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COLLECTIVE VIOLENCE AND INTERNATIONAL CRIMINAL JUSTICE

An interdisciplinary approach

Edited by

Alette Smeulers

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I sincerely hope that this book will further contribute to this newly developing field of international crimes and of international criminology and that it will stimulate the academic and interdisciplinary debate on international crimes in order to enhance our knowledge and understanding of these crimes and thus ultimately contribute to preventing such crimes in the future.

Alette Smeulers
Amsterdam, June 4 2010

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CHAPTER 17

PRESERVING THE OVERVIEW OF LAW AND FACTS: THE CASE MATRIX

Morten BERGSMO, Olympia BEKOU and Annika JONES*

1. INTRODUCTION

Since the establishment of the *ad hoc* International Criminal Tribunals for the Former Yugoslavia and Rwanda,[1] other internationalized 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.

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

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1 S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., art. 8, U.N. doc. S/Res/827 (1993) and S.C. Res. 955, Annex, U.N. SCOR, 49th Sess., 3453d mtg., art. 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, (Rome Statute/ICCSt).

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

application of law to the facts of the case 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, thereby 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 internationalized criminal jurisprudence (approximately 700 pages); (4) a 'Means of Proof Digest' that provides structured access to discussions in internationalized criminal jurisprudence on types or categories of facts that may be resorted to in order to prove legal requirements of core international crimes and modes of liability (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 for overall evidence management. This chapter only deals with existing function (5), the evidence database structure for cases, suspects, incidents and crimes.

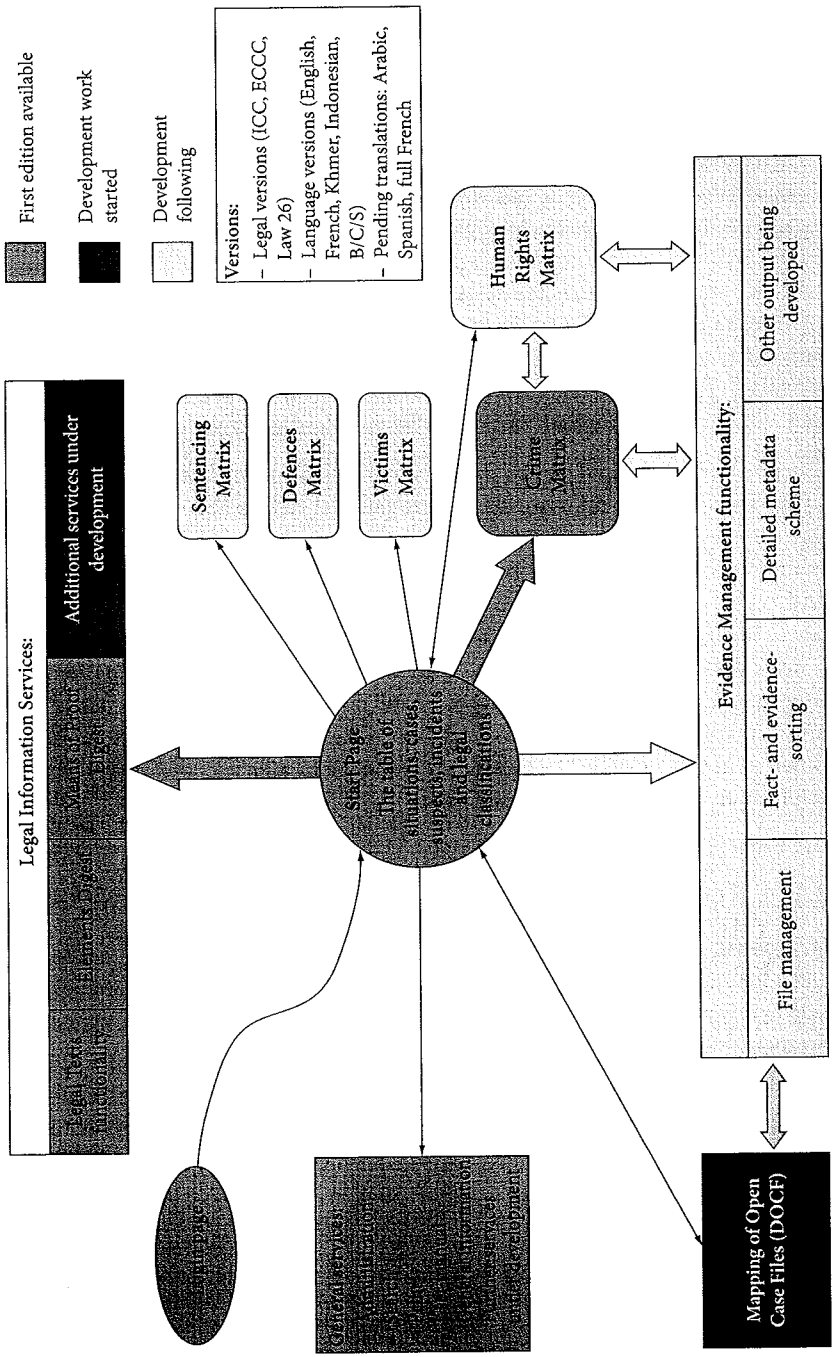
The chapter discusses how the Case Matrix contributes to alleviating some of the challenges in the melding of facts and law in core international crimes cases. It begins by highlighting some legal specificities of core international crimes cases and the importance of a proper understanding of the legal requirements of a case

