Big Data in Criminal Justice – Few Chances Serious Risks

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BIG DATA: NEW CHALLENGES FOR LAW AND ETHICS

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1 Introduction – 3 thought-provoking statements

2 Conceptualising truth-finding in evidentiary procedure

3 Practical implications of digitizing justice – paradigm-shift

4 Conclusions – Risks and Chances
1 Introduction

Appreciation to the organisers!
Appreciation to the organisers!
1 Introduction

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Appreciation to the organisers!
Three statements at the beginning – also for provoking discussion:

1) **Need to know:**
   There is a lack or even absence of public and mainstream-political awareness of the ultimate consequences of digitization in criminal justice despite the every-day mantras of “Big Data”, “Machine Learning”, “Artificial Intelligence” etc..

2) **Haunted Justice:**
   The major professional decision-makers in the legal-judicial field are NOT the driving forces behind the digitization of criminal justice – they are driven.

3) **Apocalypse Now?**
   Due to the special meaning of digitization for judicial decision-making in the criminal procedure we are facing the risk of a tacit structural change of democracy-based due process and rule of law in criminal justice.
Some caveats and clarifications:

- Work in progress
- Selective perspective – German/international – case reference
- Cross-cutting professional background - legal/judicial/criminology/crime analyst/political-parliamentarian analyst/CAQDAS/software trainer

- Terminology – “Big Data”, “Digitization”
- Focus of the paper is not analytic-technical but concentrates on the socio-legal implications of Big Data or digitization in (international) criminal justice - which are linked to ethics too last but not least when it comes to issues of truth, fair trial, justice.
- Example International Criminal Justice – Why? Pioneers – similarity with →
- Reference to big OC cases
2 Conceptualizing truth-finding in evidentiary procedure

Point of Departure - The reality of mass data evidence (ICJ, NCJ):
- Understanding the meaning of the shift from analog to digital (big) data in criminal justice – for the time being under-theorized
- Here focus on the production of evidence as information and knowledge management process (which is the core of producing evidence)
- “Reason” and “Truth” as core concepts are based on information-processing
• In para. 21 Brdjanin trial judgement the Trial Chamber states:
• „Every criminal trial involves two issues: first, that the crimes charged have been committed and, second, that an accused is responsible for those crimes. The object of evidence is to ascertain the truth of the facts with respect to these two issues, in order to enable the Trial Chamber to arrive at a conclusion, because ist duty is to decide the issues soleley upon the evidence fore it. “
2 Conceptualizing truth-finding in evidentiary procedure

– The so-called hybrid-system at the ICTY
– What do the Rules of Procedure and Evidence say?
  • Rule 90: (F) “The Trial Chamber shall exercise control over the mode and order of interrogating witnesses and presenting evidence so as to
    • (i) make the interrogation and presentation effective for the ascertainment of the truth”
– Information, material, evidence – The language of the Rules:
  • Evidence and “formally tendered (information) into evidence” (Rule 41)
  • admissibility/exclusion of evidence (Rule 95): “No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antithetical to, and would seriously damage, the integrity of the proceedings.”
  • Evidence and “formally tendered (information) into evidence” (Rule 41)
• **Evidence Definition:** “information put before a court to establish a fact in question” (International Criminal Evidence, May/Wierda, p. 2)

• **Relevance:** substantial relation to fact of crime

• **Credibility:** Reliability/Validity

• **Probative Value:** refers to the issue to rely facts of the crime on information to infer guilt

• **Presentation of Evidence (R 85):** prosecution-defence-rebuttal-rejoinder-ordered by TC
Presentation of Evidence at the ICC

