THE NATURE OF INTERNATIONAL CRIMES AND EVIDENTIARY CHALLENGES: PRESERVING QUALITY WHILE MANAGING QUANTITY

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1. Introduction

Scholarship no longer regards international criminal procedure as a collection of predominantly common law and civil law particles but has started viewing it as a *sui generis* system.¹ This is not surprising. International criminal courts and tribunals have been developing procedures and practices that would enable them to deal with the complexities and extremities of prosecuting the notoriously fact-rich cases involving international crimes. At the same time, the tribunals have had to overcome the institutional handicaps of investigating crimes committed far away with little cooperation on the ground and without police forces of their own. These unique challenges, as well as the fact that the tribunals are composed of professionals from different domestic legal systems, could not but lead to the gradual consolidation of international criminal procedure as a distinctive system.

Furthermore, an increasing amount of scholarly attention focuses on how these courts deal with the challenge of attaining reliable evidence.² The jurisprudence from the International Criminal Court demonstrates that such attention is well warranted, as acquiring high-quality evidence has proved to be a major hurdle in practice. For instance, the unanimous judgment acquitting Mathieu Ngudjolo Chui was the consequence of evidentiary

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deficiencies in the form of the incredibility of all three key witnesses.\(^3\) In the *Situation in Kenya*, Chief Prosecutor Fatou Bensouda filed a notification in early 2013 stating that her office was dropping the charges, which had been confirmed by the Pre-Trial Chamber, against one of the accused, Francis Muthaura, due to the limited amount of witnesses willing and able to testify.\(^4\) Regarding another accused in the same situation, Kenya’s President Uhuru Kenyatta, Bensouda requested in December 2013 that the trial be postponed for three months, stating her office’s inability to proceed after one witness had asked to withdraw and another had admitted to lying.\(^5\) In the *Laurent Gbagbo* case, the Pre-Trial Chamber adjourned the hearing on the confirmation of charges, urging the prosecutor to provide further evidence in a decision containing a slap on the wrist for the OTP’s high reliance on reports of non-governmental organizations and press articles, i.e. anonymous hearsay evidence.\(^6\)

For domestic practitioners—the primary actors expected to investigate and prosecute international crimes both now and (even more so) in the future—it will be very useful to know what is typical for those crimes, and which problems are inherent to the efforts of constructing and proving these cases in court, regardless of the institutional framework employed for those purposes. Evidentiary difficulties as identified by scholarship and case law of the international criminal tribunals are not all forum-neutral, but it is reasonable to assume that some are. In dealing with this category of cases, domestic courts face certain evidentiary challenges, too, as shown by a recent Dutch case. In March 2013, the Dutch District Court in The Hague convicted Yvonne Basebya for incitement to commit genocide in Rwanda in 1994, but acquitted her of all other charges due to a lack of evidence. The decision emphasized that in establishing the facts in the case the court faced formidable evidentiary

\(^3\) See Judgment pursuant to article 74 of the Statute, *Ngudjolo*, ICC-01/04-02/12-3-tENG, TC II, ICC, 18 December 2012, paras 124, 138-41, and 157-9 (witness P-250); paras 171-83, 189-90 (witness P-279); paras 202, 204-7, 209, 211-3, 218-9 (witness P-280).


\(^5\) Notification of the removal of a witness from the Prosecution’s witness list and application for an adjournment of the provisional trial date, *Kenyatta*, ICC-01/09-02/11-875, TC V(B), ICC, 19 December 2013, paras 2-3.

\(^6\) Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute, *Gbagbo*, ICC-02/11-01/11-432, PTC I, ICC, 3 June 2013 (‘*Gbagbo adjournment decision*’), paras 27-35.
challenges, such as the time that had passed since the crimes took place and the precariousness of witnesses’ memories.7

Despite the presence of forum-neutral evidentiary challenges in the investigation and prosecution of international crimes, the discourse has thus far been controlled by the conceptual divide between the international and national tiers of criminal adjudication. This Chapter suggests a change of methodological perspective. Focusing on the nature of the crime and keeping the domestic practitioner in mind, it raises the following interrelated questions. To what extent are the above-mentioned challenges inherent to the kind of court, i.e. forum-specific, and to what extent are they typical for the nature of international crimes? To be able to answer this twofold query we must first explain what makes international crimes different. If international crimes are indeed distinguishable from ‘regular’ domestic crimes, and the difficulties faced at the international level are not forum-specific but crime-specific, then international criminal tribunals and domestic courts face similar evidentiary challenges. Solutions to these challenges developed by the international tribunals will also be a useful source of guidance for the investigative and prosecutorial endeavors at the national level. Such solutions may then be found in crime-focused analysis instead of through a sui generis approach to scrutinizing the law and practice of international criminal prosecutions. Although some of the evidentiary challenges in investigating, prosecuting, and adjudicating international crimes are universal and not forum-specific, the nature of such crimes could arguably serve as a harmonizing factor for procedures and practices utilized in this category of cases across the board. The idiosyncrasies of international criminality may operate as a constraint on the growing pluralism between international and national criminal procedure, at least in the cases involving international crimes.

In testing these ideas, this Chapter starts by discussing the idiosyncrasies of international crimes and the special challenges of investigating, prosecuting, and adjudicating them, including the distinct goals typically associated with international criminal justice (section 2). It then continues by connecting these characteristics to the debate on evidentiary hurdles intrinsic to the investigation and prosecution of international crimes. Section 3 examines how those hurdles affect evidentiary processes, regardless of the forum—national or international—in which the crimes are prosecuted.

2. The Nature of International Crimes: Differentiating Factors

The distinction between ordinary and international crimes is not a black and white division. While the ICTY and ICTR allow prosecuting someone for international crimes when that person has already been convicted of committing the same acts defined as regular crimes at the national level, the ICC takes a more conduct-based approach. The PTC confirmed that the Rome Statute does not make the strict distinction between ordinary and international crimes. Article 20(3) allows for a successful ne bis in idem challenge whenever a person has been tried by another court for the same conduct as described in the crime definitions of the ICC Statute. Hence, the legal characterization of conduct as ‘ordinary’ or ‘international’ is of less importance within the ICC’s framework. Nevertheless, certain conduct, i.e. a conglomeration of facts, can be legally characterized as an international crime, while other conduct, for instance a single murder in no discernible context, cannot. Moreover, by labelling something as an international crime, certain objectives (history-telling, fighting impunity, and restoring international peace and security, all further discussed below) enter the playing field. Therefore, for the purpose of this Chapter, the phrase ‘international crime’ will be used to denote a distinctive type of crime, although the conduct definable as such can also be prosecuted as an ordinary crime at the national level.

