judges, please use the following abbreviations before indicating the last name of the judge(s):

English:

Sep.Op. - separate opinion

Diss.Op. - dissenting opinion

JointOp. - joint opinion

Decl. - declaration

French:

Op.Indiv. - separate opinion

Op.Diss. - dissenting opinion

Op.Comm. - joint opinion

Décl. - declaration

- *Example*: "Iran v. United States of America (Oil Platforms), Merits (Sep.Op. Higgins)(06-11-2003)(E).pdf"

– *Example*: "Iran c. Etats-Unis d'Amérique (Plates-formes pétrolières), Principal (Op.Indiv. Higgins)(06-11-2003)(F).pdf"

2.7. International(ised) criminal jurisdictions

P. v. First and Last name of accused(s), ICTY/ICTR/SCSL/SPSC trial chamber/appeals chamber name of decision (separate opinion, *et cetera*, if applicable) (dd-mm-yyyy)(E or language other than French)
Nom d'accusé(s), TPIY/TPIR/TSSL chambre de première instance/chambre d'appel titre du décision (opinion individuelle, *et cetera*, si applicable) (dd-mm-yyyy)(F)

– *Example*: "P. v. Janko Bobetko, ICTY AC Decision on Challenge by Croatia to Decision and Orders of Confirming Judge (29-11-2002)(E).htm"

For the indication of the chamber, please use the following abbreviations:

English:

TC - trial chamber

AC - appeals chamber

French:

CPI - trial chamber

CA - appeal chamber

For the opinions and declarations of individual judges, please use the following abbreviations:

English:

Sep.Op. - separate opinion

Diss.Op. - dissenting opinion

JointOp. - joint opinion

Decl. - declaration

French:

Op.Indiv. - separate opinion

Op.Diss. - dissenting opinion

Op.Comm. - joint opinion

Décl. - declaration

Note: If there is more than one complainant/defendant, please use the name of the first (meaning alphabetically speaking the first) complainant/defendant and add "et al.".

- *Example*: the case involving Delalic, Delic, Landzo and Mucic:

"P. v. Zejnil Delalic et al., ICTY TC Decision of the Bureau on Motion on Judicial Independence (04-08-1998)(E).pdf"

"P. c/ Zejnil Delalic et al., TPIY CPI Décision du Bureau portant sur la Requête Relative à l'Indépendance de la Justice (04-08-1998)(F).html"

The rules above are also applicable to indictments, regardless of the folder within which the indictment may be placed, with the following clarifications:

- There is no indication of the chamber
- The title as it appears in the indictment is included in the filename, but if the words "First", "Second", *et cetera,* are used in the title, we incorporate them into the title as "1st", "2nd", *et cetera*.
  - *Example*: indictments placed in Blaskic folder:

"P. v. Zlatko Aleksovsky et al., ICTY Indictment (11-1995)(E).htm"

"P. v. Tihomis Blaskic, ICTY Amended Indictment (15-11-1996)(E).htm"

"P. v. Blaskic, ICTY 2nd Amended Indictment (25-04-1997)(E).htm"

2.8. National Legislation

Country, Title of statutory Law (year, when known)(E or language other than French) Pays, Titre du loi (yyyy, si connu)(F)

- *Example*: "Spain, Criminal Code (1995)(E).doc"
- *Example*: "Espagne, Code Pénal (1995)(F).doc"

2.9. National Case Law

Surname of the first accused in alphabetical order, first name (if more than one accused with the same family name) et al. (if more than one

accused) [or otherwise petitioner v. respondent] (popular name of the case, if any), Country Jurisdiction, type of decision (dd-mm-yyyy)(E or language other than French)

Nom du premier accusé dans ordre alphabétique, prénom (s'il y a plus qu'un accusé du même nom) et al. (s'il y a plus qu'un accusé) [autrement réquerant c. défendant] (nom populaire du cas, si applicable), Juridiction nationale, sorte de décision/arrêt (dd-mm-yyyy)(F)

- *Example*: "Aden, Canada FCA, Judgement (09-11-1993)(E).html"
- *Example*: "Von Leeb et al. (High Command Case), USA MT XII, Judgement (27-10-1948)(E).doc"
- *Example*: "Pushpanathan v. Canada, Canada SC, Judgement (04-06-1998)(E).doc"
- *Example*: "X., Belgique CC, Décision sur l'ordonnance de détention préventive (31-05-1995)(F)"
- Surname of the first accused in alphabetical order, first name (if more than one accused with the same family name) et al. (if more than one accused) [or otherwise petitioner v. respondent]: in order to keep the filename short, we do not include the first name of the accused if that is not necessary to distinguish one accused from another. The expression "et al.", without commas, follows the name(s) of the first accused if there are several accused. If it is not a criminal case, the parties are indicated in the format "petitioner v. respondent".
- "Popular" name of the case, if any: by "popular name" we refer to the name given to the case in academic or scientific circles (mainly literature). This is the case mostly with Nuremberg and Tokyo cases, but may also happen with modern cases. If there are several "popular" names, just pick the one you think is the most extended one.
- Country Jurisdiction: for the country, we use as abbreviated a name as possible (UK, USA, *et cetera*). For the jurisdiction, we use the abbreviation indicated in the document or otherwise easily available on the Internet (for

example, SCt (Supreme Court), CCas (Cour de Cassation)). If there is no abbreviation, full name of the jurisdiction should be provided, but trying to keep it short.

- Type of decision: there are many types of the decisions, but mostly the documents will be judgements. If other type of decision or indictments, we write the title of the document in the filename, but trying to keep it as short as possible.

Where the identification of the case is normally made on the basis of a classification number (mainly civil law countries) or the names of the parties are otherwise not available, please use the following pattern:

Case Number (popular name of the case, if any), Country Jurisdiction, Jurisdiction level and type of decision (dd-mm-yyyy)(language)

- *Example*: "90-84327, France CCas, Jugement (09-10-1990)(F).doc"

If the file does not contain the full text of a decision but a summary (that is, a text with the main findings of the decision in short) or a report thereof (that is, an explanation of the decision), this is indicated between brackets immediately after the title of the decision as in the examples below:

English:

summary

report

French:

sommaire

rapport

- *Example*: "Aden, Canada FCA, AC judgement (summary) (09-11-1993)(E).html"
- *Example*: "Von Leeb et al. (High Command Case), USA MT XII, TC judgement (report) (27-10-1948)(E).doc"
- *Example*: "90-84327, France CCas, Jugement (sommaire) (09-10-1990)(F).doc"

2.10. Publicists

1. For books, ensure the page number(s) is included in the filename.

Author's surname(s), initial(s) of forename(s)'s, Title of the book (year)(language), page(s)

- *Example*: "Brownlie, I., Principles of Public International Law (2003)(E), 120-126.pdf"

2. For articles, do not include page numbers.

Author's surname(s), initial(s) of forename(s)'s, Title of the article (year)(language)

- *Example*: "Brubacher, M., Prosecutorial Discretion within the [ICC] (2004)(E).pdf"

Capitalisation of titles:

In an article, you should write it as the title is written, that is, if only the first letter is capitalised, then leave it like that.

However, if every word starts with a capitalised letter or all the words are in full capitals, then capitalise the first letter of every word (except the little words like "at", beyond", "in", *et cetera*, which should not be capitalised).

(In case of doubt, please note that Word marks the incorrectly capitalised words when setting the case to "Title").

If the title of the article is too long for the 255 character limitation, please indicate the ellipsis with square brackets and three dots. The purpose is to indicate that the title copyrighted by the document's author is different from the one we provide.

- *Example*: "Olásolo, H., The Triggering Procedure of the International Criminal Court, Procedural Treatment of the Principle of Complementarity, and the Role of the Office of the Prosecutor (2005)(E).pdf"
- "Olásolo, H., The Triggering Procedure of the [ICC][…] (2005)(E).pdf"

If there is more than one author, please use the name of the first author as it appears in the document and add "et al.".

- *Example*: "Hafner, G. et al., A Response to the American View as Presented by Ruth Wedgwood (1999)(E).pdf"

2.11. Other Documents

The name starts with the body that adopted the document. Following that, usually the number of the document will suffice but if there is no number then use a shortened title of the document:

Body, Title (dd-mm-yyyy)(language)

SECOND ANNEX:
LEGAL TOOLS ENGLISH CITATION GUIDE

CITED DOCUMENT	Legal Tools Citation Guide
LEGAL DOCUMENTS ISSUED BY THE ICC	
OTP filings	*Full name of situation/case*[1], "Full Title", ICC document number, dd Month yyyy.
Example	• *Situation in the Democratic Republic of the Congo*, "Submission of the Document Containing the Charges pursuant to Article 61(3)(a) and of the List of Evidence pursuant to Rule 121(3)", ICC-01/04-01/06-356, 28 August 2006.
Defence filings	*Full name of situation/case*[1], "Full Title", ICC document number, dd Month yyyy.
Example	• *Prosecutor v. Lubanga Dyilo*, "Defence Motion for Clarification and Request for an Extension of the Page Limit", ICC-01/04-01/06-735, 29 November 2006.
Other participants' filings	*Full name of situation/case*[1], "Full Title", ICC document number, dd Month yyyy.
Example	• *Situation in Darfur, Sudan*, "Observations on issues concerning the protection of victims and the preservation of evidence in the proceedings on Darfur pending before the ICC", ICC-02/05-14, 25 August 2006.
Other official documents issued by other organs related to the Court (for example, ASP documents)	Issuing organ or body [if not apparent from the title], "Full title", type of document [if not apparent from the title], ICC document number, dd Month yyyy.
Example	• Assembly of States Parties, "Report on the negotiated Draft Relationship Agreement between the International Criminal Court and the United Nations", ICC-ASP/3/15, 13 August 2004.