- Pre-Trial Chamber III in BEMBA GOMBO “Decision on the Evidence Disclosure System and Setting a Timetable for Disclosure between the Parties”
- 68. The Chamber considers that disclosure of truly relevant evidence presupposes an in-depth analysis by the Prosecutor of each piece of evidence prior to its disclosure, whether that evidence is incriminating or exculpatory.
- 69 … Each piece of evidence must be analysed - page by page or, where required, paragraph by paragraph - by relating each piece of information contained in that page or paragraph with one or more of the constituent elements 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 person is charged. The same analysis technique shall apply mutatis mutandis to photographs, maps, videodiscs, tangible objects and any other support disclosed by the Prosecutor.
- 70. The Chamber considers that this analysis should be presented in the form of a summary table which shows the relevance of the evidence presented in relation to the constituent elements of the crimes with which the person is charged.
2 Conceptualizing truth-finding in evidentiary procedure

But then – the wake-up call

• some critical examples for truth-finding:
  – Blaskic – Kordic: Ahmici
  – Blaskic – Halilovic: begin fighting
  – Racak: massaker vs. military operation
  – Prosecution theories in Gotovina vs. Milosevic: “use of inconsistent and irreconcilable theories”:
    • A) Operation Storm: ‘ethnic cleansing’
    • B) Serb evacuation: ‘evacuated by Milosevic to populate territory in BiH’
  – Limaj: CAH – widespread & systematic
  – Sentencing: inconsistency and obfuscation
The realization of „Mission Impossible“:

- **Stakic trial judgement**, para. 20, 21:

- „The *unfortunate but obvious fact* that, for various reasons, this Tribunal has never had and never will have the opportunity to hear all the persons allegedly most responsible in one procedure creates additional problems. The Trial Chamber is aware that the *possibility of divergences from, or even contradictions with, findings in other cases cannot be excluded* because they are based on different evidence tendered and admitted … The Trial Chamber has endeavoured to come as close as possible to the truth. However the Trial Chamber is aware that no absolute truth exists.“
Theoretical glimpses:

- Constructivism, labelling theory, interactionism combined with newer approaches (Garland) on contingency of thinking and knowledge.
- THE GERMAN CODE OF CRIMINAL PROCEDURE
- Section 261 [Free Evaluation of Evidence]
- “The court shall decide on the result of the evidence taken according to its free conviction gained from the hearing as a whole.”
2 Conceptualizing truth-finding in evidentiary procedure


• It is not the statement of „truth“ as such which decides the functionality, acceptance and effectiveness of definitorial powers, it is the material reality of a societal „regime of truth“ as a whole (p. 131).

• Thus, what we have to study and to understand is that interaction and decision-making among these actors within the „regime of truth“ and the rules (open and tacit) they follow and apply.
2 Conceptualizing truth-finding in evidentiary procedure

- Why is this important in particular for BDE?
  - The process of fact-finding is only vaguely legally regulated; it is much more an empirical investigation and analytic process.
  - Mass data allow for ambiguous patterns.
  - For the time being on average lawyers are not particularly trained in big data analysis.

- The decision-process of selection, evaluation and interpretation of Big Data Evidence is – so far in Germany – at large neither regulated by legal rules of evidence nor specified by case law (see JURIS)

- The legal rules which should safeguard the objectivity and credibility of evidence before the court have been drafted in the old analogous times.
Thus, the principle of „free evaluation of evidence“ has had some plausibility in times where the life experience of the judge covers both, the crime in its context and also (professionally) the way evidentiary information is produced.

Inevitably, in times of Big Data at trial extra-legal rules are predominant in the evidentiary process.

Example: Expert Witnesses
3 Practical implications

Frequency distribution of EXPERT TYPE

- Forensic 34.6%
- Social 21.8%
- Medical 16.8%
- Military 19.1%
- Legal-Judicial 7.7%
3 Practical implications