This section will attempt to capture the special nature of international crimes by considering the three factors differentiating them from ordinary criminality: (i) the goals and functions of international criminal justice and international criminal trials (why an international crime needs to be adjudicated upon?); (ii) elements of the legal definitions: the ingredients and circumstances that comprise an international crime (what needs to be proven?); and (iii) the practical challenges of finding reliable evidence while managing the sheer volume of facts and the magnitude of the case (how is an international crime proven?).

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8 Art. 10(2) ICTY Statute and Art. 9(2) ICTR Statute.
2.1 Goals of international criminal justice

Traditional goals of domestic criminal law usually include retribution for wrongdoing, general and individual deterrence, incapacitation, and rehabilitation. These naturally also play a role in relation to international crimes. Holding individual perpetrators accountable for crimes is generally thought to be the first and foremost objective that (international) criminal courts and tribunals pursue. But international criminal justice is often said to have certain broader goals that go beyond the traditional confines of the regular domestic criminal trial. Trials dealing with mass atrocities such as war crimes, crimes against humanity, and genocide serve greater purposes determinative of the future of the societies in which the international crimes were committed. These goals include restoring international peace and security, fighting impunity, providing justice or ‘closure’ for victims, and recording history, or in other words ‘the objective of “educating” people of “historical truths” through law.’

The self-imposed goals of international criminal justice are plentiful, and scholars have raised questions as to whether international criminal institutions have enough strength to carry the weight of all of them. At the same time, it may prove impossible to determine in any empirical sense how the objectives specific for international criminal justice play a role in the daily realities of international criminal courts and tribunals. Still, it is possible to theorize about the potential influence of those special goals on evidentiary issues.

A. Fighting impunity

Ending impunity for international crimes by punishing the perpetrators is perhaps the most obvious objective of international criminal justice. But this goal is only partially inherent to the nature of international crimes. As a slogan, ‘fighting impunity’ was launched at the

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11 Swart (n 10) 100.
12 Cryer et al. (n 1) 30; Damaška (n 10) 331.
13 Cryer et al. (n 1) 30.
16 Damaška (n 10) 331; Ohlin (n 1) 84.
17 Swart (n 10) 107.
international level and can be found, among others, in the preamble of the ICC Statute. But as a notion it also closely resembles a more traditional objective of criminal law, namely retribution for wrongdoing. Fighting impunity may therefore be viewed as an objective of international criminal justice seen as a whole and is typical for international criminal law in that sense. However, as a criminal trial’s function, it is not necessarily typical for the prosecution and adjudication of international crimes, because the rationale behind punishing perpetrators in an individual case can be any of the traditional objectives of criminal law enforcement, i.e. retribution, general and individual deterrence, incapacitation, and rehabilitation.19

Even though fighting impunity is only a general goal of international criminal justice, and not by definition a separate objective of individual trials dealing with international crimes, it still harbors the potential of affecting evidentiary issues in specific cases. Xabier Agirre Aranburu points out, for instance, that the ‘[i]nvestigation of international crimes is often affected by a certain tendency to downgrade the presumption of innocence of the accused due to the extreme gravity of the crime and the high expectations created by the proceedings.’20 Considering the gravity and moral reprehensibility of international crimes in combination with the general objective of fighting impunity in an atmosphere of public outcry, the dangerous temptation to lower the standard of proof and demote the presumption of innocence may surface.21 From a normative perspective, it is unacceptable for the objective ‘fighting impunity’ to have the effect of lowering evidentiary standards, as such standards are indispensible for accurate fact-finding and the protection of the rights of the accused. From a practical perspective, at least some awareness of the ‘inquisitorial temptation’ is therefore of vital importance.

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19 Ibid.
20 X. Agirre Aranburu, ‘Methodology for the Criminal Investigation of International Crimes’ in A. Smeulers (ed.), Collective Violence and International Criminal Justice: An Interdisciplinary Approach (Antwerpen: Intersentia, 2010) 358. Agirre Aranburu lists a number of ways in which the ‘inquisitorial temptation’ may surface in international criminal investigations, for instance: (1) in situations that are politically charged, ‘[c]hoosing the subject matter by opportunistic criteria rather by the objective gravity and legal requirements may mislead the investigation and turn it into a plain fraud of law’; (2) suspect-driven as opposed to offence-driven investigations, which ‘tends to develop a “target-oriented” inertia, a deliberate or unconscious assumption that the suspicion must be corroborated, rather than tested objectively’; and (3) an increased emphasis on the suffering of victims combined with a decreased emphasis on the role of the suspect.
21 Ibid. 356, 358-59.
B. Restoring international peace and security

Restoring international peace and security as objective of international criminal justice is often mentioned as typical feature of international crimes prosecutions. But it only plays an explicit role with respect to a limited number of international criminal tribunals, namely the *ad hoc* tribunals for the former Yugoslavia and Rwanda, and the permanent ICC.\(^{22}\) The first two international criminal tribunals were established by the UN Security Council acting under Chapter VII of the UN Charter, which authorizes the UNSC to make binding law if there is a breach of, or threat to, international peace and security.\(^{23}\) With respect to the ICC, the UNSC may refer situations to the Court acting under the same chapter, triggering the ICC’s jurisdiction.\(^{24}\) The situations in Darfur (Sudan) and Libya were brought within the jurisdictional scope of the Court this way.\(^{25}\)

Maintaining and restoring international peace and security in the sense of the UN Charter is a goal of international criminal justice at the macro (institutional) level, because the UNSC as the guardian of international peace and security is also the sponsor of the tribunals’ mandates and the trigger of their jurisdiction. However, whether restoring peace and security in general is typical for international crimes to the extent it can be viewed as a differentiating factor at the micro level (of individual trials and related evidentiary issues) is far from obvious. Prosecutions of ordinary domestic crimes are usually not deemed to pursue the goal of restoring peace and security in the (national) criminal justice discourse. However, if left unpunished, particularly in high-profile cases and on a wide scale, ordinary crimes are bound to disrupt social peace and public order in a given country. Hence, it is possible to argue that regular prosecutions in fact aim to protect the law and order on the *national* scale, in the sense comparable to the tribunals’ supposed contribution to the maintenance of international peace. If so, restoring international peace and security is not a unique characteristic inherent in the nature of international crimes. In any event, the goal is too far removed from the context of an actual trial, and does not directly affect evidentiary processes.

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\(^{23}\) Chapter VII of the UN Charter permits the UNSC to ‘determine the existence of any threat to the peace, breach of the peace, or act of aggression’ and take military and non-military action to ‘restore international peace and security.’ This includes, for instance, the use of force or the launching of peacekeeping operations.