ICC judgements, decisions and orders not part of an identified and ongoing case or situation (extremely rare)	Issuing organ [if not apparent from the title], "Full Title", ICC document number [if any], dd Month yyyy.
Example	• Presidency, "Decision constituting Pre-Trial Chambers", ICC-Pres-01/04, 23 June 2004.
ICC judgements, decisions and orders part of an identified and ongoing case or situation	*Full name of situation/case*[1], "Full Title", ICC document number, dd Month yyyy.
Example	• *Prosecutor v. Lubanga Dyilo*, "Decision on the Prosecution Practice to provide to the Defence redacted versions of evidence and materials without prior authorization by the Chamber", ICC-01/04-01/06-355, 25 August 2006.
ICC directives or circulars	Issuing organ or body [if not apparent from the title], "Full title", ICC document number, dd Month yyyy.
Example	• Presidency, "Guidelines on the Establishment of Trust Funds of the International Criminal Court", ICC/PRESD/G/2004/002, 5 March 2004.
LEGAL DOCUMENTS ISSUED BY INSTITUTIONS OTHER THAN THE ICC	
International Statutes and Conventions	Sponsoring organisation [if any], Full Title[2], Volume UNTS registration number, dd Month yyyy of signature or adoption.
Example	• United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, 10 December 1984.
United Nations resolutions	United Nations Issuing body, Resolution resolution number, United Nations document number, dd Month yyyy.
Example	• United Nations Security Council Resolution 1373, S/RES/1373, 28 September 2001. • United Nations General Assembly Resolution 247, A/RES/52/247, 17 July 1998.

Other United Nations documents	United Nations Issuing body, Subsidiary Body, "Full title"[3], Resolution resolution number, United Nations document number, dd Month yyyy.
Example	• United Nations Economic and Social Council, Commission on Human Rights, "Human rights and mass exoduses: Report of the Secretary-General", E/CN.4/1996/42, 8 February 1996.
ICJ judgements, decisions and orders	ICJ, "Case Title" *(Names of Parties)*, Phase, Type of Decision, Date of Judgment or Decision, I.C.J. Reports yyyy, p. starting page.
Example	• ICJ, "Legality of Use of Force" *(Yugoslavia v. United Kingdom)*, Provisional Measures, Order, 2 June 1999, I.C.J. Reports 1999, p. 8263.
ICTY, ICTR, SCSL judgements, decisions and orders	Abbreviation of Tribunal, *Full name of case*[1], "Full Title", ICTY/R/SCSL document number[4], dd Month yyyy.
Example	• ICTY, *Prosecutor v. Tadic*, "Judgment", IT-95-14-T, 3 March 2000.
ICTY, ICTR, SCSL directives or circulars	Abbreviation of Tribunal[6], Issuing organ or body, "Full title", type of document, if necessary (not obvious from, for example, the title), document number, dd Month yyyy.
Example	• ICTY, Presidency, "Practice Direction on Procedure for the Investigation and Prosecution of Contempt before the International Tribunal", IT/227, 6 May 2004.
ECHR, IACHR, ICCPR judgements, decisions and orders	Abbreviation of Tribunal[6], *Full name of case*[5], Appl./Comm. no., "Full Title", document number [if any], dd Month yyyy.
Example	• ECHR, *Piersack v. Belgium*, Appl. no. 8692/79, "Judgement", 1 October 1982. • IACHR, *Case of the "Mapiripán Massacre" v. Colombia*, "Judgment", 15 September 2005. • HRC, *Fanali v. Italy*, Comm. no. 75/1980, "Views", CCPR/C/18/D/75/1980, 31 March 1983.
Domestic codes and statutes	Country, *Official Title in original language* (Translated Title into English/French), dd Month yyyy of signature or adoption, version as of dd Month yyyy [if applicable].

Example	• Argentina, *Código Procesal Penal* (Code of Criminal Procedure), Law no. 23.984, 4 September 1991. • France, *Ordonnance N° 58-1270 du 22 décembre 1958 portant loi organique relative au statut de la magistrature* (Ordinance enacting the Judicial Service Institutional Act), version as of 2 March 2004.
Domestic judgements, decisions and orders	Country, *Court in original language [if possible]* (Court in English or French translation), *Full name of case [if available]*[5], Type of decision [for civil law jurisdictions]–volume reporter number [for common law jurisdictions] / decision no. [for civil law jurisdictions], dd Month yyyy.
Example	• United States of America, Court of Appeals for the 11th Circuit, *Byrne v. Nezhat*, 261 F.3d 1075, 14 August 2001. • Spain, *Tribunal Supremo* (Supreme Court), Judgement, decision no. 645/2006, 20 June 2006. • France, *Cour de Cassation* (Court of Cassation), Criminal Chamber, Judgement, decision no. 220, 7 February 2007.
NON-LEGAL MATERIALS	
Books	Last Name, First Name(s) Initial(s)[7] (eds./ed.) [if applicable], *Book Title*, number of ed. [if applicable], Vol. [if applicable] (Publisher: City, Year).
Example	• Fletcher, G. P., *Rethinking Criminal Law*, 2nd ed. (Oxford University Press: New York, 2000). • Cassese, A. *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I (Oxford University Press: New York, 2002). • Bantekas, I. and Nash, S., *International Criminal Law*, 2nd ed. (Cavendish Publishing Ltd.: London, 2003).
Contributions to books	Last Name, First Name(s) Initial(s)[7], "Full Title of Contribution", in Last Name, First Name(s) Initial(s)[7] (eds.), *Book Title*, number of ed. [if applicable] (Publisher: City, Year), p. starting page.

Example	• McIntyre, G., "Defining Human Rights in the Arena of International Humanitarian Law: Human Rights in the Jurisprudence of the ICTY", in Boas, G. and Schabas, W.A. (eds.), *International Criminal Law Developments in the Case Law of the ICTY* (Martinus Nijhoff Publishers: Leiden, 2003), p. 193.
Journal articles	Last Name, First Name(s) Initial(s),[7] "Full Title of Article", in *Full Title of Journal*, Vol. number, Issue number (yyyy), p. starting page.
Example	• Delmas-Marty, M., "Interactions between National and International Criminal Law in the Preliminary Phase of Trial at the ICC", *Journal of International Criminal Justice*, Vol. 4, Issue 1 (2006), p. 2.
Recueil des Cours	Last Name, First Name(s) Initial(s)[7], "Full Title of Course", *Recueil des Cours de l'Académie de Droit International*, Vol. number, Issue number (yyyy), p. starting page.
Example	• Trooboff, P. D., "Foreign State Immunity: Emerging Consensus on Principles", *Recueil des Cours de l'Académie de Droit International*, Vol. 200 (1986 IV), p. 235.
Newspaper articles	Last Name, First Name(s) Initial(s)[7], "Full Title of News Article", *Full Title of Newspaper*, dd Month yyyy, p. starting page.
Example	• Lynch, C., "Holbrooke Faces Challenge at U.N.; New Ambassador Seeks to Restore U.S. Clout Eroded by Fights over Dues, Policy", *Washington Post*, 24 August 1999, p. A12.

[1] As stated in the title of each filing/order/decision/judgement, but limited to the last name(s) of the first person in the order mentioned in the cover page of the document. If there are two accused persons, the last names of both of them are included, in the order mentioned in the cover page of the document and separated by "and" (for example, *Prosecutor v. Kordic and Cerkez*). If there are three or more accused, only the last name(s) of the first person in the order mentioned in the cover page of the document is included, using *et al.* to replace the third or more persons mentioned in the cover page of the document (for example, *Prosecutor v. Delalic et al.*).

[2] For the Geneva Conventions, the number of the convention is included between brackets (for example, Geneva Convention (IV) relative to the protection of civilian persons in time of war).

[3] For United Nations Documents, please note that the title of the document is different

from the title of the agenda item and/or session in relation to which the document was adopted.

[4] The document number of ICTY/ICTR/SCSL documents is the number which appears on the top right corner of the document, and which is formed by the number of the case and an abbreviation indicating the phase of the proceedings in relation to which the document has been produced (IT-95-14-T, IT-97-24-PT, IT-02-62-AR54bis & IT-02-62-AR108bis). If such number is missing, the number of the case should be used (for example, IT-95-14, IT-97-24, IT-02-62).

