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MEMORANDUM

TO: Members of the Preparatory
Committee on the Establishment
of an International
Criminal Court

DATE: 22 March 1996

FROM: President Antonio Cassese

SUBJECT: Definition of Crimes and General Principles of Criminal Law as Reflected in
the International Tribunal's Jurisprudence

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I. Definition of Two of the Crimes Currently in the ILC Draft Statute

A. Introduction

1. The crimes within the jurisdiction of the proposed International Criminal Court are provided at Article 20 of the 1994 Draft Statute as set out in the Report of the International Law Commission (the "ILC" and the "ILC Report"¹) on the work of its forty-sixth session held 2 May-22 July 1994 (the "Draft Statute"). As proposed therein, the jurisdiction of the Court is said to exist with regard to the following crimes: a) genocide; b) aggression; c) serious violations of the laws and customs applicable in armed conflict; d) crimes against humanity; e) certain exceptionally serious crimes of international concern as listed in an Annex to the Draft Statute.

2. To date there have been very few decisions by international or national judicial bodies considering the implementation of international humanitarian law. Against this background the work of the International Criminal Tribunal for the Former Yugoslavia (the "International Tribunal") may serve to assist the Preparatory Committee in its work on the International Criminal Court.

3. As is well known, the International Tribunal is scheduled to begin the trial of Dusko Tadic on May 7 of this year. It is in the context of the consideration of this case that the International Tribunal has had occasion to consider two heads of jurisdiction which the International Tribunal has in common with the International Criminal Court, as proposed in Article 20 of the Draft Statute.² Tadic has been charged, *inter alia*, with violating Articles 3 and 5 of the International Tribunal's Statute (the "Statute"). Article 3 provides for the prosecution of *violations of the laws or customs of war* and Article 5 provides for the prosecution of *crimes against humanity*. In a pre-trial motion Tadic argued that the International Tribunal lacked jurisdiction to prosecute him for a variety of reasons; included amongst these reasons was the assertion that the International Tribunal lacked jurisdiction as a result of the non-applicability of Articles 3 and 5 to the circumstances of his case.³ The Appeals Chamber addressed this jurisdictional issue in its decision of 2 October 1995,⁴ in which it considered the applicability of Articles 3 and 5.

¹ A/49/10.

² The jurisdictional motion, *The Prosecutor v. Dusko Tadic*, Case No. IT-94-I-T, was originally heard by Trial Chamber II which issued a decision on 14 November 1995. This Trial Chamber decision will be referred to as the "*Tadic First Instance*." The decision of the Appeals Chamber (Case No. IT-94-I-AR72) of 2 October 1995 will be referred to as the "*Tadic Appeal*."

³ In short, Tadic argued that the International Tribunal's jurisdiction is limited to international armed conflict and that no such conflict existed in the context of the charges against him.

⁴ The Appeals Chamber determined that the International Tribunal does have the jurisdiction to apply these articles in the *Tadic* case.



B. Serious Violations of the Laws and Customs Applicable in Armed Conflict

4. Before attempting to highlight the areas of the International Tribunal's jurisprudence which may serve to assist in the preparation for the establishment of an International Criminal Court, it is important to note the differences in the wording of Article 3 of the Statute and the Draft Statute's Article 20(c). Article 3 of the Statute refers to the International Tribunal's power to prosecute persons "violating the laws or customs of war," whereas article 20(c) refers to "serious violations of the laws and customs applicable in armed conflict". Two differences emerge: (i) in the Statute, the reference is to "war" rather than "armed conflict" and (ii) the Statute lacks the word "serious" before the word "violations." As will be discussed below, however, neither difference would appear to amount to any real difference in the jurisdiction as set out in each Statute.