\(^{24}\) Art. 13(b) ICC Statute.

C. Preserving the historical record for didactic purposes

As philosopher Santayana famously stated, those who do not remember the past are condemned to repeat it.26 Within the legal context, a similar chain of thought is often followed in the sense that ‘the best way to prevent recurrence of genocide, and other forms of state-sponsored mass brutality, is to cultivate a shared and enduring memory of its horrors – and to employ the law self-consciously towards this end.’27 In his opening statement at the beginning of the *Eichmann* trial in Jerusalem in 1961, Attorney-General Gideon Hausner seemed less confident about the trial’s role in this larger scheme: ‘I doubt whether in this trial we … will succeed in laying bare the roots of the evil. This task must remain the concern of historians, sociologists, authors and psychologists, who will try to explain to the world what happened to it.’28 In any event, history-telling is generally regarded as the most idiosyncratic objective of prosecuting international crimes.29

The idea that we can learn from the past leads to the assumption that recording history in criminal trials for the purpose of strengthening collective memory is a form of didacticism. There is thus a connection between the goal of history-telling on the one hand, and the broader didactic aims of reinforcing collective memory, learning from the past, and propagating human rights principles on the other hand. For the purpose of this Chapter, they can be discussed jointly for the reason that they are likely to similarly affect the amount of information considered at trial. In order to explore whether and how these supposed objectives of international criminal justice affect evidentiary processes, it is useful to give an overview the debate on the history-telling purpose of trials. This may expose possible influences and tensions between that purpose and the evidentiary aspects.

Is history-telling to remain the concern of historians alone? Lawyers generally state that the primary goal of a criminal trial is to establish the truth in relation to the charges brought against the accused. But many international criminal courts and tribunals have issued lengthy judgments in which they also provide detailed accounts of the background of

29 Swart (n 10) 107.
conflicts that led to the crimes. However, the goal of recording history in international criminal trials, or the idea that the ‘process of subjecting evidence to forensic scrutiny will set down a permanent record of the crimes that will stand the test of time,’ has not gone without criticism.

There are roughly three schools of thought on the didactic goal of trials in cases involving international crimes. The first school of thought perceives the broader goal of history-telling as a legitimate (or even primary) objective of an international criminal trial. This is known as didactic legality or didactic history. The proponents of ‘didactic legality’, such as Lawrence Douglas and Mark Osiel, argue that there is room for undertaking education through history-telling in trials involving international crimes without undermining the legitimacy of the process. Douglas concedes that a criminal trial has the primary purpose of answering the guilt/innocence question, but he continues that it is not a trial’s sole purpose: extralegal interests of collective instruction are amongst its valid functions. Osiel emphasizes the importance of story-telling within the legal context for the creation of collective memory.

The second school, known as liberal legalism, advocates the idea that a criminal trial should serve only one purpose, and that is to determine the guilt or innocence of the accused. One of this school of thought’s more famous, and perhaps one of its first advocates is Hannah Arendt. In her well-known book, she states that ‘[t]he purpose of a trial is to render justice, and nothing else. Even the noblest of ulterior purposes … can only detract from the law’s main business: to weigh the charges brought against the accused, to render judgment, and to mete out due punishment.’ Even though Attorney-General Hausner was aware of the difficulties of exposing the ‘roots of the evil’, during the Eichmann trial he still maintained that history was at the center of the proceedings: ‘[i]t is not an individual that is in the dock at this historic trial, and not the Nazi regime alone, but anti-Semitism throughout history’.


Cryer et al. (n 1) 31.


Douglas (n 32) 2.

Osiel (n 27) 2.

Wilson (n 32) 2-3; Douglas (n 32) 2.

Arendt objected to this notion concluding that ‘[i]t was bad history and cheap rhetoric’, and observing that the didactic purpose pursued in the *Eichmann* trial led to breaches of due process rights. Legal liberalism asserts that the sole function of a criminal trial is to determine whether the alleged crimes occurred and whether the accused can be held criminally responsible for them. When a court attempts to answer broader questions, such as why the underlying conflict occurred, or tries to resolve a clash of competing historical interpretations, it undermines due process, which ultimately damages the credibility of the legal system as a whole.

Douglas nuances the assertion stated by legal liberalists that setting history-telling as a goal in a criminal trial will automatically violate the rights of the accused. As he puts it, ‘[t]o succeed as a didactic spectacle in a democracy, a trial must be justly conducted insofar as one of the principal pedagogic aims of such a proceeding must be to make visible and public the sober authority of the rule of law.’ In other words, these trials must be fair or else they would not be successful in getting the lessons they are meant to convey across to the general public. A blatantly unfair trial is not a convincing teacher. Douglas also notes that some legal liberalists express a related view, namely that it is not so much inappropriate for courts to try to write history, nor will the rights of the accused necessarily be violated if they pursue the history-writing objective; however, courts will inevitably fail in any attempt to do so. Judges may not have the capacity to produce a nuanced picture of events, since they function under time constraints and are bound by considerations of legal relevancy. From the perspective of the historian, judge-painted historical pictures will seem ‘fragmentary, foreshortened, and locked in an arbitrary time frame’. Osiel notes this stance, too, and observes that ‘[t]he prevailing opinion is now that the attempt to combine the two endeavors is very likely to produce poor justice or poor history, probably both.’

The judges in the *Eichmann* trial in Jerusalem were cognizant of their shortcomings as historians. They articulated the third school of thought, which is closely related to the second school of thought but milder in its articulation: the by-product doctrine. In their judgment they wrote: ‘[a]s for questions of principle which are outside the realm of law, no one has

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37 Ibid., 19.
38 Ibid., 221. See also Wilson (n 32) 4.
39 Douglas (n 32) 3; cf. Ohlin (n 1) 93 n75.
40 Douglas (n 32) 3. See also Wilson (n 32) 6.
41 Damaška (n 10) 336.
42 Ibid.
43 Osiel (n 27) 80.
made us judges of them, and therefore no greater weight is to be attached to our opinion on them than to that of any person devoting study and thought to these questions. … Without a doubt, the testimony given at this trial by survivors of the Holocaust, who poured out their hearts as they stood in the witness box, will provide valuable material for research workers and historians, but as far as this Court is concerned, they are to be regarded as by-products of the trial. 44 These three schools of thought focus on the question whether courts should promote the didactic history-telling objective. On a more practical note, though, regardless of whether they ought to, can they? Wilson conducted empirical research on how practitioners understand the combination of history and law in courtrooms. 45 He does not unequivocally subscribe to any of the schools of thought discussed above. On the one hand, he does not advocate a greater role than currently exists for history and historians in international criminal trials – international criminal courts and tribunals should not be overloaded with too many diverging functions. On the other hand, Wilson believes that these courts are indeed capable of leaving valuable historical narratives behind. 46 His research shows that practitioners often insist that the goal of history-telling is not a burden that should be placed on the shoulders of judicial institutions. 47 Providing historical truth, or historical narratives, is merely a by-product of international crimes proceedings. At times, judges have insisted that the portions of their judgments concerning history should be interpreted as background information and contextual material, not as proven facts. 48 The by-product doctrine is therefore a form of legal liberalism that accepts the inevitable effect that criminal proceedings involving international crimes have on historical narratives. However, this third school of thought explicitly distances itself from the idea that it is a trial’s purpose. That does not mean that judicial institutions should not take this inevitable side-effect into consideration or that history as such does not play a role in the adjudication of international crimes.