[5] Only last name of applicant(s) or official case name other than applicant(s)' name. When it comes to decisions from domestic courts, the name of the applicant/respondent may not be provided in decisions issued in civil law jurisdictions, in which case no case name is included in the citation.

[6] Abbreviations: ICJ (International Court of Justice), ICTY (International Criminal Tribunal for the Former Yugoslavia), ICTR (International Criminal Tribunal for Rwanda), SCSL (Special Court for Sierra Leone), ECHR (European Court of Human Rights), ECommHR (European Commission of Human Rights), IACHR (Inter-American Court of Human Rights), IACommHR (Inter-American Commission on Human Rights), HRC (Human Rights Committee), ACHPR (African Court of Human and Peoples' Rights), ACommHPR (African Commission on Human and Peoples' Rights). Rule: before the abbreviation is used in the citation, designation should have taken place. Also, it should be clear (if applicable) which Chamber has given the decision.

[7] If more than one author, they are separated by "and"; if more than two authors, only the first one in the order mentioned in the document is included, followed by *et al.*

THIRD ANNEX: CHANGE NOTES FOR VERSION 1.1 OF THE LEGAL TOOLS METADATA MANUAL (18 JANUARY 2009)

The present Manual, Version 1.1, replaces the Manual of 29 October 2008. Most changes were mere clarifications of the comments sections of the Manual. The following changes are more substantive:

The fields **LT-Related resource title**, **LT-Related resource title (EN)** and **LT-Related resource (FR)** where deleted because the titles of the relevant related resource will be available in the metadata of that resource in any event.

Regarding the field **LT-Content type**, value "Implementing legislation" was included in the list of possible values. This will allow users to limit their search to legislation implementing the Rome Statute, which is particularly important in view of Nottingham's collection.

Regarding the field **LT-Related resource link**, it was clarified that a resource is related if its content is the same, but in a different language or in a different electronic format, or if the described resource has or is a corrigendum or annex. The LTAC may take a decision on further relations that should be registered at a later time.

The field LT-Case name (Official) was split into three different fields and renamed (LT-Case Name (ICC Naming Convention) (EN), LT-Case name (ICC Naming Convention) (FR) and LT-Case name (ICC Naming Convention) (Other language), and it was clarified that the name of the case should be entered according to the ICC Naming Convention. The ICC Naming Convention was slightly modified, in particular in respect of ICJ judgments. These changes were made to address problems that were encountered when entering case names.

For the field **LT-Phase of case** it was clarified that interlocutory appeals are considered as a separate phase of the proceedings also before the ICC.

Two new fields entitled **LT-Related case** and **LT-Related case number** were included, in particular to trace cases that were joined or severed. For ICC, ICTY, ICTR and SCSL cases, the relationships will be identified previously and should be registered in the Legal Tools Database so that whenever a particular case name is chosen, any related cases are automatically entered. For **LT-Composition of chamber** and **LT-Presiding judge** it was decided that the information should be collected, but only for resources the source type of which is "judicial body". Regarding the names of counsel, *et cetera*, (**LT-Prosecutor's team/claimant, LT Counsel for defence, LT-Counsel for victims**, and **LT-Amicus curiae**) a decision has not been made yet; the Outsourcing Partners should therefore not enter this information.

The field **LT-Key judicial document** was changed from a field that does not allow for multiple entries to a field that allows for multiple entries because the decision on acquittal or guilt may be contained in the same resource as the decision on the sentence (this is frequently the case in the ICTY and the ICTR). Furthermore, the scope of the field was enlarged to cover all judicial bodies, including national jurisdictions. This was done to allow for searches for the result of the outcome of a trial, in result with the field LT-Outcome of Trial.

As proposed by the IWCRC, the fields **LT-Outcome of trial, LT-Place of court,** and **LT-Place of court** were included, as this could be useful criteria for searches.

A new field **LT-ICC TRIM number** was included. This number will be supplied automatically for all ICC Court Records that are obtained directly from the Court Management System. It is only relevant for back-tracking of records.

The field **LT-Document number**, which contained the ICC court records number was deleted because the it was redundant with the field **LT-External identifier**. The information is now entered in the latter field.

The field **LT-File number (Situation/Case number)** was deleted because the information is also contained in the field **LT-Case number**.

The new field **LT-Responsible outsourcing partner** was included to allow a distinction between the person entering the metadata (see **LT-Metadata collected by**) and the Outsourcing Partner responsible for the collection of the metadata.

The field **LT-Alternative origin** was deleted. It is a relation-type field and a decision regarding the registration of relations other than different language versions is still pending.

The field **LT-Database record number** was inserted. It will be automatically generated by the LT Database and may be useful for referencing.

For ease of reference, the Legal Tools English Citation Guide and the ICC Naming Convention were annexed to the Manual.

The fields **LT-Subject levels (level 1 – 4)** were deleted as these fields were not used. Instead two fields were included. The "LT-Subject level (Level 1)" field has been renamed "LT-Subject" and includes the subject to which a resource related. The new field "Phase of preparatory works" covers the different phases of the preparatory works for the Rome Statute, the Rules and the Elements of Crimes. The list can be amended in order to include the preparatory works of other international treaties (*et cetera*).

FOURTH ANNEX: CHANGE NOTES FOR VERSION 1.2 OF THE LEGAL TOOLS METADATA MANUAL (11 NOVEMBER 2009)

The present Manual, Version 1.2, replaces the Manual, Version 1.1, of 18 November 2009. Most changes were mere clarifications of the comments sections of the Manual. The following changes are more substantive:

The field **LT-Authoritative Language** was deleted. This was done because it turned out to be very difficult for the Outsourcing Partners to determine whether or not a document is in the authoritative language and there were often ambiguities. In light of the limited usefulness of that field for the users of the Legal Tools, it was considered best not to drop the field.

For the fields **LT-Prosecutor's team/claimant**, **LT-Counsel for defence**, **LT-Counsel for victims**, it was clarified that the information should only be collected if the document in question is from the prosecution, defence, or victims' counsel respectively. Thus, for example, for a document from the prosecution, only the names of the Prosecutor's team will be collected.

ANNEX II:
ICC KEYWORD LIST

(Only Substantive Keywords)
(Last Amended in July 2009)

This list is made by hand based upon an Excel print-out of the Thesaurus terms. Therefore, this display may not exactly mirror the original. Further, as described in chapter 7 above, many terms appear in this list several times as they are part of different hierarchical structures. The electronic original is interrelated as well as related to the legal texts of the ICC. The hierarchical levels are the following:

Bold – first level; normal – second level; italics (first line no indent, second and third lines indented) – third level; normal, indent – fourth level; italics, indent (all lines are indented) – fifth level.

accused
accused as witness
accused understands charges
medical examination of accused
accused unfit to stand trial
conditions of medical examination
medical examination by experts
reasons for medical examination
plead not guilty
presence of accused at trial
disruption of trial
removal of accused
representation by counsel in proceedings
rights of accused (*see first level entry below*)
testimony of accused

acquittal
delivery of decision on conviction, acquittal and sentence
reasoning of decision on conviction or acquittal

Additional Protocol I to the Geneva Conventions
Grave breaches of Geneva Conventions or Additional Protocol I
protected persons

effect on outcome of the trial
material advancement of the proceedings
reply to response to request for leave to appeal
response to request for leave
reviewability of decision on certification or leave
time limit to request leave
appeal against sentence
consolidation of
discontinuance
document in support of the appeal
content of document in support of the appeal
page limit of document in support of the appeal
time limit for document in support of the appeal
grounds of appeal
alternatively
cumulatively
grounds of appeal against decision on conviction or acquittal
error of fact
error of law
fairness or reliability of proceedings at risk
procedural error
grounds of appeal against decision on sentence
disproportion between crime and sentence
gravity (sentencing)
individual circumstances of the person
notice of appeal
content of notice of appeal
time limit for notice of appeal
reply to response to document in support of the appeal
response to the document in support of the appeal
content of response to document in support of the appeal
page limit for response to document in support of the appeal
time limit for response to document in support of the appeal
suspensive effect of appeal
request for suspensive effect
suspension of execution of the decision on conviction or sentence during appeal proceeding

appeal proceedings
additional evidence
delivery of judgement of Appeals Chamber
delivery in absence of person acquitted or convicted

general principles of law
abuse of process
Common Law System of Law
Islamic law
Romano Germanic System of Law
jura novit curia
male captus bene detentus
other law
internationally recognised human rights
previous decisions
stare decisis
principles and rules of international law
principles of international law of armed conflict
Regulations of the Court
Rome Statute (*see first level entry below*)