Field of Expertise and Party/Court calling the Expert

Evidence Reference

<table>
<thead>
<tr>
<th>Field of Expertise</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>MILITARY</td>
<td>77</td>
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<tr>
<td>SOCIAL</td>
<td>70</td>
</tr>
<tr>
<td>MEDICAL</td>
<td>63</td>
</tr>
<tr>
<td>FORENSIC</td>
<td>56</td>
</tr>
<tr>
<td>LEGAL-JUDICIAL</td>
<td>49</td>
</tr>
<tr>
<td>SOCIAL-PROCEDURAL</td>
<td>42</td>
</tr>
<tr>
<td>MEDICAL-PROCEDURAL</td>
<td>35</td>
</tr>
<tr>
<td>FORENSIC-PROCEDURAL</td>
<td>28</td>
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<tr>
<td>LEGAL-JUDICIAL-PROCEDURAL</td>
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</tr>
<tr>
<td>MEDICAL-CLINICAL</td>
<td>14</td>
</tr>
<tr>
<td>FORENSIC-CLINICAL</td>
<td>7</td>
</tr>
<tr>
<td>LEGAL-JUDICIAL-CLINICAL</td>
<td>0</td>
</tr>
</tbody>
</table>
3 Practical implications

- Ambivalent image of expert witnesses in general:
  
  - “Whores of the Court” (Margaret A. Hagen, ‘Whores of the Court. The Fraud of Psychiatric Testimony and the Rape of American Justice’, 1997)
  
  
  - “Wrong – Why Experts keep Failing Us – And How to Know When Not to Trust Them” (Freedman, David H., 2010)
"Material Truth" vs. "Formal Truth"

Evidence-related judicial decision-making

Knowledge Generation (Analysis)
- admissibility
- relevance
- credibility
- probative value

"Formal" or "Procedural Truth"

Evidence-related judicial decision-making

Knowledge Generation (Analysis)
- objectivity
- plausibility
- reliability
- validity

Inferential Reasoning

External influence

"Material Truth"

Inferential Reasoning

Questions:
1. ?
2. ?
3. ?
3 Practical implications

• What follows from here in light of mass electronic data?
• In short:
  – The party in the courtroom which is able to produce an evidence-based narrative in the eye of the judge and jury (“to its free conviction”) is more likely to make the case.
  – The more the judge is dependent on the preparation of evidence by ‘others’, in particular if these ‘others’ work with tools and methods not familiar for the judge/jury - the evaluation of big evidentiary data are prone to underlying intentions (of conviction).
  – By example of evidence production in International Criminal Justice this issue can be demonstrated.
ICTY Model of qualitative Data Archiving
- centralized & distributed model of qualitative archiving
- INVESTIGATION LEVEL

C = case or accused, correlates to CaseMap and other case related databases
4. Conclusions

Some final reflections on the three statements at the beginning:

1) **Need to know:**
   There is a lack or even absence of public and mainstream-political awareness of the ultimate consequences of digitization in criminal justice despite the every-day mantras of “Big Data”, “Machine Learning”, “Artificial Intelligence” etc.:
   * Political parties, civil society, legislators need to prioritize Big Data issues in justice.

2) **Haunted Justice:**
   The major professional decision-makers in the legal-judicial field are NOT the driving forces behind the digitization of criminal justice – they are driven.
   * Training programs for trial lawyers, law students, research of actual practice.

3) **Apocalypse Now?**
   Due to the special meaning of digitization for judicial decision-making in the criminal procedure we are facing the risk of a tacit structural change of democracy-based due process and rule of law in criminal justice.
   * We need political mechanisms and legal barriers to make sure that no measure are taken in digitizing justice which jeopardize our constitutional agreements on the way we live.
4. Conclusions

More specifically: In light of the nature and complexity of decision-making in the evidentiary process in criminal justice the replacement of analog data by digital and mass computer-based data as evidence, dramatic changes (paradigm change) is anticipated:

1) **Limitation of Independence of the court:**
The gravity of decision-making shifts from the traditional judicial decision by judges to investigators, digital forensics, analysts and prosecutors.

2) **De-Regulation of Justice:**
Shift from more legal-formal to extra-legal-informal rules of decision-making. (The suggestion/predictions of ‘hidden’ actors are taken as real – de-skilling of lawyers.)