Setting didactic history-telling as general objective of international criminal justice is rather harmless in the sense that it does not automatically lead to infringing the rights of the accused and it does not necessarily affect the scope of the trial. However, when this objective is set as a function at the trial level, or as a prosecution’s explicit objective, it may have a

45 Wilson (n 32).
46 Ibid., 16, 18.
48 Schabas (n 47) 162.
differentiating effect because the amount of information relevant to the case increases as does the amount of elements that need to be proven.

2.2 What to prove
The goal of didactic history-telling may influence the scope of the truth-finding process, but substantive criminal law norms govern it in the most direct sense, serving as restrictions on the search for the truth.\(^{49}\) Substantive elements, such as the factual allegations pertaining to the individual crimes charged, the contextual elements of the crimes, and the criminal responsibility of the accused, demarcate the scope of the case and comprise the material facts establishing the innocence or guilt of the accused. With respect to international crimes, there is a thin line, here. International crime definitions contain contextual elements that refer to the historical and political context. Courts prosecuting and adjudicating international crimes will inevitably focus on more than just the specific conduct charged, as is the case with conventional crimes.\(^{50}\) International crimes are crimes of context because their definitions contain ‘elements that operate as qualifiers of gravity and restrictors of international jurisdiction to extraordinarily offensive crimes.’\(^{51}\)

The political and historical context being part of the definitions of international crimes is not their only typical and challenging aspect when it comes to substantive law. Another such aspect concerns the theories of individual criminal liability and, more specifically, the ways of linking intellectual perpetrators to the atrocities committed on the ground. This challenge arises not only in relation to the didactic goal of history-telling, but also in relation to the pragmatic task of attributing crimes to the leadership. Since prosecution of international crimes is aimed at the most responsible and usually the furthest removed perpetrators, linkage problems inevitably arise regardless of any additional goals pursued. Broader goals of international crime prosecutions, context in which the crimes take place, and individual culpability are aspects of international criminal law that should not be seen as isolated notions. This section will address the connections between them in greater detail.

\(^{50}\) Damaška (n 10) 337.
\(^{51}\) Agirre Aranburu (n 20) 367.
A. Crimes of context

The adjudication of international crimes is more likely than conventional criminal prosecutions to involve evidence relating to the context, because the historical and political context in which such crimes take place is relevant for proving them. Consider, for instance, that the political and historical context in which a domestic crime such as a single murder (or even multiple murders by a serial killer) takes place generally does not matter for understanding or proving the crime in court.\(^\text{52}\)

In relation to an international crime, there are three key ways in which context plays a role. First, it can in fact be part of the crime definition, and consequently, subject of the truth-finding endeavor. For example, war crimes are classified as such only where certain acts take place within the context of an (international or internal) armed conflict.\(^\text{53}\) Crimes against humanity are defined as occurring as part of a widespread of systematic attack against a civilian population.\(^\text{54}\) As to genocide, it is not clear-cut whether contextual elements are part of the crime definition. The ICC Elements of Crimes add to all the different acts which may constitute genocide (killing, causing serious bodily or mental harm, deliberately inflicting conditions of life calculated to bring about physical destruction, and imposing measures intended to prevent births) that ‘[t]he 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.’\(^\text{55}\) Usage of the word ‘or’ leaves both options open. Conversely, the ICTY Appeals Chamber in *Jelisić* held that ‘the existence of a plan or policy is not a legal ingredient’ of the crime of genocide, i.e. that the context is not a mandatory element, but may play a role in proving the crime.\(^\text{56}\) Antonio Cassese formulated the middle-ground position: ‘a contextual element is not required … for some instances of genocide, whilst it is needed for other categories.’\(^\text{57}\)

The second way in which context plays a role in international crimes prosecution has been mentioned above with reference to the ICTY Appeals Chamber’s holding in *Jelisić*.

\(^{52}\) Koskenniemi (n 15) 12.

\(^{53}\) Arts 2 and 3 ICTY Statute; Art. 4 ICTR Statute; Art. 8 ICC Statute.

\(^{54}\) Art. 5 ICTY Statute; Art. 3 ICTR Statute; Art. 7 ICC Statute. The ICC Statute adds an element, namely that a crime against humanity is a crime committed in furtherance of a state or organizational policy.

\(^{55}\) Arts 6(a)(4), 6(b)(4), 6(c)(4), and 6(d)(4) ICC Elements of Crimes (emphasis added).

\(^{56}\) See Judgement, *Jelisić*, IT-95-10-A, AC, ICTY, 5 July 2001, para. 48 (‘the existence of a plan or policy is not a legal ingredient of the crime. However, in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases. The evidence may be consistent with the existence of a plan or policy, or may even show such existence, and the existence of a plan or policy may facilitate proof of the crime.’).

Context can be used for proving certain elements of crimes, such as the existence of a plan or policy to commit genocide may be relied upon for establishing the mandatory elements of that crime. This does not mean that the context forms a part of the substantive merits of the case or in itself amounts to such an element. The ICC uses context in a similar manner. For instance, in the decision adjourning the hearing on the confirmation of charges in the case against Laurent Gbagbo, the PTC held that when the prosecutor identifies particular incidents that constitute the attack against the civilian population (in relation to crimes against humanity), ‘the incidents are “facts” which “support the [contextual] legal elements of the crime charged”’.\textsuperscript{58} The individual incidents are not contextual elements of the crime against humanity; the attack, however, is such an element.