arrest and surrender
arrangements for surrender
competing requests for surrender for different conduct
competing requests for surrender for same conduct
States Parties are requesting surrender too
decision on admissibility of the case in arrest proceedings
notification to Prosecutor of non extradition to requesting State
non States Parties are requesting surrender
obligation to notify of competing requests
definition of surrender
provisional arrest
consent of person to surrender upon provisional arrest
consequences of not presenting request for arrest and surrender
content of request for provisional arrest
time limit for presentation of request for arrest and surrender
request for arrest and surrender
competing judicial proceedings or enforcement of other sentence
temporary surrender to ICC
content of request for arrest and surrender
translation of the request accompanying documents
surrender to another State
transportation and transit

arrest and surrender proceedings in the custodial state
appointment of counsel by ICC
costs for surrender of person
interim release pending surrender in custodial state

seat of the Bureau

calculation of page limits
attachments to documents

challenge to jurisdiction of the Court or admissibility of a case
challenge by State with jurisdiction
ground for challenge by State who acted under article 18
ground for challenge by State with jurisdiction
challenge by accused person
challenge by non State party that accepted jurisdiction
challenge by suspect
consequences on investigation of challenge
provisional measures under article 19, paragraph 8
completion of evidence
criteria for authorisation of investigative measures
prevention of absconding
provisional measures under article 18, paragraph 6
significant risk of not preserving evidence
unique opportunity to obtain important evidence
suspension of investigation upon challenge
validity of previous acts
procedural requirements for mounting a challenge
limitation in number of challenges
relevant Chamber to receive challenge
challenge addressed to Presidency before constitution of Trial Chamber
Chamber in charge of challenge after confirmation of charges
Chamber in charge of challenge prior to the confirmation of charges
time of mounting a challenge
after the commencement of the trial
prior to trial
proceedings before the Chamber under article 19

charges
amendment of charges
additional charges
amendment of charges after the confirmation of charges before start of trial
amendment of charges before the confirmation hearing
reasonable notice of amendment or withdrawal of charges
substitution of more serious charges
confirmation of the charges
appealability of decision confirming the charges

new evidence for confirmation hearing
service of document containing the charges
time limit for submission of document containing the charges
indictment
amendment of indictment
referral of indicment to another court
submission of indicment
withdrawal of indictment
modification of the legal characterization of facts
prima facie case
withdrawal of charges
ineffectiveness of arrest warrant
withdrawal of charges after commencement of trial
permission of Trial Chamber to withdraw charges
withdrawal of charges before the confirmation hearing
reasonable notice of amendment or withdrawal of charges

Charter of the United Nations

Code of Judicial Ethics of the ICC
adoption

Code of Professional Conduct for counsel of the ICC
adoption of Code of Professional Conduct for counsel
amendment of Code of Professional Conduct for counsel
entry into force of Code of Professional Conduct for counsel
national or other codes of ethics
disciplinary measures imposed by national or other disciplinary bodies
primacy of Code of Professional Conduct for counsel of ICC
Provisions of the Code of Professional Conduct for counsel
publication of Code of Professional Conduct for counsel

codes of ethics
conflict between codes of ethics
national ethical rules

command responsibility

Common Article 3 of Geneva Conventions

Common Law System of Law

common legal representative
assistance of Registry in choosing common legal representative
common legal representative and conflict of interest
decision of the Chamber to request Registrar to choose common legal representative

proceedings on preliminary objections or observations at confirmation hearing
date of confirmation hearing
final observations of Prosecutor and person
right of person to make final observations last
preparation of confirmation hearing
amendment of charges before the confirmation hearing
reasonable notice of amendment or withdrawal of charges
disclosure before confirmation hearing
status conferences before confirmation hearing
rights of the person during the confirmation hearing
person challenges the evidence presented by Prosecutor
person objects to charges
person presents evidence
reasonable notice of amendment or withdrawal of charges
right of person to make final observations last
support of each charge with sufficient evidence

constitution of Trial Chamber
challenge addressed to Presidency before constitution of Trial Chamber
constitution of new Trial Chamber
referral of case to previously constituted Trial Chamber

contempt of court

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Convention for the Protection of Cultural Property

Convention on the Prevention and Punishment of the Crime of Genocide

Convention on the Rights of the Child
Optional Protocol II to the United Nations Convention on the Rights of the Child in armed conflict

Convention on the safety of United Nations and associated personnel

conviction
conviction of guilt beyond reasonable doubt
delivery of decision on conviction, acquittal and sentence
evaluation of entire proceedings
evaluation of evidence
evidence discussed at trial
evidence submitted
evaluation of facts

decision on payment of legal assistance paid by the Court
- action plan
- fees
- decision on disputes relating to fees
- legal aid commissioner
- recovery of means after inaccurate information
- review of decision on payment of legal assistance

determination of means of indigent person
- proof of indigence
- recovery of fees paid if not indigent

determination of scope of legal assistance paid by the Court
- decision by the Registrar on request to extend scope of legal assistance
- fixed fee system
- request to extend scope of legal assistance
- review by competent Chamber of decision of Registrar

professional investigators
- list of professional investigators

legal representative of victims

appointment of legal representative by Chamber

common legal representative
- assistance of Registry in choosing common legal representative
- common legal representative and conflict of interest
- decision of the Chamber to request Registrar to choose common legal representative

legal representative's participation during proceedings
- participation in hearings
- questioning of witnesses by legal representative
- written observations

qualifications of legal representatives

right of victim to choose a legal representative

withdrawal of legal representative

list of assistants to counsel

list of counsel

inclusion of counsel in list of counsel
- standard form for request for inclusion on list of counsel

publication of counsel's data by Registry

removal of counsel from list of counsel

review of registrar's decision on list of counsel

suspension of counsel from list of counsel

national or other codes of ethics

persecution as crime against humanity
connection to any crime
discriminatory intent (persecution)
identifiable group
impermissible grounds
political grounds (persecution)
racial grounds (persecution)
national grounds (persecution)
ethnic grounds (persecution)
cultural grounds (persecution)
religious grounds (persecution)
gender grounds (persecution)
other universally recognized impermissible grounds (persecution)
rape as crime against humanity
severe deprivation of physical liberty as crime against humanity
sexual slavery as crime against humanity
sexual violence as crime against humanity
torture as crime against humanity
widespread or systematic attack

crimes under international law
aggression
crimes against humanity (*see first level entry above*)
drug trafficking
genocide (*see first level entry below*)
other crimes under international law
piracy
terrorism
war crimes (*see first level entry below*)

customary international law

decision/judgement
declaration appended to a judgment
deliberations by Trial Chamber
delivery of judgements/decisions
delivery of decision on conviction, acquittal and sentence
delivery of decision on reparation order
delivery of judgement of Appeals Chamber
delivery in absence of person acquitted or convicted
presence of judges at delivery of judgments/decisions
dissenting opinion(s)
majority judgement/decision
views of majority and minority

detention
detention centre
complaints by the detainee
conditions of detention
arrival of the detainee
cell monitoring
daily routine
instruments of restraint
personal search
search of cells
segregation
use of force in detention
detention after conviction
detention record
accessibility of detention record
confidentiality of detention record
order of Chamber for disclosure
discipline of detainee
disciplinary offences of detainee
disciplinary procedure for the detainee's misconduct
isolation cell
temporary segregation
management of detention centre of ICC
Chief Custody Officer
inspections of detention centre of ICC
rights of the detainee and restrictions thereto
access to news by the detainee
accommodation of the detainee
care for infants of the detainee
communication of the detainee
communication of the detainee with counsel
diplomatic and consular assistance
health and safety of the detainee
other rights of the detainee
spiritual welfare of the detainee
visits of the detainee
length of pre trial detention
inexcusable delay by Prosecutor
inexcusable delay not only by the Prosecutor
unreasonable period of detention

privileged communications
International Committee of the Red Cross privileged communication
counsel client privilege
consent
medical doctor and other privileged communication
voluntary disclosure to third party
protection of further or ongoing investigation
protection of national security information
State's right to intervene for protection of national security information
refusal to disclose information on guilt or innocence
inference of existence or non existence of a fact at trial
order for disclosure
protection of national security information as impediment to cooperation
resolution of conflict as to protection of national security information
alternative form
alternative source
disclosure under specific conditions
modification or clarification of request
no resolution of conflict as to protection of national security information possible
redactions
summary of evidence

disqualification
disqualification of Judges
criteria for disqualification of Judges
decision on disqualification by meeting of all Judges
request for disqualification of Judges
disqualification of Prosecutor or Deputy Prosecutor
criteria for disqualification of Prosecutor or Deputy
decision of Appeals Chamber
request for disqualification of Prosecutor or Deputy

document containing the charges
list of evidence
new evidence for confirmation hearing
service of document containing the charges
time limit for submission of document containing the charges