3) **Hidden Justice – “Black-boxing”:**
Shift from ‘equality of arms’ and public hearing to autocratic knowledge management and tacit data processing. The analytic capacities are hidden from the user (who actually is the core decision-maker). Goes together with “Dataism” were correlation is taken for causality. (Example: “Excuse-email of analyst in OC-case)
4. Conclusions

THUS: The “Regime of Truth” looses its legitimacy.

Legislators and legal professions have to become the masters (instead of users) of digitization in justice and determine the functions (possibilities and limits) of ICT and AI.

The incremental shifting of decision-powers away from the courts indicates that principles of democratic jurisprudence are at stake – comparable with questions of genetic engineering or civil use of nuclear power.

Instead chances of digitizing of justice should be emphazised. This is support and qualifying of human decision-making.

We should support a debate and qualified discourse which goes beyond protection of personal data but helps to be aware about meaning of changes (Zuckerberg’s promise) for the foundations of our life to come to a human answer to the question whether and how we want these changes.
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CaseMap Suite

Resources for your CaseMap software suite

Many of your CaseMap questions can be easily answered with a quick search through our online resources below. Bookmark these sites for easier access later.

We are here to help.
**OTP Apps**

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**Hawkins - LexisNexis CaseMap**

### Facts

<table>
<thead>
<tr>
<th>Date &amp; Time</th>
<th>Fact Text</th>
<th>Source(s)</th>
<th>Material</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>11/25/02</td>
<td>William Lang meets Philip Hawkins while touring Converse Chemical Labs Plant in Bakersfield.</td>
<td>Deposition of William Lang, 25:14</td>
<td>Yes</td>
<td>Disputed by: Us</td>
</tr>
<tr>
<td>12/7/2002</td>
<td>William Lang invites Philip Hawkins to visit Anstar Biotech Industries facilities in Irvine.</td>
<td>InterviewNotes</td>
<td>No</td>
<td>Prospective</td>
</tr>
<tr>
<td>01/7/2003</td>
<td>William Lang offers Philip Hawkins <strong>Sales Manager</strong> position at Anstar Biotech Industries.</td>
<td>InterviewNotes, Email from Phil Hawkins at.</td>
<td>Yes</td>
<td>Undisputed</td>
</tr>
<tr>
<td>Mon 01/03/2003</td>
<td><strong>Philip Hawkins joins Anstar Biotech Industries as a Sales Manager.</strong></td>
<td>Anstar Biotech Industries Employment</td>
<td>Yes</td>
<td>Undisputed</td>
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<tr>
<td>Mon 12/03/2003</td>
<td>Philip Hawkins promoted to Anstar Biotech Industries VP of Sales.</td>
<td>InterviewNotes</td>
<td>Yes</td>
<td>Undisputed</td>
</tr>
<tr>
<td>02/7/2004</td>
<td>William Lang tells Philip Hawkins that he has changed his mind regarding the Hawkins Employment</td>
<td>Hawkins Employment Agreement</td>
<td>Unsure</td>
<td>Disputed by:</td>
</tr>
<tr>
<td>03/7/2004</td>
<td>Susan Sheridan has dinner with Linda Collins and complains about Anstar Biotech Industries management.</td>
<td>Deposition of Linda Collins, 33:15</td>
<td>Unsure</td>
<td>Disputed by:</td>
</tr>
<tr>
<td>06/7/2005</td>
<td>William Lang makes decision to reduce size of staff.</td>
<td>Deposition of Karen Thomas 43:19</td>
<td>Yes</td>
<td>Disputed by: Us</td>
</tr>
<tr>
<td>07/7/2005</td>
<td>Susan Sheridan is terminated.</td>
<td>Deposition of Philip Hawkins</td>
<td>Yes</td>
<td>Undisputed</td>
</tr>
</tbody>
</table>
IBM i2 Analyst's Notebook

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OTP Apps – I2/Analyst’s Notebook
Senior Advisers