The third way in which context is relevant is when facts are used for the construction of a narrative or as background information. For example, the Dutch court used context implicitly in the \textit{Basebya} case.\textsuperscript{59} Jurisprudence from the ICC, however, makes explicit that a narrative shedding light on the prosecution’s theory of the case is an important aspect of presenting evidence at the confirmation stage of the proceedings. At that stage, the prosecution must demonstrate ‘a clear line of reasoning underpinning [the] specific allegations’.\textsuperscript{60} It is to do so by presenting certain contextual facts (often referred to as ‘subsidiary facts’).\textsuperscript{61} Such facts are only to be considered ‘as background information or as indirect proof of the material facts’.\textsuperscript{62} This is slightly odd. How can (alleged) facts be considered indirect proof of material facts? ICC jurisprudence, however, does not equate subsidiary facts with circumstantial evidence, despite the similarities between the notions circumstantial evidence and indirect proof. Rather, ‘[t]he [material] “facts and circumstances” underlying charges are to be distinguished from other factual allegations which may be contained in a DCC [Document Containing the Charges] as a whole. These

\textsuperscript{58} \textit{Gbagbo} adjournment decision (n 6), para. 21.
\textsuperscript{59} See e.g. \textit{Basebya} judgment (n 7) at 4.18, 4.34, 5.1.
\textsuperscript{61} \textit{Banda and Jerbo} confirmation of charges decision (n 60) paras 36, 39; Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, \textit{Muthaura et al.}, ICC-01/09-02/11-382-Red, PTC II, ICC, 23 January 2012, paras 59-60, 158-9; see also Dissenting Opinion of Judge Silvia Fernandez de Gurmendi, \textit{Gbagbo} adjournment decision (n 6), para. 34 n39.
\textsuperscript{62} \textit{Banda and Jerbo} confirmation of charges decision (n 60) para. 37.
other allegations may provide general background information or indicate intermediate steps in the prosecution's chain of reasoning.\(^{63}\)

This Chapter, dealing with the characteristics of the crime as such, focuses primarily on the first type of use of context, i.e. when it is indeed part of the crime definition. From the perspective of the court’s reach, the contextual elements in the definitions of international crimes narrow the scope of material jurisdiction. Only conduct that took place within a specific context may be characterized as an international crime. However, compared to domestic crimes, contextual elements in international crime definitions widen a trial’s scope as they increase the number of crime ingredients that need to be proven, and consequently, the amount of direct and indirect evidence that will be presented. The contextual elements also pose additional evidentiary challenges. Next to certain other peculiar requirements of international crime definitions, e.g. the special intent for the crime of genocide, such elements are in fact most difficult to establish.\(^{64}\) They therefore enhance the complexity and magnitude of the process of gathering and presenting evidence.

B. Modes of liability

A typical characteristic of international crimes prosecutions is the distinction between crime base evidence and linkage evidence.\(^{65}\) In a conventional criminal case, the starting point for police investigators is the occurrence of a crime, after which a suspect will be sought. But in international crime cases, courts and tribunals, whether national or international, are often faced with a reversal of this sequence. Certain suspects will have already been identified,

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\(^{63}\) Order regarding the content of the charges, Muthaura and Kenyatta, ICC-01/09-02/11-536, TC V, ICC, 20 November 2012, para. 13. Judge Silvia Fernández de Gurmendi observed that “facts of a subsidiary nature will usually emerge from “circumstantial evidence””. See Dissenting Opinion of Judge Silvia Fernandez de Gurmendi, Gbagbo adjournment decision (n 6) para. 34 n39. While not clarifying the distinction between material and subsidiary facts any further, the AC has endorsed the use of the term ‘subsidiary facts’ on several occasions: see Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled “Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court”, Lubanga, ICC-01/04-01-06-2205, AC, ICC, 8 December 2009, para. 90 n163; Judgment on the appeal of Mr Germain Katanga against the decision of Trial Chamber II of 21 November 2012 entitled “Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons”, Katanga, ICC-01/04-01-07-3363, AC, ICC, 27 March 2013, para. 50; Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled “Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute”, Gbagbo, ICC-02/11-01/11-572; AC, ICC, 16 December 2013, para. 37.

\(^{64}\) Agirre Aranburu (n 20) 367.

after which the individual crimes and the suspects’ connection to them will be investigated. The identified suspect is linked to the crime, the occurrence of which is known through open source materials such as NGO reports, news articles, and social media, instead of identifying the suspect based on his or her putative link to the crime.

Linking the crime(s) to the alleged perpetrator remains one of the biggest challenges in international criminal justice. Yet, linkage evidence is more determinative for the decision on individual criminal responsibility and for the outcome of the case than crime base evidence, which may be less disputed at trial.66 Since prosecutions focus on the most responsible perpetrators that are generally far removed from the actual crime scene, investigators and prosecutors dedicate a considerable amount of their effort to unearthing linkage evidence. Moreover, these perpetrators are not only far removed, but they also hardly ever act alone. With the political and historical context being an element of international crime definitions, individualization inevitably comes under a certain amount of pressure. Koskenniemi goes even further, stating that ‘in the end, individualisation is … impossible’.67 There is always the danger that establishing the connection between the accused and the crime would be drawn through ‘broad interpretations and assumptions about the political and administrative culture.’68

In order to translate the complex realities into legal qualifications, theories of liability, such as Joint Criminal Enterprise, (indirect) co-perpetration, superior and command responsibility, and aiding and abetting as a form of complicity in crime, have been developing at the international criminal courts and tribunals. It is beyond the scope of this Chapter to attempt to contribute to the fascinating debates on these theories.69 Clearly, linkage issues and related theories of attribution are central to dealing with international crimes, but just as the contextual elements in crime definitions, they do not necessarily affect evidentiary rules or principles directly. However, the position of the accused vis-à-vis the crime(s) raises the same practical question as with contextual elements, namely: how are international crimes to be proven? This third differentiating factor, discussed below, lies at the heart of the dialectic relationship between substantive and procedural law.

66 Ibid., 98.
67 Koskenniemi (n 15) 16.
68 Ibid.
2.3 How to Prove

As Damaška pointed out, in the previous century we have ‘witnessed not only the growing uncertainty about the concept of objective truth, but also the realization of the fallibility of our fact-finding methods, particularly when human behavior is the object of investigation.’ In the international criminal justice discourse, a similar observation may be made. In addition to the legal linkage problems discussed above, factually linking the (intellectual) perpetrator to the atrocity is often difficult when prosecuting and adjudicating international crimes. As noted, international crimes prosecutions target the most responsible perpetrators higher-up in the political and military structures that are not always well-defined and meticulously documented and people that are usually most removed from the scene of the crime. Therefore, ‘assigning individual liability may turn out to be a laborious and intricate task, requiring the use of a variety of sources and long hours of painstaking analysis.’