documents
authorities relied upon

request to State for cooperation in enforcement of fines, forfeiture and reparation orders
State's inability to give effect to request for enforcement
State's obligation to not modify decision on fine
transfer of fines to Trust Fund
enforcement of orders of forfeiture
decision by Presidency on disposition or allocation of property or assets
priority on victims' reparation
ongoing monitoring of financial situation of sentenced person
request to State for cooperation in enforcement of fines, forfeiture and reparation orders
State's inability to give effect to request for enforcement
State's obligation to not modify decision on fine
transfer of assets and property to Trust Fund
transfer of forfeitures to the ICC
enforcement of reparation order
enforcement similar to enforcement of fines and forfeitures orders
obligation on States Parties to give effect to order on reparations
State's obligation to not modify order for reparation
enforcement of sentence of imprisonment
binding nature of sentence of imprisonment
change in State of enforcement
procedure for change of state of enforcement
channel of communication for enforcement matters
delivery of sentenced person to State of enforcement
designation of state of enforcement
acceptance of convicted persons by designated State
information for designated State
list of States of enforcement
principle of equitable distribution
geographical distribution
number of persons received
opportunity to receive sentenced persons
role of host State in enforcement of sentence
views of sentenced person on designation of state of enforcement
limitation on prosecution or punishment in State of enforcement
procedure for State request to prosecute a sentence for prior conduct
State of enforcement
bilateral enforcement agreements
conditions to acceptance as state of enforcement

other evidential matters
reasonable diligence standard
rebuttal evidence
rejoinder
privilege on confidentiality
relevance of evidence
request for submission of evidence by Chamber
ruling on admissibility and relevance of evidence
submission of evidence
testimony of witnesses
accomplice's evidence
anonymous witness
audio or video link technology - testimony
compellability of witness
conduct of witness while testifying
corroboration of testimony
cross examination of witness
examination of witness
questioning of witnesses by legal representative
family members' testimony
presence of another witness during testimony
prior recorded testimony
proofing of witness
self incrimination of witness
sexual violence testimony
principles of evidence - sexual violence
transcript of testimony
viva voce testimony
witness undertaking
voir dire procedure
written statement of witness in lieu of oral testimony

excusing
excusing of Judges

exercise of jurisdiction
proprio motu initiation of investigation
authorisation of investigation by Pre Trial Chamber
decision by Pre Trial Chamber not to authorise investigation
information by Prosecutor to facilitate assignment of a situation to Pre Trial Chamber
participation of victims in initiation of investigations proprio motu
preliminary examination

assessment of contributions
contributions made by State Parties
expenses of the ICC and Assembly
Financial Regulations and Rules of the ICC
United Nations funds
voluntary contributions

fine
imposition of a fine
appropriate level of fine
calculation according to system of daily fines
financial capacity of convicted person
personal financial gain as crime motive
reasonable period for payment of fine
non payment of a fine
procedure before the ICC upon non payment of a fine
decision on extension of imprisonment
views of Prosecutor on extension of term of imprisonment
views of sentenced person on extension of term of imprisonment
States observations on non payment of a fine
subsequent payment of fine
consequences of subsequent payment of fine
payment of fine

functions and duties of the Registrar/Registry
channel of communication of the ICC
Code of Conduct for investigators of the ICC
delivery of sentenced person to State of enforcement
duty to inform the President of negotiation of arrangement or agreement
recommendations of Advisory Committee on Legal Texts on agreements and arrangements
functions of Registrar/Registry related to court proceedings
Court management
electronic Court
publication of decisions of the Court
Registrar's inquiry of a State's intent to accept jurisdiction
Translation and Interpretation Services
functions of Registrar/Registry with respect to participants and counsel
appointment of duty counsel
assistance of Registry in choosing common legal representative
completion of standard forms for participation
completion of standard forms for reparations
decision by the Registrar on request to extend scope of legal assistance

management of detention centre of ICC
Chief Custody Officer
inspections of detention centre of ICC
Official Journal of the ICC
responsibility for internal security of the Court
website of the ICC

functions and powers of Trial Chamber
adjournment of proceedings
Chamber in charge of challenge after confirmation of charges
ensuring fair and expeditious trial
functions of Pre Trial Chambers
imposition of sentence
additional hearing for purposes of reparations or sentencing
delivery of decision on conviction, acquittal and sentence
evidence presented and submissions made during trial
hearing for purposes of forfeiture
bona fide third party
public pronouncement of sentence
inherent powers
modification of the legal characterization of facts
non compliance with orders of a Chamber
permission of Trial Chamber to withdraw charges
preparation of trial
conferring with parties
date for beginning of trial
language of trial
status conferences before trial

functions and powers of the Appeals Chamber
adjournment of proceedings
decision on disqualification of Prosecutor or Deputy Prosecutor
decision on merits of application for revision
constitute new Trial Chamber
reconvene original Trial Chamber
reject application for revision
retain jurisdiction to decide on revision
decision on reduction of sentence
inherent powers
non compliance with Regulations of the Court
non compliance with orders of a Chamber
powers of Appeals Chamber on appeal
amendment to appealed decision

no preclusion from subsequent request for confirmation
support by additional evidence
decision to adjourn the confirmation hearing
different decisions on multiple charges
Prosecutor to consider amendment of charges
Prosecutor to consider providing further evidence or conducting investigation
decision to confirm the charges
commission of person to a Trial Chamber for trial
constitution of Trial Chamber
challenge addressed to Presidency before constitution of Trial Chamber
constitution of new Trial Chamber
referral of case to previously constituted Trial Chamber
notification of decision on the confirmation of charges
transfer of record to Trial Chamber
decision to request Prosecutor to reconsider decision
inherent powers
issuance of a summons to appear
conditions restricting liberty provided by national law
reasonable grounds to believe in commission of crime by person
sufficiency of summons to ensure person's appearance
issuance of orders and warrants
issuance of warrant of arrest
arrest appears necessary
ensuring appearance at trial
ensuring no obstruction to or endangerment of investigation or court proceedings
preventing commission of crime or similar crimes
reasonable grounds to believe in commission of crime
medical examination of investigated person/suspect
non compliance with Regulations of the Court
orders and warrants required for investigation requested by Prosecutor
Pre Trial Chamber to issue orders or measures under article 56 for defence
Pre Trial Chamber to seek cooperation for preparation of the defence
proceedings before Pre Trial Chamber relevant to the authorization of investigation under article 18
unique investigative opportunity (*see first level entry below*)
unique opportunity to obtain important evidence

functions and powers of the Presidency
administration of the ICC

procedure before the ICC upon non payment of a fine
decision on extension of imprisonment
views of Prosecutor on extension of term of imprisonment
views of sentenced person on extension of term of imprisonment
States observations on non payment of a fine
subsequent payment of fine
consequences of subsequent payment of fine
ongoing monitoring of financial situation of sentenced person
request to State for cooperation in enforcement of fines, forfeiture and reparation orders
State's inability to give effect to request for enforcement
State's obligation to not modify decision on fine
transfer of fines to Trust Fund
enforcement of reparation order
enforcement similar to enforcement of fines and forfeitures orders
obligation on States Parties to give effect to order on reparations
State's obligation to not modify order for reparation
external relations
order of longer period of interdiction than 30 days
procedure for State request to prosecute a sentence for prior conduct
replacement of a Judge
review of decision on payment of legal assistance
review of decision to refuse request for assignment of counsel
standard forms and templates
supervision of enforcement of term of imprisonment
communications between sentenced person and ICC
equal conditions of imprisonment
international treaty standards for detention
suspension of proceedings
transfer of record to Trial Chamber

functions and powers of the Prosecutor/Office of the Prosecutor
application for summons to appear
application for warrant of arrest
appointment of staff
burden of proof
burden of proving the standard for confirmation
support of each charge with sufficient evidence
conclusion of arrangements and agreements by Prosecutor
duty to inform the President of negotiation of arrangement or agreement
recommendations of Advisory Committee on Legal Texts on agreements and arrangements

increase in number of Judges
independent oversight mechanism
management of the ICC
referral of non cooperation to Assembly of States Parties
removal from office of a Judge
removal from office of the Prosecutor or a Deputy Prosecutor
settlement of disputes between States Parties
referral to the Assembly of States Parties
referral to the International Court of Justice

functions of the Bureau
discipline of Deputy Prosecutor
disciplinary procedure for Deputy Prosecutor's misconduct
misconduct of a less serious nature
pecuniary sanction
reprimand
providing assistance to Assembly of States Parties

gender, definition of

General Assembly of the United Nations

general principles of criminal law
application of the more favourable law
interpretation in favour of the accused (in dubio pro reo)
non retroactivity ratione personae
nulla poena sine lege
nullum crimen sine lege
presumption of innocence
prohibition of analogy for crimes
statute of limitations