1. International Tribunal's Definition of "violations of laws and customs of war"

5. Based on the definition of the concept of "laws or customs of war" as it is currently understood, this difference in language between the Statute and the Draft Statute is not relevant. As noted in the judgement of the Appeals Chamber,⁵ the outdated term "violation of the laws or customs of war"⁶ has been largely replaced by the two broader notions of violations of the laws and customs of "armed conflict"⁷ and "international humanitarian law." Indeed, the Secretary-General himself concedes that the traditional laws of warfare are now more correctly termed "international humanitarian law," with the Hague Rules forming only an important part.⁸

6. In the *Tadic Appeal*, counsel for the Appellant argued that the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed to that Convention were adopted to deal with interstate conflict. Since, in the appellant's submission, the conflict in the former Yugoslavia was an internal one, this meant that the Tribunal lacked "Hague Law" subject-matter jurisdiction. The Appeals Chamber held, however, that while the jurisdiction for "violations of laws and customs of war" under Article 3 is, indeed, based on the Hague Law and Regulations and the Nuremberg Tribunal's interpretation of those Regulations, to limit it to this law would be too close a reading of the jurisdiction. They held that the prohibition of "violations of the laws and customs of war" went further, encompassing the Geneva Conventions as well. Indeed, such prohibition included all violations of humanitarian law provided for under customary international law⁹—other than those covered by other, more specific provisions in the Statute.¹⁰ More specifically, it was found to include: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions; (iii) violations of customary rules

⁵ *Tadic Appeal* at paragraph 87.

⁶ A term which was referred to primarily to make reference to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto.

⁷ A concept which is said in paragraph 87 of the Appeals Chamber decision to have been essentially introduced by the Geneva Conventions of 1949.

⁸ See *Tadic Appeal* at paragraph 87.

⁹ Or, in certain circumstances, under a treaty.

¹⁰ This is a reference to the provision for the prosecution by the International Tribunal of grave breaches of the Geneva Conventions (Article 2), genocide (Article 4) and crimes against humanity (Article 5).



on internal conflicts, including Article 3 common to the four Geneva Conventions; and, (iv) violations of agreements binding upon the parties to the conflict.¹¹

2. "Serious" Violations

7. The second difference between the language in Article 3 and that in Article 20(c) arises from the fact that the Statute refers only to "violations" of laws and customs, whereas Article 20(c) refers to "serious violations." Again, however, this difference is not meaningful. The Appeals Chamber considered the word "serious" to be an implied part of Article 3, based on the fact that the Statute speaks of "serious" violations of international humanitarian law in other places.

8. The Appeals Chamber decision defines a "serious" violation as one involving "grave consequences for the victim. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a 'serious violation of international humanitarian law.'"¹²

3. Individual Criminal Responsibility

9. In addition to holding that for a crime to be a "violation of the laws or customs of war", it must constitute a "*serious*" infringement of a rule of international humanitarian law, the Appeals Chamber found that there must also be *individual responsibility* under customary international or treaty law.¹³ As noted by the Appeals Chamber, the Military Tribunal in Nuremberg concluded "that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of the breaches."¹⁴ In reaching this conclusion, the Nuremberg Tribunal considered a number of relevant factors,¹⁵ which the Appeals Chamber applied to the violations alleged in the *Tadic Appeal*. The Appeals Chamber held that such violations entailed individual criminal responsibility, regardless of whether committed in an internal or international conflict.¹⁶

4. Customary International Law and the Blurring of the Distinction Between Internal and International Conflicts

10. In order to determine whether, in a given situation, there has been a violation of international humanitarian law which entails individual criminal responsibility, it is necessary

¹¹ See *Tadic Appeal* at paragraph 89.

¹² *Tadic Appeal* at paragraph 94.

¹³ *Tadic's* Defence Counsel had argued that even if it were the case that customary international law prohibited acts regardless of whether committed in internal or international armed conflicts, such prohibitions do not entail *individual criminal responsibility* when breaches are committed in internal armed conflicts.

¹⁴ As discussed in the *Tadic Appeal* at paragraph 128.

¹⁵ Included here was the clear and unequivocal recognition of the rules of warfare in international law and State practice indicating an intention to criminalize the prohibition, including statements by government officials and international organizations, as well as punishment of violations by national courts and military tribunals.