Moreover, there are certain typical fact-finding impediments that afflict the processes of investigation and prosecution of international crimes. These include cultural differences between witnesses and criminal justice professionals, language issues and translation errors, and unreliability of witnesses. Not all of these are necessarily caused by the nature of the crime. For instance, language and cultural differences pose no comparable difficulties when an international crime is prosecuted in the country where the atrocities took place. However, there are several issues concerning witnesses that are a re-occurring theme when dealing with international crimes.

First, the ICC acquittal of Mathieu Ngudjolo Chui in the Situation in the DRC, the dropping of charges against Muthaura as well as the request for postponement in the Kenyatta case in the Situation in Kenya show how difficult it is to find (and hold on to) reliable witnesses, and how the lack thereof may make the prosecution lose its case. Save for

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70 Damaška (n 49) 294.
72 Agirre Aranburu (n 20) 355-6.
73 See generally Combs (n 2).
74 The ECCC are an exception to this: although technically a domestic court with jurisdiction over (international) crimes committed by the Khmer Rouge regime in Cambodia between 1975 and 1979, the ECCC is joined by the United Nations Assistance to the Khmer Rouge Trials. Consequently, three different languages (Khmer, French, and English) are required for all official interactions in court proceedings. Based on the author’s personal observations while at the ECCC, the questionable quality of simultaneous translations in the courtroom sometimes cause portions of testimony to be lost in translation, given the difficulty of immediately translating words and culture into another language.
exceptional situations such as in Nuremberg, a considerable reliance on witness testimony is inevitable when prosecuting international crimes.\footnote{See Combs (n 2) 12 (‘the vast bulk of the evidence presented to the current international tribunals comes in the form of witness testimony.’).} This presents investigators and prosecutors with a number of problems. Kenneth Mann points to such problems with evidence in the \textit{Demjanjuk} trial in Israel: ‘the testimony came from witnesses whose memories were created in extremely traumatic settings, based on events that had occurred many years earlier.’\footnote{K. Mann, ‘Hearsay Evidence in War Crimes Trials’ in Y. Dinstein and M. Tabory (eds), \textit{War Crimes in International Law} (The Hague: Martinus Nijhoff, 1996) 352.} The Hague District Court in the \textit{Yvonne Basebya} case also devoted a considerable portion of its judgment to analyzing the reliability of witness statements. It observed that they are ‘based on the memory of the witnesses’ and that ‘[a]lthough most memories of sincere witnesses are reliable, memories are never a complete and accurate rendition of reality. Human perceptivity is limited, matters are forgotten and mistakes may be made when remembering things.’\footnote{\textit{Basebya} judgment (n 7) at 8.11.} The court acknowledged that assessing credibility and reliability of witnesses was a difficult task since the alleged crimes during the Rwandan genocide took place over 20 years ago. Time lapse calls for great prudence, and ‘[t]his cautiousness is all the more relevant since this case concerns events in … a country which was torn by deep political and ethnic differences and an armed conflict as a result of all this.’\footnote{Ibid. See also Witteveen (n 71) 70-1.} Criminal courts dealing with old core crimes cases will encounter these problems to a great extent, as has also been noted, for instance, with respect to the ECCC.\footnote{See generally A. Cayley, ‘Prosecuting and Defending in Core International Crimes Cases Using Old Evidence’ in M. Bergsmo and C. Wui Ling (eds), \textit{Old Evidence and Core International Crimes} (Beijing: Torkel Opsahl Academic EPublisher, 2012). Notably, in the first (and as of writing only) trial judgment from the ECCC in the case against Kaing Guek Eav alias Duch, there is no section devoted to the method of assessing the reliability and credibility of witnesses.}

There is often some amount of delay when investigating and prosecuting international crimes. Whether it be a time lapse of 20, 30, 50, or only a few years, this can cause problems with finding and preserving evidence, and dealing with the fading memories of witnesses. But also newer cases will suffer from the problem that witnesses have been through an extremely traumatic experience, trauma being a factor diminishing the factual accuracy of witness recollections, and will have told their stories on several previous occasions, for instance to journalists, NGO workers, and members of UN commissions of inquiry. One can think of domestic cases where the level of traumatization is similarly grave, such as sexual crimes cases, but in those instances it is unlikely that the victim witness will have told their
story repeatedly to other (non-judicial) fact-finders. The ICC, conversely, does encounter this problem, as nowadays journalists and human rights researchers are generally at the crime scene before the Court starts its investigation, and these non-judicial fact-finders will have talked to potential witnesses before the Court’s investigators get the opportunity to do so.\(^80\)

### 3. Quantity Affects Quality

As already briefly stipulated in the previous sections, some objectives of international criminal justice, the typical features of international crimes, and doctrines of individual criminal responsibility lead to an increase in the amount of information relevant for a specific case. But compared to the meticulous documentation kept by the Nazi regime, modern-day war criminals generally do not leave a paper trail usable in criminal prosecutions.\(^81\) The significant role played by witnesses is typical for the prosecutions of international crimes as there are usually not enough written records or forensic evidence to serve as linkage evidence. However, the complexity of the crime and the physical distance of the alleged perpetrator from the offence make such evidence crucial – in fact, most evidence in core crimes cases is linkage evidence.\(^82\) Considering the issues surrounding reliability of witness recollections regarding events that happened a long time ago, an increase in quantity of proof may be the response of parties in practice to the lack of quality of individual pieces of evidence. Such additional evidence may be more witness testimony or other types of evidence in corroboration. At the international criminal tribunals this is not a solution in the normative sense though. These institutions’ evidentiary regimes rest on the principle of free assessment of proof not requiring a multiplicity of pieces of evidence; the presentation of excessive and repetitive witness evidence may be discouraged in light of the manageability of the trial. But in practice, the gathering and usage of multiple sources is an understandable tactic employed by the parties when trying to prove a fact.

Given the poor quality of the available evidence, the increase in the amount of information and evidence that potentially comes under consideration by the court is

\(^{80}\) There are a number of comprehensive scholarly projects dealing with this subject, for instance the Harvard Group of Professionals on Monitoring, Reporting and Fact-finding, the Initiative on Human Rights Fact-Finding, Methods, and Evidence by NYU’s Center for Human Rights and Global Justice, and the project titled ‘From Fact-Finding to Evidence: Harmonizing Multiple Investigations of International Crimes’ launched by Leiden University and The Hague Institute for Global Justice.

\(^{81}\) Combs (n 2) 12.

inevitable. Scale and quantity are more than bare numbers, as in quantity itself lie problems. This section draws a link between the features of international crimes discussed above and evidentiary challenges. It does so by examining the following hypothesis: the quantity of information affects the quality of evidence, and eventually, could affect the law governing the admission and presentation of evidence. Measures that are designed to reduce the quantity of evidence in international crimes cases, in particular taking judicial notice of adjudicated facts and facts of common knowledge, will therefore be discussed.