Dr. Olympia Bekou

Dr. Olympia Bekou is Professor and Head of the International Criminal Justice Unit of the Nottingham Human Rights Law Centre. A qualified lawyer, she specialises in international criminal law with particular expertise in national implementing legislation for the ICC. She has provided research and capacity building support for 63 States, through intensive training to more than 75 international government officials and drafting assistance to Samoa (with legislation enacted in November 2007), Fiji and Jamaica. She is responsible for the National Implementing Legislation Database (NILD) of the ICC Legal Tools Project and has researched and taught extensively worldwide. She has undertaken CMN missions to a number of countries in several continents.

Dr. Helge Brunborg (II)

Dr. Helge Brunborg is a Senior Research Fellow in Statistics Norway. He has previously worked for the International Criminal Tribunal for the former Yugoslavia (ICTY) as a demographer/statistician (1997–98 and later as a Consultant). He pioneered the use of statistics and demography in the investigations and prosecutions of the international criminal tribunals. He has served as an expert witness in a number of ICTY trials. He holds a Ph.D. in Economics/Demography from University of Michigan and a Cand. Oecon. from the University of Oslo. He is Chair of the Panel on the Demography of Armed Conflict, International Union for the Scientific Study of Population. He has worked as a special advisor on data and analysis issues in numerous countries in Africa, Asia and Europe. He has also published a book and several articles on issues related to the demography of armed conflict.

Dr. Uwe Ewald (II)

Dr. Uwe Ewald is affiliated with the Max Planck Institute for Foreign and International Criminal Law in Freiburg, i. Br., Germany, as a Senior Researcher at the criminological department, conducting research on serious international crimes and preparing a European Core Crime Data Base. Since 2002, he teaches Supranational Criminology as a lecturer at the Ruhr University Bochum, Chair of Criminology and Police Science. He is the founding Executive Director of the International Justice Analysis Forum, an Internet portal which appeals to unite crime and legal analysts as well as empirical researchers in social and legal sciences in the field of serious crimes of international concern, first and foremost international core crimes. From 2002 till 2009, he worked as a crime analyst for the Office of the Prosecutor at the International Criminal Tribunal for the Former Yugoslavia, mainly conducting strategic analysis. Due to his legal background (Dr. iur.) he has been working (beside his academic positions) as a defense counsel, in particular in state crime cases in Germany. He began his academic career at the Humboldt University Berlin, and conducted research and hold teaching positions at different universities, in particular at Simon Fraser University, Vancouver, and the Free University Berlin.
## Case Matrix

### Case: The Prosecutor v. Jean-Pierre Bemba Gombo

#### Case no.: ICC-01/05-01/08

<table>
<thead>
<tr>
<th>Suspect</th>
<th>Incident</th>
<th>Category of crime</th>
<th>Crime</th>
<th>Mode of liability</th>
<th>Matrix</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jean-Pierre Bemba Gombo</td>
<td>2002-2003 CAR Conflict</td>
<td>Art. 7</td>
<td>Art. 7 (a) Murder</td>
<td>Command responsibility</td>
<td>Matrix</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Art. 7 (c) Murder</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Art. 7 (d) Torture</td>
<td>Art. 7 (c) (d) Rape</td>
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<td></td>
<td></td>
<td>Art. 7 (c) (e)</td>
<td>Art. 8 (2)(c)(g) Murder</td>
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<tr>
<td></td>
<td></td>
<td>Art. 8 (2)(c)(g)</td>
<td>Art. 8 (2)(c)(g) (d) Torture</td>
<td>Joint perpetration</td>
<td>Matrix</td>
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<tr>
<td></td>
<td></td>
<td>Art. 8 (2)(c)(g)</td>
<td>Art. 8 (2)(c)(g) (d) Outrages upon personal dignity</td>
<td>Joint perpetration</td>
<td>Matrix</td>
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<td></td>
<td></td>
<td>Art. 8 (2)(c)(g)</td>
<td>Art. 8 (2)(c)(g) (d) Rape</td>
<td>Joint perpetration</td>
<td>Matrix</td>
</tr>
</tbody>
</table>