¹⁶ To find otherwise would be to disregard not only the advances resulting from Nuremberg, but also a whole set of factors: certain principles and rules on humanitarian law, elements of practice indicating that States intend to criminalize serious breaches of customary rules and principles on internal conflicts, national legislation designed to implement the Geneva Conventions, certain relevant Security Council resolutions and substantive justice and equity.



to consider the state of international law, both in terms of customary and treaty law.¹⁷ Here again there is evidence that the distinction between an international and an internal conflict is no longer as determinative of the application of international law as it once was.

11. The Appeals Chamber noted that, since the 1930s, there has been a *gradual blurring of the distinction between the customary international law rules governing international conflicts and those governing internal conflicts*. Put another way, there has been a convergence of two bodies of international law with the result that internal strife is now governed to a large extent by the rules and principles which had traditionally only applied to international conflicts. In arriving at this conclusion regarding the formation of customary international law rules *to protect those who are not taking part in the hostilities*, the Appeals Chamber considered the practice of various States and international and regional organisations.¹⁸ To summarize the reasoning of the Appeals Chamber, this convergence has come about due largely to the following four factors: (1) the increase in the number of civil conflicts; (2) the increase in the level of cruelty of internal conflicts; (3) the increasing interdependence of States; and, (4) the influence of universal human rights standards.¹⁹ The Appeals Chamber then turned to the extension of the rules regarding *means and methods* of warfare to internal armed conflicts and concluded that a similar blurring had occurred. In short, the Appeals Chamber concluded that certain norms apply as customary international law to internal and international armed conflicts alike.

12. This blurring of the distinction is not, however, without limitation. At paragraph 126 the Appeals Chamber noted that internal strife is not regulated by general international law in all its aspects. In particular, it noted two limitations: "(i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts."

C. Crimes Against Humanity

13. Article 5 of the Statute grants the International Tribunal the power to "prosecute persons responsible" for certain crimes committed in situations of "armed conflict, whether international or internal in character," when these crimes are "directed against any civilian population." Thus, the International Tribunal has no jurisdiction to prosecute under Article 5

¹⁷ At paragraph 143 of the Appeals Chamber decision the International Tribunal noted that it was authorised to apply any treaty which "(i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict with or derogated from peremptory norms of international law ..." As currently drafted, the Draft Statute's Article 20(e) deals with exceptionally serious crimes established under or pursuant to certain treaty provisions.

¹⁸ In particular, it considered: 1. State practice as evidenced, *inter alia*, by the Spanish Civil War; 2. the practice of States in applying parts of the Geneva Conventions pursuant to the invitation to do so in common Article 3; and, 3. the unilateral willingness of States to abide by international humanitarian law in their internal conflicts. Additionally the Appeals Chamber considered the action of the ICRC, United Nations General Assembly resolutions, declarations made by member States of the European Union, Additional Protocol II of 1977 and some military manuals (paragraph 108).

¹⁹ The difficulty of assessing and attempting to identify the state of customary international law was recognized by the Appeals Chamber at paragraph 99 of the *Tadic Appeal*.



unless these circumstances have been fulfilled. The International Tribunal has had cause to consider the ambit of its jurisdiction under Article 5 and in particular these circumstances on three occasions: (1) *Tadic First Instance*; (2) the *Tadic Appeal*; and (3) in the review of an indictment pursuant to a Rule 61 hearing in the case of *Dragan Nikolic* ("*Nikolic*").²⁰ These circumstances are briefly discussed below.