3.1 On scope and quantity
As noted previously, the didactic purpose of history-telling may entail a significant increase in the amount of information considered legally relevant to a particular case. Didactic legalism is likely to welcome the expansion of the scope of (supposedly) relevant evidence as it allows for the educational value of the trial to take center stage. However, this also means that the larger historical context, including parts of it that are outside the scope of the acts of the accused or the strict crime definition, becomes the subject of truth-finding at trial. This can be problematic on two levels. First, when a criminal trial concerns larger historical and political events, it will necessarily involve an interpretation of that context. The interpretation of the context is exactly the thing that is disputed in relation to the individual acts of the accused, which is the subject of the trial. 83 Consider, however, the following example articulated by Koskenniemi: Milošević, not Western leaders, was on trial, which presumes the correctness, from the ICTY’s perspective, of the Western view of the political and historical context of the Yugoslav wars. However, the accused understandably contested this view, and therefore contested the context. If the Tribunal’s view of the historical context had remained uncontested, it may have increased the trial’s educational value, but the position of the prosecutor would have been automatically vindicated, potentially turning it into a show trial. 84 To refer to contemporary international criminal trials as show trials is controversial, but Koskenniemi rightly points out a potentially treacherous paradox that is created here. He explains that

to convey an unambiguous historical “truth” to its audience, the trial will have to silence the accused. But in such case, it ends up as a show trial. In order for the trial to be legitimate, the accused must be entitled to speak. But in that case, he will be able to challenge the version of

83 Koskenniemi (n 1516.
84 Ibid., 16-7.
truth represented by the prosecutor and relativize the guilt that is thrust upon him by the powers on whose strength the Tribunal stands.  

The second problem with allowing more contextual information into evidence is that it diametrically opposes international criminal law’s most basic foundation as it was articulated in the Nuremberg judgment: international crimes are committed by men, not by abstract entities.  

The concept of individual criminal responsibility constituted emancipation from collective responsibility, and more specifically, it meant breaking away from the theory of immunity of state officials.  

The so-called ‘fight against impunity’ is based on the belief that international crimes should be subjected to individual criminal responsibility, not (only) state responsibility. Admittedly, individualization has its limits in this respect: these crimes inevitably take place within a certain context or system, and therefore imply collective criminality.  

To borrow from Van Sliedregt: ‘[t]his type of “system-criminality” generates “system-responsibility” which, by bringing in collective elements, puts pressure on the principle of individual criminal responsibility.’  

International criminal law scholars and practitioners are engaged in a constant balancing act of collective elements and individualization.  

The question arises whether this area of tension can endure more pressure. As Damaška points out, ‘deeper background issues tend to dwarf the subject of individual culpability, and it becomes clear that it is best for judges to limit their inquiries into the larger context to the very minimum required by the definition of international crimes’.  

Including history-telling as a trial’s objective, and widening the trial’s substance

85 Ibid., 1, 35.  
88 See J.G. Stewart, ‘Overdetermined Atrocities’ (2012) 10 JICJ 1189, 1190 (‘In fact, if there were one overarching tension in the ongoing struggle for defensible standards of blame attribution in this discipline, it might be between our exclusive focus on individual accountability and the pervasive influence of collectivities that furnish a long line of willing substitute perpetrators, thereby diluting the significance of individual agency upon which criminal liability is predicated.’). However, Stewart does not argue that individualization is impossible: ‘it is too early to concede that individual criminal responsibility is structurally incapable of accounting for the collective nature of most international crimes.’ Ibid., 1217.  
89 Van Sliedregt (n 87) 82. See also A. Chouliaras, ‘From “Conspiracy” to “Joint Criminal Enterprise”: In Search of the Organizational Parameter’ in C. Stahn and L. van den Herik (eds), Future Perspectives on International Criminal Justice (The Hague: T.M.C. Asser Press, 2010) 547.  
90 See Ohlin (n 1) 97.  
91 Damaška (n 10) 341.
under scrutiny even further, may put additional pressure on the principle of individual criminal responsibility.

It can therefore be disputed whether setting additional objectives in international crimes cases is desirable at the micro (trial) level. Insofar as the context is part of the crime definition, an increase in the amount of evidence is unavoidable but perhaps only to that extent legitimate. Quantity may lead to quality on the one hand, but it can also lead to evidence debris and other unwanted side-effects on the other hand. For instance, quality may improve where the fact that requires proof is of a quantitative nature. When trying to demonstrate that an armed attack was in fact widespread, having a plurality of witnesses that can testify to incidents that help corroborate that element of a crime against humanity affects the strength of the case in a positive way. However, where quantity leads to so much evidence that it clogs up the system and creates unmanageable trials, the quality of the proceedings as a whole may be affected negatively. Scrutinizing large quantities of evidence becomes difficult and time-consuming for all parties involved and may create ambiguity as to the scope of the case, potentially infringing upon the accused’s right to be tried without undue delay and to be notified of the charged against him or her.

3.2 Enhancing judicial economy

When discussing the quantity of evidence and what needs to be proven, it is also important to note what does not need proof. Not all of the material facts need to be proven at the international criminal tribunals, and that may solve part of the quantity problem. Broader solutions such as judges’ managerial powers and negotiated justice aside, two evidentiary rules come to mind that are intended to stimulate judicial economy, and which allow a court to consider a fact established without requiring evidence to prove its existence: first, agreed facts, and second, judicial notice of facts of common knowledge and adjudicated facts.92

Parties may agree upon facts that then do not require formal proof. For instance, Rule 65ter(H) of the ICTY RPE states that the pre-trial judge shall record the points of agreement and disagreement on matters of fact and law. The ICC RPE contains a similar provision in Rule 69 concerning the agreements on facts, which the Chamber may consider as having been proven unless the interest of justice required otherwise. Parties may agree upon any (type of) fact. The scope of agreed facts is therefore broad in theory, but because it depends

on the willingness of the parties to agree on them the amount of agreed facts is usually marginal in practice.\textsuperscript{93}

