

## Innovations at the International Criminal Court: bringing new technologies into the investigation and prosecution of core international crimes

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### 1. Introduction

Since 2003, the Legal Advisory Section (LAS) of the Office of the Prosecutor (OTP) at the International Criminal Court (ICC) has been working steadily on a range of online legal services known as the *Legal Tools*. The *Tools* are a suite of documents, databases, commentaries and applications on international criminal law and justice. They can be considered as a digital library containing all the key sources of international criminal law.

### 2. Identifying the need for the Legal Tools

The LAS has drawn on more than ten years of experience from the practice of international criminal justice to develop the *Legal Tools* in ways which are work-process oriented and as forward-looking as possible. The starting point for the project was the observation that core international crimes cases are characterised by great factual complexity. Investigating a crime of murder in an international criminal jurisdiction is not simply a matter of proving that the perpetrator killed one or more persons with the requisite mental state. There are contextual and circumstantial elements that must be proven for every crime and an infinitely higher volume of crimes than in cases of ordinary crime in peace time. Murder as a crime against humanity, for example, requires proof that the conduct was committed as part of a widespread or systematic attack directed against a civilian population and the perpetrator knew that the conduct was part of or intended the conduct to

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be part of that widespread or systematic attack.<sup>2</sup> The war crime of wilful killing, on the other hand, requires proof of several contextual/circumstantial elements, including the protected status of the persons killed and the fact that the killing took place in the context of an (international) armed conflict.<sup>3</sup> The approach to investigating international crimes is further complicated by the legal requirements of the modes of liability, which have an average of three to four specific elements. More than one mode of liability is often charged for the same conduct, so there is an accumulation of elements which prosecutors or judges would normally not work with in a national jurisdiction and therefore are not very familiar with. Finding and making use of all the relevant legal information has proven a considerable challenge.

The result of these multiple challenges has all too often been a costly loss of overview in core international crimes cases. Investigators and prosecutors lose overview and focus when confronted with facts so varied and complex that no one person can hold an entire case in his or her head alone. This leads to imprecision in the formulation of the theory of liability and the organisation of the evidence. It also makes it more difficult to ensure continuity of knowledge-bases from one stage in the work process to another. All in all this tends to bloat the cases, as prosecutors err on the side of including potential evidence, and this can add up to thousands of exhibits. Proceedings are inevitably extended to incorporate this mass of information. Ultimately, the very credibility of international justice is questioned as the costs grow significantly.

After extensive observation of these factors in several internationalised criminal jurisdictions, the LAS found that the problems experienced by international prosecutors have much in common with those faced by serious fraud and organised crime workers in national criminal justice systems (more so than those who work with violent crime in national systems). Serious fraud shares some key features with international crimes: factual complexity, a tendency for the scope of the case to expand exponentially, and the need to prove multiple legal requirements ranging from the contextual to the specific. After conducting several study visits to leading serious fraud offices and national prosecution services in Europe and the United States, the LAS found that there was a genuine need for legal tools that facilitated targeted legal research, harmonised the work of team members, and provided a strong case overview function driven by the logic of the applicable law. From this foundation, the *Legal Tools* project began.

### 3. Objectives

The *Legal Tools* have been designed and developed with several objectives in mind. There are five global objectives for the overall project. First, the *Legal Tools* aim to rationalise legal research, learning and drafting processes linked to international criminal law, in the interests of fairness, increased quality of work product and cost efficiency (*inter alia*, by reducing duplications of effort). Second, the *Tools* aim to contribute to competence building in national criminal justice systems through sharing information and knowledge as part of the complementarity principle enshrined in the ICC Statute. By sharing the *Tools*, the cooperation between the ICC and these actors is strengthened. Third, the *Legal Tools* are expected to contribute to making core international crimes work processes more rational and cost-effective, and therefore strengthen their longer term credibility and legitimacy. Fourth, it is hoped that the *Tools* will contribute to the harmonisation of the development of international criminal law by providing a common digital platform for research in this field. And finally, the *Tools* should give concrete content to networks that the ICC is building with national jurisdictions, regional organisations, non-governmental organisations, and private lawyers.