1. The Condition that an Armed Conflict Should Exist

14. The Appeals Chamber in the *Tadic Appeal* defined armed conflict for the purposes of the application of international humanitarian law as follows:

We find that an armed conflict exists whenever there is resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state.²¹

The Appeals Chamber went on to say that international humanitarian law extends from the initiation of the conflict to the cessation of hostilities or the general conclusion of peace and that the law applies in the whole territory of the warring State(s). Thus it can be said that the Appeals Chamber considered that armed conflict acted as a trigger for the application of international humanitarian law in the *entire territory* and that for a successful prosecution under this article (as well as articles 2 and 3) there is no need for an armed conflict to exist at the precise place and time of the commission of the crime charged because, as the Appeals Chamber stated, "It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict."²² The Trial Chamber in *Nikolic* adopted and applied this definition.²³ In contrast, Article 20(d) of the Draft Statute, which covers practically the same ground as Article 5 of the Statute, does not require a connection to armed conflict. In this regard, it should be noted that the International Tribunal has held in all three cases, that the definition of crimes against humanity set out in the Statute is a *narrow* one specifically set out for the purposes of the International Tribunal and not a standard definition of crimes against humanity.²⁴ The Appeals Chamber in *Tadic* cited as examples of crimes against humanity having no nexus with armed conflict the crimes of genocide²⁵ and apartheid.²⁶ In this sense, therefore, the provisions of the Draft Statute are wider than Article 5 of the Statute.

²⁰ Case No. IT-94-2-R61, Trial Chamber I, Decision of 20 October 1995.

²¹ See *Tadic Appeal* at paragraph 70.

²² See *Tadic Appeal* at paragraph 70.

²³ See *Nikolic* at paragraph 26.

²⁴ See generally, *Tadic Appeal* at paragraphs 139 to 141.

²⁵ Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 U.N.T.S. 277, art. 1, provides that genocide, "whether committed in time of peace or in time of war, is a crime under international law."

²⁶ International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, 1015 U.N.T.S. 243, arts. 1-2.



2. "Crimes directed against any civilian population"

15. The Trial Chamber in the *Tadic First Instance* case adopted the definition given to crimes against humanity in the Secretary-General's Report²⁷ as crimes committed as part of a widespread or systematic attack against any civilian²⁸ population on national, political, ethnic, racial or religious grounds without any comment.²⁸ In *Nikolic*, however, the Trial Chamber held that according to prevailing opinion, the phrase covers "three distinct components":

1. The crimes must be directed against a civilian population, specifically identified as a group by the perpetrators of those acts.
2. The crimes must, to a certain extent, be organised and systematic. Although they need not be related to a policy established at State level, in the conventional sense of the term, they cannot be the work of isolated individuals alone.
3. The crimes, considered as a whole, must be of a certain scale and gravity.²⁹

It seems that this elaboration given to the phrase is in line with the definition of the Secretary-General. The reference to a group in the first component clearly refers to a group based on the criteria of race, nationality, religion or political affiliation given by the Secretary-General. It also accords with the understanding of the Commission as expressed in the Report of the ILC.³⁰

3. Other Pronouncements Regarding the Application of Article 5

16. The International Tribunal has stated unequivocally that crimes against humanity form a part of customary international law which previously found expression in Article 6 paragraph 2(c) of the Charter of the International Military Tribunal for the Prosecution and Punishment of the Major War Criminals of the European Axis of August 8 1945, Article II paragraph 1(c) of Control Council Law No. 10 of 20 December 1945 and Article 5(c) of the Charter of the International Military Tribunal for the Far East of 26 April 1946. In the section of the ILC Report discussing crimes against humanity, it is reported that "The view was expressed that the concept of 'crimes against humanity' gave rise to the difficult question of determining, at the present stage of development in international law, when such crimes - in the absence of an applicable treaty regime - were triable as international crimes."³¹ However, the International Tribunal has consistently maintained that crimes against humanity are a part of customary international law without expressing any opinion on or examination of the absence or presence of a treaty regime. It is likely that the International Tribunal would have to deal with this issue at some later date. For the present however, the International Tribunal has concerned itself with interpreting the unambiguous wording of Article 5.

17. The International Tribunal has also held that it is irrelevant whether or not the armed conflict is international or internal in character. This is obvious from the wording of Article 5.

²⁷ S/25704 at paragraph 48.

²⁸ *Tadic First Instance* at paragraph 75.

²⁹ See *Nikolic* at paragraph 26.

³⁰ See ILC Report at paragraph 14.