**Matrix/Legal Tools**

[Website Link](https://otp.crim.icj.int/cas/index.php?folder=3&op=masterpage&CaseID=20)
### OTP Apps – Case Matrix/Legal Tools

#### Case Matrix/Legal Tools

<table>
<thead>
<tr>
<th>Situation</th>
<th>Case</th>
<th>Suspect</th>
<th>Incident</th>
<th>Category of Crime</th>
<th>Crime</th>
<th>Mode of Liability</th>
</tr>
</thead>
<tbody>
<tr>
<td>Case 1</td>
<td>Doe</td>
<td>Jean</td>
<td>2002-2009</td>
<td>Case: Conflict</td>
<td>Art 1</td>
<td>Jurisdiction</td>
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</table>

#### Legal Reference Matrix

<table>
<thead>
<tr>
<th>Requirement</th>
<th>Components of Legal Requirement</th>
<th>Comments</th>
<th>Exculpatory/Conserversing</th>
<th>Discriminating</th>
<th>Test</th>
</tr>
</thead>
<tbody>
<tr>
<td>E1.1</td>
<td>The conduct was committed as part of a widespread or systematic attack directed against a civilian population.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>E1.2</td>
<td>Conducted against any civilian population.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>E1.3</td>
<td>Widespread or systematic character of the attack.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>E1.4</td>
<td>As part of means between the acts of the perpetrator and the attack.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

#### Specific Elements

<table>
<thead>
<tr>
<th>Element</th>
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<th>Comments</th>
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<th>Discriminating</th>
<th>Test</th>
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</thead>
<tbody>
<tr>
<td>E.1</td>
<td>The perpetrator killed one or more persons.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>E.2</td>
<td>Mental Element for Element 2: Conduct of Killing. The perpetrator meant to...</td>
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<td></td>
<td></td>
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<tr>
<td>E.3</td>
<td>Mental Element for Element 2: Conduct of Killing. The perpetrator was...</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>E.4</td>
<td>Mental Element for Element 2: Conduct of Killing. The perpetrator meant...</td>
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</table>

#### Joint Perpetrators

<table>
<thead>
<tr>
<th>Element</th>
<th>Requirement</th>
<th>Comments</th>
<th>Exculpatory/Conserversing</th>
<th>Discriminating</th>
<th>Test</th>
</tr>
</thead>
<tbody>
<tr>
<td>M.1</td>
<td>Adequacy of presence involved in the commission of a crime.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>M.2</td>
<td>Common plan or agreement which amounts to co-conspirators in the commission of a crime.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>M.3</td>
<td>The common plan or agreement includes an element.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

#### Legal Reference Sources

- E1.1: Case OTP-2004-6959 at 0426
- E1.2: Case OTP-2005-6099
- E1.3: Case OTP-2005-6099 at 0426
- E1.4: Case OTP-2005-6099 at 0426
- E1.5: Case OTP-2005-6099 at 0426
- E1.6: Case OTP-2005-6099 at 0426
- E1.7: Case OTP-2005-6099 at 0426
- E1.8: Case OTP-2005-6099 at 0426
- E1.9: Case OTP-2005-6099 at 0426

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OTP Apps – Case Matrix/Legal Tools

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  - ICC Documents
  - ICC Preparatory Works and Statute Amendments
  - International Legal Instruments
  - Other International Law Decisions and Documents
  - Human Rights Law Decisions and Documents
  - International(ised) Criminal Jurisdictions (Basic Documents)
  - International(ised) Criminal Decisions
  - National Jurisdictions
  - National Implementing Legislation (Content in "National Jurisdictions")
  - National Cases Involving Core International Crimes (Content in "National Jurisdictions")
  - Publications
  - United Nations War Crimes Commission
  - International(ised) Fact-Finding Mandates

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