In terms of specific goals, three objectives can be identified for the *Legal Tools*. First, there is the aim of creating a virtual library of all sources of international criminal law. This could well be impossible for the sources of mature areas of law such as contracts or domestic criminal law, but is actually within reach in international criminal law given the relative youth of the discipline. There has only been a decade's worth of international jurisprudence since the International Military Tribunals for Nuremberg and Tokyo, and there are less than ten internationalised criminal jurisdictions in operation. For reasons touched upon in the previous section, these jurisdictions tend to have lengthy proceedings and issue fewer judgments than domestic criminal courts do. Second, the *Tools* are structured on the basis of the legal logic of a standard user of international criminal law. Despite the digital platform, the user should feel as if he or she is in a well-organised shelf law library when working with the *Tools*. Third, the *Tools* have been built on a platform that is as universally available as possible with a stand-alone capacity. The aspiration of the ICC is for the *Tools* to be used with equal effectiveness in The Hague and Phnom Penh with no need for expensive software or sophisticated information technology support. In terms of aims related to future development, the ICC is in the process of transforming the document collections into searchable databases to further enhance the utility of the *Legal Tools*.

<sup>2</sup> ICC Statute article 7(1)(a), crime against humanity of murder.

<sup>3</sup> ICC Statute article 8(2)(a)(i), war crime of wilful killing.

#### 4. What are the Legal Tools?

As stated at the beginning of this note, the *Legal Tools* are a legal information system consisting of collections, databases, commentaries and applications. In concrete terms, these services include but are not limited to the following:

- The *Elements Commentary*, a doctrinal commentary to each element of the crimes and legal requirement of the modes of liability in the ICC Statute, fully integrated with the *Case Matrix*, described below. It will only become available to users of the *Matrix*, who must enter into an agreement with the ICC.
- The *Means of Proof Commentary* (MPC), a detailed compilation of international criminal jurisprudence and commentary on the type or category of facts which can constitute evidence for the existence or satisfaction of the specific legal requirement of an international crime or mode of liability. The MPC can be used in several ways. First, it is a free-standing legal reference tool that can assist in the preparation of cases by showing which types of facts have been relevant or decisive in proving the elements of a crime in the past, or by suggesting the types of facts that could prove crimes which have not yet been prosecuted, such as forced pregnancy. Second, the MPC forms part of the legal reference services section of the *Case Matrix*. The MPC numbers 6000 pages and is continuously updated to reflect jurisprudential developments.
- The *Case Matrix* is a unique, law-driven case management application that explains the elements of crimes and legal requirements of modes of liability for all crimes in the ICC Statute. It serves as a user's guide to proving international crimes and modes of liability and provides a database service to organise and present the potential evidence in a case. The *Matrix* is only available to users working on core international crimes cases on the basis of an agreement with the ICC. It is further described in the next section.
- The *Proceedings Commentary* is a detailed commentary on key procedural and evidentiary questions in the ICC Statute, the Rules of Procedure and Evidence and the Regulations of the Court. This tool will not be made publicly available in the near future.
- The ICC »Preparatory Works« Database contains more than 9000 official and unofficial documents related to the negotiation and drafting of the ICC Statute, the Rules of Procedure and Evidence and the Elements of Crimes, issued by States, NGOs, academic institutions, the United Nations and other international organisations between December 1989 and September 2002. It is one of several databases and collections available through the Legal Tools service on the ICC website ([http://www.icc-cpi.int/legal\\_tools.html](http://www.icc-cpi.int/legal_tools.html)).
- Selected documents from international (ised) criminal jurisdictions, including the primary law, indictments, judgments and selected decisions of international and allied military tribunals sitting in Nuremberg and Tokyo, the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International

Criminal Tribunal for Rwanda (ICTR), the United Nations Mission in Kosovo mechanism, the Special Court for Sierra Leone (SCSL), the East Timor Panels for Serious Crimes, the Iraq High Tribunal (IHT) and the Extraordinary Chambers in the Courts of Cambodia (ECCC). These services are available through the ICC website.

- Selected documents from national criminal jurisdictions, including national instruments implementing the ICC Statute and the most relevant decisions issued by domestic courts and tribunals concerning genocide, crimes against humanity and war crimes. These services are also available through the ICC website.
- Selected international treaties, judgments of the International Court of Justice, decisions of regional and international human rights bodies, Internet websites and academic works relevant to the research and practice of international criminal law and related areas of international law. These services are partially available through the ICC website.

The *Legal Tools* amount to over 10 gigabytes of legal information and thousands of pages of documents that have never previously been collected, organised and made available in one place.