³¹ See ILC Report at paragraph 11.



4. Conclusion

18. This brief examination of the jurisprudence on Article 5 has attempted to reveal the interpretation given by the International Tribunal to certain elements of the Article in the light of the small volume of case-law available at the moment. These elements are the requirement of a situation of armed conflict and that the crimes must be directed against any civilian population. It is likely that the International Tribunal will address some of the other matters discussed in the Report as judicial activity increases.



II. General Principles of Criminal Law as Reflected in the Statute, the Rules of Procedure and Evidence and the Case Law of the International Tribunal

A. Introduction

19. Certain general principles of criminal law have been laid down in the Statute or recognised by the Secretary-General's Report. The International Tribunal, however, has gone further in several instances in recognising other principles, or in elaborating and applying these principles in its Rules of Procedure and Evidence (the Rules) or its case law.

B. Specific Principles

1. Impartiality of Judges

20. Impartiality as a condition for the exercise of judicial function is now recognised as a general principle of law. Article 13 of the Statute provides that "[t]he judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices." The Secretary-General's Report explained that "[i]mpartiality in this context includes impartiality with respect to the acts falling within the competence of the International Tribunal."³²

21. The International Tribunal itself has further elaborated on this point in its Rules by requiring each Judge to make a solemn declaration to the effect that the Judge will perform the duties and exercise the powers as a Judge of the International Tribunal "honourably, faithfully, impartially and conscientiously."³³

2. Independence of the Prosecutor

22. Article 16 of the Statute provides that the Prosecutor "shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source." This is obviously to ensure that the Prosecutor of the International Tribunal performs the prosecutorial functions objectively and independently on behalf of the international community as a whole and not as an agent of any individual State or any group thereof. This Article further provides that the Prosecutor "shall be appointed by the Security Council on nomination by the Secretary-General," and that the terms and conditions of service of the Prosecutor "shall be those of an Under-Secretary-General". This is apparently aimed to strengthen the independence and effectiveness of the Prosecutor.

23. The International Tribunal in its Rules has provided the Prosecutor "shall perform all the functions provided by the Statute in accordance with the Rules and such Regulations,

³² S/25704 at paragraph 74.

³³ Rule 14.



consistent with the Statute and Rules as may be framed by him.”³⁴ Thus, the Prosecutor has wide discretion in the performance of his or her official duties.

3. Principle of Legality (*Nullum Crimen Sine Lege and Nulla Poena Sine Lege*)

24. The Statute does not itself explicitly lay down the principle of legality. The Secretary-General’s Report comments that

In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.³⁵

25. As is clear, this is not a definition of the principle of legality, which is well settled,³⁶ but an elaboration as to what applicable law, consistent with the principle *nullum crimen sine lege*, may be applied by the International Tribunal. The International Tribunal, through its Appeals Chamber, addressed this question in the *Tadic Appeal*, where the Appeals Chamber held that treaty law may also be part of the applicable law:

It should be emphasised again that the only reason behind the stated purpose of the drafters that the International Tribunal should apply customary international law was to avoid violating the principle of *nullum crimen sine lege* in the event that a party to the conflict did not adhere to a specific treaty. ... It follows that the International Tribunal is authorised to apply, in addition to customary international law, any treaty which: (i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict with or derogated from peremptory norms of international law, as are most customary rules of international humanitarian law.³⁷

26. Another aspect of the principle of legality is that the penalty imposed upon a convicted person should not be heavier than the one applicable at the time when the offence was committed (*nulla poena sine lege*). Strict application of this aspect in the international context is difficult in the absence of an international criminal code detailing the penalties for each crime. Moreover, the peril of strict application of national sentencing practices is obvious; certain national laws may deviate from the general practice of the majority of States. For this reason, Article 24 of the Statute provides that “the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.” The phrase “have recourse to” indicates that the practices in the former Yugoslavia need not be strictly followed but constitute a guide for the International Tribunal.

³⁴ Rule 37.

³⁵ S/25704, paragraph 34.