Geneva Conventions of 1949
Common Article 3 of Geneva Conventions
Convention (I) for the amelioration of the condition of the wounded and sick in the field
Convention (II) for the amelioration of the condition of wounded, sick and shipwrecked at sea
Convention (III) relative to the treatment of prisoners of war
Convention (IV) relative to the protection of civilian persons in time of war
Grave breaches of Geneva Conventions or Additional Protocol I
protected persons
protected property

genocide
causing serious harm as genocide

forcibly transferring children as genocide
imposing measures to prevent births as genocide
inflicting destructive conditions of life as genocide
intent to destroy
destruction of a group
in part
in whole
protected groups
ethnical group
national group
racial group
religious group
killing as genocide
rape as genocide

grounds for excluding criminal responsibility
adjustment of exclusionary grounds to case
grounds excluding criminal responsibility derived from applicable law
duress
balance of interests
necessary and reasonable measures
threat of harm
intoxication
incapacity
involuntary intoxication
voluntary intoxication
mental disease or similar defect
mistake of fact
mistake of law
necessity
other grounds for excluding criminal responsibility
incapacity
insanity
self defence
defensible interests
imminent and unlawful use of force
proportionate measures
superior orders
manifestly unlawful order

habeas corpus

Hague Convention on Cultural Property 1954

Hague Regulations of 1907

Headquarters Agreement between the ICC and the Kingdom of the Netherlands

hearings
audio visual services
broadcasting
closed session
court recess
courtroom
ex parte proceedings
in camera
interpretation services
public session
status conferences
status conferences before confirmation hearing
status conferences before trial
under seal proceedings

human rights treaties and conventions
African Charter on Human Rights and Peoples' Rights
American Charter on Human Rights
American Declaration of the Rights and Duties of Man
European Convention on Human Rights
International Covenant on Economic, Social and Cultural Rights
International Covenant on Civil and Political Rights

immunities
immunities under international law
United Nations Convention on Jurisdictional Immunities of States and Their Property
Vienna Convention on Consular Relations
Vienna Convention on Diplomatic Relations
immunities under national law
irrelevance of official capacity

impartiality

imprisonment
imprisonment for a maximum of 30 years
imprisonment for specified number of years

conspiracy
contribution
joint criminal enterprise
category I joint criminal enterprise
category II joint criminal enterprise
category III joint criminal enterprise
preparation
providing means
soliciting
superior responsibility (*see first level entry below*)

initial appearance
information on crimes
information on rights

intent
being aware that consequence will occur
meaning to cause a consequence
meaning to engage in conduct
ordinary course of events

interim release
conditional release
amendment of conditions for interim release
participation of victims in interim release proceedings
review of ruling on release or detention
changed circumstances
periodic review upon Pre Trial Chamber's own motion
review upon request by person or Prosecutor
right to apply for interim release
ruling on release for unreasonably long pre trial detention
inexcusable delay by Prosecutor
unreasonable period of detention
ruling on release or detention

international armed conflict
internationalised armed conflict
occupation

International Committee of the Red Cross
International Committee of the Red Cross commentaries to Additional Protocols 1977
International Committee of the Red Cross commentaries to Geneva Conventions 1949

evidence production
examination of places including grave sites and exhumation
execution of searches and seizures
facilitating the voluntary appearance of witnesses and experts
identification and whereabouts of persons or items
identification, tracing and freezing of assets for forfeiture purposes
questioning of a person investigated or prosecuted
service of documents
temporary transfer of persons in custody of another State
temporary transfer of sentenced person from state of enforcement
victims and witnesses protection and preservation of evidence
transfer of criminal proceedings
transit
unscheduled landing
ICC's assistance to State Party
obligation to cooperate
availability of procedures for cooperation in national law
compliance with requests under procedures of national law
failure to comply by States Parties
finding of the Court on failure to comply
legality of request for cooperation
referral of non cooperation to Assembly of States Parties
referral of non cooperation to Security Council
failure to comply by non States Parties
referral of non cooperation to Assembly of States Parties
referral of non cooperation to Security Council
request for cooperation
assurance by ICC to witness or expert of non prosecution
channel of communication
International Criminal Police Organization as channel of communication
channel of communication of the ICC
channels of communication of States Parties
channel designated by State Party
diplomatic channel
regional organisation
competing requests for surrender for same conduct
States Parties are requesting surrender too
decision on admissibility of the case in arrest proceedings
notification to Prosecutor of non extradition to requesting State
non States Parties are requesting surrender

channels of communication of States Parties
channel designated by State Party
diplomatic channel
regional organisation
urgency of request

International Criminal Court (ICC)
ICC as an institution
establishment of the ICC
legal capacity of the ICC
personality
place of proceedings
ICC sitting in State territory
application
host State

International Criminal Courts/Tribunals
International Criminal Tribunal for Rwanda (ICTR)
Bilateral Agreements of the ICTR
Code of Professional Conduct for Defence Counsel at the ICTR
Directive for the Registry of the ICTR
Directive on the Assignment of Defence Counsel of the ICTR
Practice Directions of the ICTR
Rules covering the detention of persons before the ICTR
Rules of Procedure and Evidence of the ICTR
Security Council Resolutions respecting the ICTY and ICTR
Statute of the ICTR
International Criminal Tribunal for the former Yugoslavia (ICTY)
Bilateral Agreements of the ICTY
Defence Counsel Payment Scheme for the Pre Trial Stage (ICTY)
Defence Counsel Payment Scheme for the Trial Stage (ICTY)
Directive on Assignment of Defence Counsel (ICTY)
Headquarter Agreement between the United Nations and The Kingdom of The Netherlands
other rules respecting detention at the ICTY
Practice Directions of the ICTY
Rules governing the Detention of persons at the ICTY
Rules of Procedure and Evidence of the ICTY
Security Council Resolutions respecting the ICTY and ICTR
Statute of the ICTY
The Code of Professional Conduct for Defence Counsel Appearing before the ICTY
Internationalized Criminal Courts/Tribunals

election of Judges
excusing of Judges
independence of a Judge
order of precedence
plenary session
adoption of the Regulations of the Court
assignment of Judges to Divisions
election of Deputy Registrar
election of Registrar
election of the Presidency
replacement of a Judge
resignation of a Judge
salary and allowances
solemn undertaking of Judges
term of office of a Judge

judicial Divisions of the ICC
Appeals Division (*see first level entry above*)
Pre Trial Division (*see first level entry below*)
Trial Division (*see first level entry below*)

jurisdiction
acceptance of jurisdiction by a State not Party to the Statute
declaration of State to accept jurisdiction
    acceptance with respect to crime in question
    cooperation without delay or exception
challenge to jurisdiction of the Court or admissibility of a case (*see first level entry above*)
concurrent jurisdiction
deferral to international court/tribunal
exercise of jurisdiction (*see first level entry above*)
implied powers
inherent jurisdiction
jurisdiction ratione loci
jurisdiction ratione materiae
jurisdiction ratione personae
    age of criminal responsibility
    nationality of perpetrator
    nationality of victim
jurisdiction ratione temporis
    declaration under article 12, paragraph 3
    entry into force of Rome Statute
    non retroactivity ratione personae

review of decision on payment of legal assistance
determination of means of indigent person
proof of indigence
recovery of fees paid if not indigent
determination of scope of legal assistance paid by the Court
decision by the Registrar on request to extend scope of legal assistance
fixed fee system
request to extend scope of legal assistance
review by competent Chamber of decision of Registrar
professional investigators
list of professional investigators

legal representative of victims
appointment of legal representative by Chamber
common legal representative
assistance of Registry in choosing common legal representative
common legal representative and conflict of interest
decision of the Chamber to request Registrar to choose common legal representative
legal representative's participation during proceedings
participation in hearings
questioning of witnesses by legal representative
written observations
qualifications of legal representatives
right of victim to choose a legal representative
withdrawal of legal representative

list of counsel
inclusion of counsel in list of counsel
standard form for request for inclusion on list of counsel
publication of counsel's data by Registry
removal of counsel from list of counsel
review of registrar's decision on list of counsel
suspension of counsel from list of counsel

London agreement on war criminals 1945
Charter of the Nuremberg Tribunal

mens rea

mental element
dolus directus
dolus eventualis
dolus specialis
intent

cooperation of non governmental organization
cooperation with NGOs during preliminary examination

non international armed conflict

notification
notification of decision on review of sentence
notification of documents and decisions
electronic notification
other forms of notification
postal notification
recipients of documents
recipient for State
recipient for accused
recipient for intergovernmental organisation
recipient for participant
service on the person
service of arrest warrant
service of document containing the charges
service of summons to appear

notification of documents and decisions
electronic notification
other forms of notification
postal notification

offences against the administration of justice
false of forged evidence adduced
false testimony
impeding, intimidating or corruptly influencing an official of the ICC
influencing a witness corruptly and evidence related crimes
obligation on States Parties to penalize offences against the administration of justice
periods of limitation for offences against the administration of justice
procedure upon offences against the administration of justice
retaliating against an official of the ICC
sanctions for offences against the administration of justice
soliciting or accepting a bribe as an official of the ICC

Office of Public Counsel for the defence
establishment of Office of Public Counsel for the defence
independence from Registry of Office of Public Counsel for the defence
mandate of the Office of Public Counsel for the defence

Office of Public Counsel for victims
establishment of Office of Public Counsel for victims