#### 5. The Case Matrix application

One of the most exciting innovations within the *Legal Tools* project is the *Case Matrix*. It is a case management application that is tailor-made to core international crimes cases. The concept and content of the *Case Matrix* has been developed within the LAS 2003-05, with the invaluable contributions by LAS Law Clerks. The technical platform has been implemented by the Institute of Law and Informatics at the University of Saarbrücken in Germany.

The idea behind the *Case Matrix* was to develop a case management application that addresses the main challenges from the analysis/early investigation stage of core international crimes cases through trial, appeal, reparations and revision proceedings. The *Matrix* is customisable to different user groups (judges, prosecutors, investigators, defence counsel, victims' counsel, states, and human rights non-governmental organisations) in different criminal procedure regimes. It is designed to respond to the different information needs at every stage of the criminal justice process.

The *Case Matrix* has three main functions. First, it details the elements of crimes and modes of liability for every crime under the ICC Statute. Each element or requirement is hyperlinked to an on-line legal commentary which elaborates the legal standard in question. Second, it provides a comprehensive list of the means of proof for elements of crime and modes of liability. The term »means of

proof« refers to all types or categories of facts which can constitute potential evidence for the existence or satisfaction of a specific legal requirement of a crime or mode of liability. More detailed »subsidiary means of proof« are also included wherever possible. Each means of proof is hyperlinked to a document providing legal authority, examples of concrete pieces of evidence, and some evidentiary commentary. This is designed to facilitate, and to avoid the unnecessary duplication of, legal research. Finally, the *Matrix* also includes a database service to organise and present the potential evidence gathered in a particular case in a manner which can be tailored to different users such as prosecutors, judges, defence counsel and victims' counsel, and to any criminal justice system. This gives a 'snapshot' overview of the substantive status of a case at any stage of the work process. The emphasis on this feature is a direct result of the challenge that triggered the *Legal Tools* project – the difficulty of developing and preserving a proper overview of information and potential evidence in large core international crimes cases.

The *Case Matrix* has an 'implied methodology' making the work with facts or evidence more precise and focused by having the legal requirements broken to the smallest components of the law. The application can be used to empower team members working on a case by providing unrivalled access to legal information and encouraging autonomous learning through their computers, and by that making them less dependent on experts or other 'legal information controllers'. This is particularly important from a national competence building perspective. The experiences of the hybrid tribunals have taught us that the transfer of knowledge from international experts to local staff is notoriously hard to achieve in practice. The *Case Matrix* also has the potential to rationalise the co-existence of different professional actors within the criminal justice process, such as prosecutors, investigators and analysts, but providing a common, law-driven approach to building and working with a case.

The *Case Matrix* is designed for use within and outside the ICC. Outside users will include national criminal justice systems dealing with core international crimes (investigators, prosecutors and judges), specialised national war crimes units, defence counsel, victims' counsel, and non-governmental organisations engaged in documenting and reporting on gross human rights violations amounting to core international crimes. A prototype version of the *Matrix* was implemented at an early stage of the ICC investigation of alleged crimes in Darfur. Outside the ICC, the *Matrix* has been introduced in the work of the ECCC, the IHT, the War Crimes Chamber in Bosnia and Herzegovina, the national war crimes units in Canada, Denmark, Indonesia, Norway and the Netherlands, to defence counsel before the ICC, ICTR and ICTY, and to Human Rights Watch and the Norwegian Helsinki Committee. The *Matrix* has already been translated into Arabic, Bahasa Indonesian and Khmer. There are further expressions of interest in the *Matrix*, notably from the ICTR, the SCSL, the International Commission for Missing Per-

sons, OSCE Macedonia, the UNHCR, and countries such as China, Italy, Portugal and Serbia.

Access to the *Case Matrix* is only granted to users who are working on core international crimes cases and on the basis of an agreement with the ICC. In this way a virtual community of *Matrix* users is developed in an organised fashion, where all users are working off *Matrix* versions which can be updated easily as the application is enhanced through careful observation of user experience.

## 6. *The Legal Tools as public goods*

The first version of the *Legal Tools* was completed in December 2005. It has been realised with limited human resources and minimal costs thanks to the active assistance of short-term staff and Law Clerks who worked in the LAS as part of the ICC Internship Programme. The *Legal Tools* have since moved from being a Section-based activity to an ICC-wide project, and from an internal Court service to common property. Many of the *Legal Tools* services are already freely available at the ICC website.