Judicial notice is a tool that allows a court to take certain facts as proven without hearing evidence. Rule 94 of the ICTY and ICTR RPE states that the court may take judicial notice of facts of common knowledge (or ‘notorious’ facts), adjudicated facts, and of the authenticity of documentary evidence (such as UN documentation).\textsuperscript{94} The rule originated in the common law, but can also be found in civil law systems.\textsuperscript{95} As Nina Jørgensen illustrates, the most telling example of the use of judicial notice of notorious facts is the decision of a United States Circuit Court to judicially notice the ‘traditional features of a snowman.’\textsuperscript{96} An example at the international level is when the International Criminal Tribunal for Rwanda (ICTR) took judicial notice of the occurrence of genocide in Rwanda in 1994 as a fact of common knowledge,\textsuperscript{97} something that was also followed by the Dutch court in \textit{Basebya}.\textsuperscript{98} The rationale behind rules of judicial notice is to speed up trials by not devoting time to proving issues that are blatantly obvious, and to enhance consistency in factual findings between various chambers.\textsuperscript{99}

At first glance, taking judicial notice of certain facts and recognizing agreed facts appear to save a substantial amount of time. However, these evidentiary rules also expose evidence law as an area of law that is a balancing act of various fair trial rights. For example, the right to be tried without undue delay may benefit from judicially noticing certain facts, but at the same time, judicially noticed facts should not form the decisive basis for a conviction, as that would violate the right of the accused to a fair trial. Regular evidentiary procedures of proving a fact in court allow the accused to exercise a number of rights, such as the rights to defend himself or to examine witnesses.\textsuperscript{100} While judicially noticed facts cannot be relied upon for establishing individual criminal liability directly, they may be used to do

\textsuperscript{93} Jørgensen (n 82) 698. See e.g. Decision on the Joint Submission regarding the contested issues and the agreed facts, \textit{Banda and Jerbo}, ICC-02/05-03/09-227, TC IV, ICC, 28 September 2011.
\textsuperscript{94} The SCSL RPE contains an almost identical Rule 94. The ICC, however, does not have a similar provision. Art. 69(6) ICC Statute merely states that ‘[t]he Court shall not require proof of facts of common knowledge but may take judicial notice of them.’ The provisions and case law from the \textit{ad hoc} tribunals are therefore the most useful in light of this section.
\textsuperscript{95} Jørgensen (n 82) 695.
\textsuperscript{97} Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice, \textit{Karemera et al.}, ICTR-98-44-AR73(C), AC; ICTR, 16 June 2006 (‘\textit{Karemera et al.}, Decision on Judicial Notice’), para. 35.
\textsuperscript{98} \textit{Basebya} judgment (n 7) at 5.31.
\textsuperscript{99} Jørgensen (n 82) 696; Stewart (n 92) 245.
\textsuperscript{100} See e.g. Art. 21 ICTY Statute; Art. 20 ICTR Statute; Art. 67 ICC Statute. See also Stewart (n 92) 269.
so indirectly.\textsuperscript{101} It has been suggested that the matter should not be a balance between equally fundamental interests, but a protection of the fundamental right to a fair trial while improving judicial economy.\textsuperscript{102}

Furthermore, it can be disputed whether dispensing with the need for formal proof truly speeds up trials. While the Court is obliged to judicially notice facts of common knowledge, adjudicated facts or the authenticity of documentary evidence may be judicially noticed at the request of a party, after hearing the parties.\textsuperscript{103} This implies an obligation on the opposing party to dispute the accuracy of the suggested facts.\textsuperscript{104} Having to respond to long lists of facts offered for notice by the prosecution places a significant burden on the defence. As one ICTY Trial Chamber recognized, ‘since the admission of an adjudicated fact only creates a presumption as to its accuracy, the admission may consume considerable time and resources during the course of the proceedings, thereby frustrating, in practice, the implementation of the principle of judicial economy.’\textsuperscript{105}

While in theory a valuable tool for restricting the quantity of evidence, taking judicial notice of certain facts should not be overestimated as a practical solution. Unfortunately, the same can be said of agreed facts; in reality, parties are not likely to reach such agreements often. If these rules are to decrease evidence quantity in relation to international crimes across the international-national boundary, additional mechanisms need to be developed to remedy their practical shortcomings.

\section*{4. Concluding Remarks}

This Chapter shows that certain typical features of international crimes set these crimes apart from ordinary crimes. Such features lead to an exponential increase of information that must be considered and managed at all stages of investigation, prosecution, and adjudication. The amount of information can help prove the relevant fact where, due to subpar quality of individual pieces of evidence, it serves the purpose of corroboration (and not merely repetition). But quantity also leads to time- and information-management problems that should not be underestimated. This Chapter does not come up with new evidentiary rules

\textsuperscript{101} Karemera \textit{et al.}, Decision on Judicial Notice (n 97), paras 47-51; Jørgensen (n 82) 709.
\textsuperscript{102} Jørgensen (n 82) 709.
\textsuperscript{103} Rule 94 ICTY and ICTR RPE.
\textsuperscript{104} Stewart (n 92) 272.
allowing to better deal with the tremendous amount of information relevant in the prosecutions of international crimes. Instead, it mainly illustrates the point that the search for procedural solutions that may prove effective in international crimes cases both at the international and national level should proceed from the systematic review of the unique characteristics of international crimes. Such review will also be indispensable for identifying the problems intrinsic in core crimes prosecutions and the extent to which the available solutions provide an adequate response to those problems. Hence, it could be useful for any investigation, prosecution and adjudication of international crimes, whether conducted by an international criminal tribunal, a hybrid court, or a domestic court. Essentially, the Chapter suggests a change of perspective on the law of evidence and advocates for a different methodology that focuses on the crime, not the court.

All courts are likely to encounter the same evidentiary challenges if these are inherent to the type of crime. Forum-neutral solutions may be the answer. In addition to the horizontal harmonization of international criminal law and procedure at the international level that has led to much scholarship on the *sui generis* nature of these bodies of law, vertical harmonization across the national-international divide will occur if one assumes that the type of crime is in fact the binding, overarching factor. While national courts can learn from the best practices developed by international courts and tribunals, any harmonization in accordance with the type of crime, i.e. vertical harmonization, will also lead to collateral, horizontal pluralism within any given national system. In respect of justice for international crimes, pluralism and harmonization are in fact mutually inclusive phenomena.

In any event, the effect of the typical features of international crimes on principles or rules of evidence should be left to a minimum, the pursuance of additional goals at the micro-level is better avoided, and the temptation to downgrade the presumption of innocence should be resisted. Such tendencies would defy the purpose of international criminal justice as ‘[i]t would indeed be a disheartening irony if a justice system, designed to contribute to the protection of human rights, could properly function only by disregarding humanistic values’.

This would lead to legal fictions and trials of preferred outcomes, in which case we would be getting as lost in our ideology of fighting impunity, as many of the perpetrators of international crimes got lost in theirs.

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106 Damaška (n 10) 355.