Presidency of the ICC (*see first level entry below*)
Registry
Deputy Registrar (*see first level entry above*)
functions and duties of the Registrar/Registry (*see first level entry above*)
non judicial aspects of administration and servicing of the Court
structure of the Registry
duty officers of the Registry
Translation and Interpretation Services
unit in charge of applications of victims to participate in proceedings
Victims and Witnesses Unit (*see first level entry below*)

participation of victims
application for participation
dissemination of standard forms for participation
standard forms for application to participate
Victims Participation and Reparations Section
completion of standard forms for participation
content of standard forms
report on applications of victims to Chamber
time to submit application for participation
decision on participation of victims
determination of appropriate stages
manner not prejudicial to or inconsistent with rights of accused or fair trial
modification of decision of Chamber
personal interests of victims affected
victim as defined
views and concerns to be presented and considered
notification to victims
participation in revision proceedings
participation of victims in confirmation hearing
participation of victims in initiation of investigations proprio motu
participation of victims in interim release proceedings
participation of victims in investigation
participation of victims before investigation
participation of victims in pre trial proceedings
participation of victims in proceedings on jurisdiction and admissibility
participation of victims in review concerning reduction of sentence
participation of victims in trial proceedings

penalties
non prejudice to national law (penalties)
fine

Presiding Judge of the Pre Trial Chamber
conduct of confirmation hearing
challenge to admissibility or jurisdiction first to be looked at
order in which to present evidence
preliminary objections or observations at confirmation hearing
preclusion from raising preliminary objections and observations again
proceedings on preliminary objections or observations at confirmation hearing

Pre Trial Division
composition of Pre Trial Division
President of Pre Trial Division
direction of a matter to a Pre Trial Chamber
service in Pre Trial Division

Preamble Rome Statute

Presidency of the ICC
election of the Presidency
functions and powers of the Presidency (*see first level entry above*)

President of the ICC
conclusion of agreement and arrangements
election of the President of the ICC
President is member of Appeals Division
Registrar acts under authority of President of the Court

Presiding Judge
election of Presiding Judge
function of Presiding Judge
Presiding Judge of the Pre Trial Chamber
conduct of confirmation hearing
challenge to admissibility or jurisdiction first to be looked at
order in which to present evidence
preliminary objections or observations at confirmation hearing
preclusion from raising preliminary objections and observations again
proceedings on preliminary objections or observations at confirmation hearing

presumption of innocence

principles and rules of international law
principles of international law of armed conflict

sufficient legal and factual basis to seek warrant of arrest or summons to appear

Prosecutor
death of the Prosecutor
deputy prosecutors
death of Deputy Prosecutor
discipline of Deputy Prosecutor
disciplinary procedure for Deputy Prosecutor's misconduct
misconduct of a less serious nature
pecuniary sanction
reprimand
disqualification of Prosecutor or Deputy Prosecutor
criteria for disqualification of Prosecutor or Deputy
decision of Appeals Chamber
request for disqualification of Prosecutor or Deputy
election of Prosecutor and Deputy Prosecutor
excusing of Prosecutor or Deputy Prosecutor
independence of Prosecutor or Deputy Prosecutor
removal from office of the Prosecutor or a Deputy Prosecutor
resignation of Deputy Prosecutor
salary and allowances
solemn undertaking of Prosecutor and Deputy Prosecutor
term of office of Deputy Prosecutor
discipline of the Prosecutor
disciplinary procedure for Prosecutor's misconduct
misconduct of a less serious nature
pecuniary sanction
reprimand
discretionary powers
disqualification of Prosecutor or Deputy Prosecutor
criteria for disqualification of Prosecutor or Deputy
decision of Appeals Chamber
request for disqualification of Prosecutor or Deputy
duties of Prosecutor with respect to investigation and prosecution
duty to establish the truth
exonerating and incriminating circumstances equally
investigation in all facts and evidence to assess criminal responsibility
effectiveness of investigation and prosecution
respect for victims 'and witnesses' interests
respect for rights of persons

loss
enforcement of reparation order
enforcement similar to enforcement of fines and forfeitures orders
obligation on States Parties to give effect to order on reparations
State's obligation to not modify order for reparation
forms of reparations
compensation as form of reparations
other forms of reparations
rehabilitation (reparations)
restitution
individual reparations
principles relating to reparations
procedure on reparations
hearing on reparations
additional hearing for purposes of reparations or sentencing
hearing at the same time as hearing on sentencing
hearing during trial
initiative of the Chamber to start reparation proceedings
publication of proceedings
representations on reparations
request for reparations
completion of standard forms for reparations
dissemination of standard forms for reparations
standard forms for request for reparations
reparation order
delivery of decision on reparation order

res judicata

revision
decision for revision
grounds for revision
false, forged or falsified evidence
new evidence
removal from office of a Judge
participation in revision proceedings
procedure for revision

rights of accused
adequate time and facilities for preparation of defence
right to request Pre Trial Chamber's assistance in preparation of the defence
Pre Trial Chamber to issue orders or measures under article 56 for defence

Pre Trial Chamber to seek cooperation for preparation of the defence
disclosure of exculpatory evidence
equality of rights of the accused
examination of witnesses
fair hearing
impartial hearing
information of charges in language of accused
prompt information of charges
last word of accused
no onus of rebuttal
no reversal of burden of proof
not to be compelled to testify or confess guilt
presence of accused at trial
disruption of trial
public hearing
protective measures during court proceedings
in camera
prohibition of disclosing information to third parties
pseudonym for victim, witness or person at risk
redaction of public records
special measures for protection under rule 88
testimony by special means
right to interpretation and translation
right to legal assistance
right to remain silent
right to self defence
trial without undue delay
unsworn statement

rights of investigated person/suspect
right to be informed of rights
right to be informed of suspicion
right to counsel during questioning
right to legal assistance
right to remain silent

rights of the detainee and restrictions thereto
access to news by the detainee
accommodation of the detainee
care for infants of the detainee
communication of the detainee
communication of the detainee with counsel

diplomatic and consular assistance
health and safety of the detainee
other rights of the detainee
spiritual welfare of the detainee
visits of the detainee

rights of the person during the confirmation hearing
person challenges the evidence presented by Prosecutor
person objects to charges
person presents evidence
reasonable notice of amendment or withdrawal of charges
right of person to make final observations last

Romano Germanic System of Law

Rome Statute
accession to Rome Statute
amendments to the Rome Statute
adoption of amendments to Rome Statute
Secretary General of the United Nations
amendments to provisions of an institutional nature
entry into force of amendments to procedural law
entry into force of amendments to substantive law
proposals for amendments to Rome Statute
decision of Assembly of States Parties whether to accept proposal
authentic texts of Rome Statute
deposition of instruments
Secretary General of the United Nations
entry into force of Rome Statute
ratification, acceptance or approval
reservation to Rome Statute regarding jurisdiction on war crimes
review of the Rome Statute
convening a Review Conference
Secretary General of the United Nations
first Review Conference
other Review Conferences
withdrawal from Rome Statute
effect
on cooperation
on matters under consideration by a Chamber
on obligations
requisites
time for coming into effect

gravity (sentencing)
imposition of life imprisonment
individual circumstances of the person
maximum sentence
minimum sentence
mitigating circumstances
close to constituting grounds for exclusion of criminal responsibility
mistake of fact
mistake of law
conduct after commission of crime
compensation of victim by convicted person
cooperation with the ICC by convicted person
irrelevance of official capacity
multiple sentence
other relevant factors
imposition of sentence
additional hearing for purposes of reparations or sentencing
delivery of decision on conviction, acquittal and sentence
evidence presented and submissions made during trial
hearing for purposes of forfeiture
bona fide third party
public pronouncement of sentence
purpose of sentencing
deterrence (sentencing)
rehabilitation (sentencing)
reduction of sentence
criteria for review concerning reduction of sentence
factors establishing clear and significant change of circumstances
voluntary assistance in enforcement of judgements and orders
willingness of person to cooperate with ICC
ex officio review of sentence
review after 25 years in case of life imprisonment
review after two thirds of sentence of imprisonment
periodical review of question of reduction of sentence
significant change in circumstances
procedure for review concerning reduction of sentence
composition of Appeals Chamber for reduction of sentence
notification of decision on review of sentence
participation of State of enforcement in procedure for review of sentence

binding nature of sentence on States
confidentiality of request for cooperation and documents
obligation on States Parties to give effect to order on reparations
State's obligation to not modify order for reparation
obligation on States Parties to penalize offences against the administration of justice
State's obligation to not modify decision on fine
State's obligation to not modify order for reparation
States Party's obligation to arrest
participation of States in proceedings before the ICC
declaration of State to accept jurisdiction
acceptance with respect to crime in question
cooperation without delay or exception
States Party's participation in jurisdiction and admissibility proceedings
States observations on non payment of a fine
referral of situation by State Party
review upon request by State or Security Council
decision to request Prosecutor to reconsider decision

status conferences
status conferences before confirmation hearing
status conferences before trial