The *Legal Tools* must continue to reflect the developments in international criminal law and to be improved from a technical perspective in order to achieve the highest standards of quality, scope and relevance. Given the limited human resources available in the ICC-OTP, the further development work has been outsourced to agencies with expertise in this field. This outsourcing activity is underway with partners from around the world. The activities of the outsourcing agencies are regulated by detailed operational protocols and quality control by an advisory committee composed of representatives from every ICC organ and an external expert advisory group of law and technology specialists. An ICC Trust Fund has been established to facilitate and co-ordinate the introduction, implementation and use of the *Legal Tools*, in particular the *Case Matrix*, by users outside the ICC, an activity that is not funded over the regular budget of the ICC.

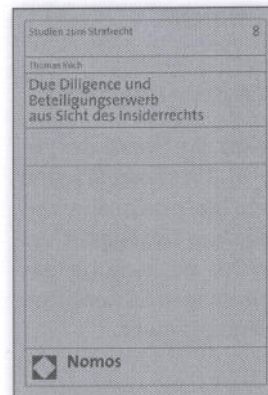
Since the *Legal Tools* became available to the public on the website of the ICC in 2006, the ICC website is becoming the focal point for practitioners and scholars of international criminal law around the globe as the host of the most comprehensive virtual international criminal law library.

## *Abstract*

Die vom Internationalen Strafgerichtshof (IStGH) entwickelten *Legal Tools* stellen einen bedeutenden Schritt in der Entwicklung der internationalen Gerichtsbarkeit dar. Das Projekt fasst eine nie dagewesene Menge an rechtlicher Information, umfassender Kommentarliteratur sowie Dienstleistungen für Fallbearbei-

tung und Fallmanagement im Bereich der internationalen Strafgerichtsbarkeit in einer einzigen öffentlichen Plattform zusammen. Die *Legal Tools* sind auf die Bedürfnisse derjenigen zugeschnitten, die mit Fällen von internationalen Kernverbrechen wie Völkermord, Verbrechen gegen die Menschlichkeit und Kriegsverbrechen zu tun haben und sind für die verschiedensten Nutzergruppen, wie Richter, Ermittler, Ankläger, Beschuldigten- und Opferanwälte sowie Nichtregierungsorganisationen hilfreich. Ihnen allen macht der IStGH diese Quellen im Geiste des im Römischen Statut verankerten Grundsatzes der Komplementarität zugänglich.

# Studien zum Strafrecht

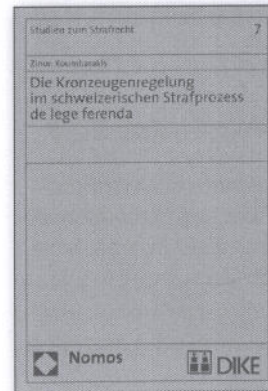


## Due Diligence und Beteiligungserwerb aus Sicht des Insiderrechts

Von Dr. Thomas Koch

2007, Band 8, 318 S., brosch., 74,- €, ISBN 978-3-8329-2427-0

Der Autor behandelt die Zulässigkeit von Unternehmenstransaktionen nach due diligence-Prüfungen. Dabei arbeitet er die Grundlagen des deutschen Insiderstrafrechts umfassend auf. Im Mittelpunkt der Untersuchung stehen Lösungsmöglichkeiten für Paketerwerbe und Angebote nach dem Wertpapierübernahmegesetz (WpÜG).



## Die Kronzeugenregelung im schweizerischen Strafprozess de lege ferenda

Von Zinon Koumbarakis

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Die relativ neue Thematik der Kronzeugenregelung wird in der schweizerischen Literatur zum Straf- und Strafprozessrecht, wenn überhaupt, nur sehr kurz und unvollständig behandelt. Das Werk untersucht schwerpunktmäßig die Systemkonformität von Kronzeugenregelungen im schweizerischen Strafprozess. Vor dem Hintergrund der zunehmenden Komplexität der zu ermittelnden Sachverhalte und der sich weltweit verschärfenden Lage zur Bekämpfung von organisierter Kriminalität und Terrorismus liefert die Arbeit für die Wissenschaft und die Praxis wertvolle Erkenntnisse und Anregungen, gerade auch für die deutsche Strafrechtswissenschaft.