5 The Legal Tools are available through the International Criminal Court's website, see www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/.

6 That is, at the start of 2010.

7 For the Legal Tools Database, see www.legal-tools.org.

Illustration 1. Development plan for Case Matrix functionality



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.

2. 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.

2.1. UNDERSTANDING THE LEGAL REQUIREMENTS FOR THE PROSECUTION OF CORE INTERNATIONAL CRIMES

The crimes of genocide, crimes against humanity, war crimes and aggression have been recognized by the States drafting the Statue 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 fulfill their role under the ICC's complementarity regime and avoid

8 Article 5 ICCSt.

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. Article 5(2) ICCSt.

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 crimes 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 crime. Unlike ordinary crimes found under domestic criminal law, core international crimes require proof of certain 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 Crimes document with

10 Article 17 ICCSt.

11 Article 9 ICCSt.

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.

13 Bergsmo and Webb 2007.

14 Article 8(2) ICCSt.

15 Article 7(1) ICCSt.

16 Elements of Crimes document, Article 6.

17 Articles 25 and 38 ICCSt. See further Bergsmo and Webb 2007.

the perpetrator in mind. But perpetration is only one of several ways or forms of participating in the realization 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 Modes of Liability document' detailing the legal requirements of each mode of liability. The specialized 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, and over which some lack of 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 internationalized 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 criminal law may raise greater challenges for some national tribunals that work with fewer resources and less specialized expertise, international courts and tribunals, including the ICC, are also likely to be challenged when applying

18 Greppi 1999; Danner and Martinez 2005; Meloni 2007 and Van Sliedregt 2009.
19 Werle 2007.
20 Ferdinandusse 2006: 106.
21 Ferdinandusse 2006: 106.
22 See Report of the OSCE Mission to Bosnia and Herzegovina, War Crimes Trials Before the Domestic Courts of Bosnia and Herzegovina 2005, available at www.oscebih.org, p. 30.

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.

2.2. 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 of 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 analyze and organize the materials, and assess their relevancy and weight in light of the legal parameters of the case. The ability to organize 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 prioritization, 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 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 defense 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.

23 See, for example, a description of the difficulties faced by the ICTY in preparing a case for prosecution. Keegan 1997: 125–127.

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

3. 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 facts is important for several reasons.

24 For example, Burke-White (2005: 579) describes the limited resources available at the national level in the Democratic Republic of the Congo.

25 Blum 1998: 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 www.fraudadvisorypanel.org.

26 See brochure on the Case Matrix available at www.legal-tools.org/en/what-are-the-icc-legal-tools/.

3.1. 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 which 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 which 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 on the ability of criminal justice institutions to pursue justice in any particular case; it may also affect the quality of justice that the institution ultimately renders.[28] The establishment of international courts and tribunals has 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 which 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 internationally. The process of judicial cross-referencing between different tribunals has been thought to play a

27 Article 17 ICCSt. See further Stahn 2008 and Segall 2003.

28 Burke-White 2003: 16.

29 Matz-Lück 2008: 99–212.

30 Ellis 2002–2003; Burke-White and Kaplan 2009.

31 Article 17 ICCSt.

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, thereby adding 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 that they do so to the highest possible standards.

3.2. 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 facts 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 a 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 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 which 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 organize 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 which 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, defense 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.