summons to appear
application for summons to appear
content of summons to appear
issuance of a summons to appear
conditions restricting liberty provided by national law
reasonable grounds to believe in commission of crime by person
sufficiency of summons to ensure person's appearance
service of summons to appear

superior responsibility
chain of command
command responsibility
crimes within effective responsibility and control of superior
effective command, authority and control
de facto authority
de facto organ
de jure authority
failure to take all necessary and reasonable measures
knowledge
awareness that a circumstance exists
awareness that a consequence will occur

ordinary course of events
mental standard lower than knowledge
conscious disregard of information
should have known
official capacity
other superiors responsibility
superior/ subordinate relationship

testimony of witnesses
accomplice's evidence
anonymous witness
audio or video link technology - testimony
compellability of witness
conduct of witness while testifying
corroboration of testimony
cross examination of witness
examination of witness
questioning of witnesses by legal representative
family members' testimony
presence of another witness during testimony
prior recorded testimony
proofing of witness
self incrimination of witness
sexual violence testimony
principles of evidence - sexual violence
transcript of testimony
viva voce testimony
witness undertaking

third party information

threat or use of force

time limits
calculation of time limits
time limits for documents filed with the Court
variation of time limits
Chamber varying time limits on its own motion
variation of time limit upon request
request after expiry of time limit
request before expiry of time limit

transcripts
electronic format of transcripts

transfer
delivery of sentenced person to State of enforcement
temporary transfer of persons in custody of another State
temporary transfer of sentenced person from state of enforcement
transfer of sentenced person to another State
transfer during serving the sentence
transfer upon completion of sentence
transfer of sentenced person to the ICC
transfer for assistance
transfer for hearing revision
transfer of the person to State investigating or prosecuting

transitional justice

trial
admission of guilt
consequences of admission of guilt
plea bargaining
requirements for admission of guilt
conduct of trial
challenge to admissibility or jurisdiction first to be looked at
closing statement
closure of evidence
directions of Presiding Judge
examination of witness
questioning of witnesses by legal representative
last word of accused
opening statement
submission of evidence
deliberations by Trial Chamber
delivery of decision on conviction, acquittal and sentence
guilty plea
joint trials
judgment of acquittal under rule 98bis ICTY Rules of Procedure and Evidence
last word of accused
no case to answer
ordering production of evidence
participation of victims in trial proceedings
place of trial
pre defence conference
pre trial brief
pre trial conference

preparation of trial
conferring with parties
date for beginning of trial
language of trial
status conferences before trial
presence of accused at trial
disruption of trial
Presiding Judge of Trial Chamber
directions of Presiding Judge
maintenance of order in the courtroom
submission of evidence
record of trial proceedings
separate trials
trial in absentia

Trial Chamber
composition of Trial Chamber
alternate judge
presence of judges at each stage of trial
constitution of Trial Chamber
challenge addressed to Presidency before constitution of Trial Chamber
constitution of new Trial Chamber
referral of case to previously constituted Trial Chamber
functions and powers of Trial Chamber (*see first level entry above*)
Presiding Judge of Trial Chamber
directions of Presiding Judge
maintenance of order in the courtroom
submission of evidence

Trial Division
composition of Trial Division
President of Trial Division
service in Trial Division

Trust Fund for Victims
allocation of funds
awards for collective reparation through Trust Fund
awards for individual reparation through Trust Fund
establishment of Trust Fund for victims
management of Trust Fund for victims
transfer of money or other property collected through fines and forfeiture to Trust Fund
written or oral observations by representatives of Trust Fund
use of other resources for benefit of victims

occupation
non international armed conflict
awareness of conflict
awareness of nature of conflict
discriminatory intent (crimes against humanity and war crimes)
large scale commission
nexus of act with armed conflict
part of plan or policy
prohibited means of warfare
employing asphyxiating, poisonous or other gases, liquids, material or devices
employing bullets which expand or flatten easily
employing poison or poisonous weapons
employing prohibited weapons, projectiles, material and methods of warfare
annex to Statute
prohibited methods of warfare
attacking undefended towns etc.
attacks directed against buildings dedicated to religion, education, art, science, hospitals
attacks directed against civilian objects
attacks directed against civilians
intentionally directing attacks against civilian population
individuals not active in hostilities
attacks directed against humanitarian/peacekeeping personnel or objects
attacks against humanitarian/peacekeeping personnel
attacks against personnel, objects involved in humanitarian assistance
attacks against personnel, objects using the emblem of the Geneva Conventions
attacks that cause disproportionate incidental damage
civilians
excessive/disproportionate
injury to persons
loss of life
natural environment
objects
subjective element
conscripting, enlisting or using children under 15
declaring that no quarter will be given
improper use of flag of truce, military insignia, or distinctive emblem of Geneva Conventions

distinctive emblem of Geneva Conventions
flag of truce
military insignia of enemy or of United Nations
improper use of flag etc. resulting in death or personal injury
starvation of civilians as method of warfare
terror against civilian population
treacherously killing or wounding combatant
treacherously killing or wounding individuals belonging to the hostile nation or army
use of human shields
exploiting the presence of the civilian population for military objectives
starvation of civilians as method of warfare
war crimes against persons
biological, medical or scientific experiments
serious consequence of experiment
unjustified medical procedures
causing great suffering
causing serious injury
compelled participation in operations of war
compelled service in forces of hostile power
confinement, unlawful, as war crime
conscripting, enlisting or using children under 15
cruel treatment
delay in repatriation of prisoners of war
deportation or forcible transfer as a war crime
deprivation of judicial guarantees
enforced prostitution as a war crime
enforced sterilization as a war crime
forced labour as a war crime
forced pregnancy as a war crime
hostage taking
inhumane treatment as war crime
killing as a war crime
killing of combatant hors de combat
mutilation as a war crime
other grave sexual violence
outrages on personal dignity
rape as a war crime
sexual slavery as a war crime
sexual violence as a war crime

slavery as a war crime
torture as war crime
transferring own civilians into occupied territory
treacherously killing or wounding combatant
treacherously killing or wounding individuals belonging to the hostile nation or army
war crimes against property and other rights
abolishing or suspending legal rights
destroying enemy property
extensive appropriation of protected property
extensive destruction of protected property
military necessity of destruction or appropriation
pillaging of town or place
seizing enemy property

warrant of arrest
amendment of warrant of arrest
modification or addition of crimes
requirements for amendment of arrest warrant
application for warrant of arrest
challenge to warrant of arrest after detention
content of application for warrant of arrest
content of warrant of arrest
effectiveness of warrant of arrest
issuance of warrant of arrest
arrest appears necessary
ensuring appearance at trial
ensuring no obstruction to or endangerment of investigation or court proceedings
preventing commission of crime or similar crimes
reasonable grounds to believe in commission of crime

withdrawal from Rome Statute
effect
on cooperation
on matters under consideration by a Chamber
on obligations
requisites
time for coming into effect

withdrawal of charges
ineffectiveness of arrest warrant
withdrawal of charges after commencement of trial
permission of Trial Chamber to withdraw charges

withdrawal of charges before the confirmation hearing
reasonable notice of amendment or withdrawal of charges

witnesses
protection of witnesses
appropriate measures for protection
measures not inconsistence with fair and impartial trial
measures not prejudicial to rights of the accused
Victims and Witnesses Unit (*see first level entry above*)
safe conduct of witnesses
testimony of witnesses
accomplice's evidence
anonymous witness
audio or video link technology - testimony
compellability of witness
conduct of witness while testifying
corroboration of testimony
cross examination of witness
examination of witness
questioning of witnesses by legal representative
family members' testimony
presence of another witness during testimony
prior recorded testimony
proofing of witness
self incrimination of witness
sexual violence testimony
principles of evidence - sexual violence
transcript of testimony
viva voce testimony
witness undertaking
voir dire procedure
written statement of witness in lieu of oral testimony

INDEX

A

B

C

D

E

F

G

H

I

M

N

O

P

R

S

T

U

W

Z

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Morten Bergsmo (editor)

'Positive complementarity' has become a trendy term since the 2010 Kampala Review Conference. Little thought went into its definition when it was first coined in informal discussions at the International Criminal Court in 2003. 'Complementarity' in the Court's Statute is a passive admissibility threshold below which the Court will not investigate or prosecute. The process to construct national ability to investigate and prosecute core international crimes, on the other hand, requires tireless efforts by numerous international and national actors for many years to come.

Democratizing the access to legal information should lie at the heart of such capacity building and knowledge-transfer. One way of reducing existing conditions of inequality faced by war crimes lawyers and investigators operating in different jurisdictions is to facilitate the direct access of national actors to legal sources and knowledge.

This book seeks to make the existing capacity building discourse more practical, focused and real. It brings together contributions by persons with expertise in the practice of capacity building, the development and maintenance of tools that can be used to make knowledge-transfer more effective and sustainable, and international criminal law. The Legal Tools Project of the International Criminal Court – a technical platform that can be used by those who intend to strengthen capacity – is discussed in some detail.

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