3.3. 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 defense 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

32 See Cogan 2008; Helfer and Slaughter 1997–1998; Koch 2003–2004; Perju 2007; Rahdert 2007 and Slaughter 2004.

33 Straus 2004 and Bergsmo et al. 2009.

34 It has been anticipated that the cost of the two *ad hoc* tribunals will "probably top at least $2.4 billion". Romano 2005: 296. On the costs of the *ad hoc* tribunals, see also Wippman 2006. 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 Ingadottir 2004.

35 Schiff 2008.

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 Article 67(1)(a) and (b) ICCSt.

39 Cogan 2002.

accused to a fair trial will depend on the manner in which the criminal justice process is carried out, in particular how evidence is organized and presented by the prosecution. In a number of recent decisions, which will be discussed below, the ICC has emphasized 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 defense 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.

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 which 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.

3.4. 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 facts. The next section will consider the ability of the Case Matrix application to provide such an approach.

40 ICCPR, Article 14(3)(c).
41 Boas 2007: 31.
42 See report of the OSCE, *supra* note 23, p. 30.

4. THE CASE MATRIX AND THE FACILITATION OF THE APPLICATION OF LAW TO FACTS

The previous sections have outlined the difficulties faced in applying law to facts in core international crimes cases and the implications of 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.

4.1. THE CASE MATRIX

The Legal Tools, of which the Case Matrix is an integral part, are a range of digital tools which 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-coordinated 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 which 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-

43 Www.legal-tools.org/en/what-are-the-icc-legal-tools/.
44 See www.legal-tools.org/en/what-are-the-icc-legal-tools/2003-2005/.
45 The Legal Tools Outsourcing Partners. See www.legal-tools.org/en/work-on-the-tools/.

1990s shows that these work processes are far too labor 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 shares the burden of work, 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 Cocoordinator of the Legal Tools Project, who is responsible to the ICC for the coordination 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(ized) 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 all members of the team 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 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

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). See www.legal-tools.org/en/work-on-the-tools/.

48 Bergsmo and Webb 2007: 210.

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 8,000 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 organizations and counsel involved in core international crimes cases.[53] By 2012, all specialized 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 organize evidence and create a prosecutorial strategy, by defense council to assess the strength of the evidence submitted by the prosecution and to develop the client's defense, 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, organization of

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

50 Www.casematrixnetwork.org/.

51 Bergsmo and Webb 2007: 210.

52 Www.legal-tools.org/en/what-are-the-icc-legal-tools/.

53 See www.casematrixnetwork.org/users/.

54 Www.casematrixnetwork.org/network-advisers/.

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 organizations.[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.

4.2. THE FACILITATION OF THE APPLICATION OF LAW TO FACTS 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 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 which 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 organized 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.

55 Www.casematrixnetwork.org/.

56 Concannon (2000: 234) 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'.

5. THE ICC AND THE CASE MATRIX

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

5.1. 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 which correlates 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 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, which 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

57 *Situation in the Central African Republic in the case of the Prosecutor v. Jean-Pierre Bemba Gombo,* "Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties" (ICC-01/05-01/08-55), 31 July, 2008.

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

59 *Ibid.,* para. 69.

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

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 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

61 *Ibid.*, para. 8.
62 *Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol" (ICC-01/04-01/07-956), 13 March 2009.
63 ICC-01/04-01/07-T-52-ENG ET WT 27-11-2008, p. 58, lines 9-10.
64 *Situation in the Democratic Republic of the Congo in the case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Ordonnance enjoignant aux participants et au Greffe de déposer des documents complémentaires" (ICC-01/04-01/07-788), para. 7.
65 ICC-01/04-01/07-956, para. 1.
66 *Ibid.*, para. 9.
67 *Ibid.*, para. 9.
68 *Ibid.*, para. 11.
69 *Situation in the Central African Republic in the case of the Prosecutor v. Jean-Pierre Bemba Gombo* (ICC-01/05-01/08-682), 29 January 2010.

submission of evidence, reflecting several of the issues discussed in the preceding section.

5.2. 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.

5.2.1. 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 defense 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 which 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 recognized 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.

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.*

5.2.2. *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 or impossible to comprehend the usefulness for the case merely puts the defense 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 organized manner, presenting it in the format it proposed.

In a similar manner, the Trial Chamber recognized the concerns of the Defense regarding the amount of evidence in the case and entitlement to be informed of the precise evidentiary basis of the Prosecution's case, and emphasized that the methodology would "ensure that the accused have adequate time and facilities for the preparation of their defense, 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 facts 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.

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.

6. 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 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 caused by the large quantities of facts and evidence that must be organized 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 utilized in this manner, the Case Matrix can assist both international and national institutions to maximize 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.

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