³⁶ International Covenant on Civil and Political Rights (“ICCPR”), 999 U.N.T.S. 171, art. 15; European Convention for the Protection of Human Rights and Fundamental Freedoms (the “European Convention”), Euro. T.S., No. 5., art. 7.

³⁷ *Tadic Appeal*, paragraph 143.



4. Prohibition against Double Jeopardy (*Non-bis-in-idem*)

27. Article 9 of the Statute provides that the International Tribunal and national courts shall have concurrent jurisdiction over the crimes within the jurisdiction of the International Tribunal, but that the International Tribunal shall have primacy over national courts. This situation may lead to repeated prosecutions of the same persons for the same conduct. Article 10 of the Statute prohibits such repeated prosecutions, with two exceptions. Paragraph 1 provides that "[n]o person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal." Paragraph 2 provides that "[a] person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal only if: ... (a) the act for which he or she was tried was characterised as an ordinary crime; or ... (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted." Paragraph 3 directs the International Tribunal to take into account, when imposing penalties on a person convicted by the International Tribunal, the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

28. So far, only Trial Chamber II has addressed this question. It ruled that an investigation proceeding by a national authority leading to an indictment already filed against the accused has not progressed so far that the accused has actually been tried as that term is used in the Statute.³⁸

5. Rights of the Accused

29. Article 21³⁹ of the Statute guarantees the rights of the accused during the criminal process, including, most notably, the right to be equal before the International Tribunal, to be

³⁸ The *Tadic* Case, No. IT-94-I-T, Trial Chamber II, Decision of 14 November 1995, paragraph 12.

³⁹

Article 21 Rights of the Accused

1. All persons shall be equal before the International Tribunal.
2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.
3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.
4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
 - (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
 - (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
 - (c) to be tried without undue delay;
 - (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
 - (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;



presumed innocent, to have a fair and expeditious public trial, to be tried in his presence, to have the assistance of counsel and interpreters, and not to be compelled to testify against himself or to confess guilt. This Article is taken almost verbatim from article 14, paragraphs 1 through 3 of the ICCPR (similar to article 6 of the European Convention). These rights are, in the view of the Secretary-General, "internationally recognised standards."⁴⁰

(a) Right to Be Tried by a Court Established by Law

30. The Appeals Chamber in the *Tadic Appeal* considered whether the general principle that courts must be *established by law* had been violated by the establishment of the International Tribunal. The Appeals Chamber considered the ICCPR, article 14 of which states:

in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to fair and public hearing by a competent, independent and impartial court *established by law*.

It also considered similar provisions in the European Convention as well as the American Convention on Human Rights. The Appeals Chamber found that the general principle of law imposing an international obligation on States in the municipal setting to guarantee that individuals have the right to have criminal charges against them determined by a tribunal established by law was inapplicable in the case of International Courts. The Appeals Chamber did hold, however, that any International Tribunal created "*ought to be rooted in the rule of law and offer all guarantees embodied in the relevant international instruments. Then the court may be said to be 'established by law'.*"⁴¹

31. According to the Appeals Chamber the phrase "established by law" may be susceptible to three possible interpretations:

a) *Established by a legislature.* The Appeals Chamber recognised that the jurisprudence of the European Court showed that it favoured this interpretation but stated that the U.N. system does not have the division of powers into executive, judiciary and legislature found in most State systems. Thus this interpretation was impossible in the context of the International Tribunal.

b) *Established by a body which, though not the legislature, has the power to make binding decisions.* The Appeals Chamber found that the Security Council was such a body by virtue of its powers under Article 25 of the U.N. Charter.⁴² Therefore, the establishment of the International Tribunal satisfied this interpretation of the phrase. In any case, the Appeals Chamber considered the endorsement of the International Tribunal by the U.N. General

(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;

(g) not to be compelled to testify against himself or to confess guilt.

⁴⁰ S/2570 at paragraph 106.

⁴¹ *Tadic Appeal* at paragraph 70.

⁴² "The members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."



Assembly as a sign of representative participation in the establishment of the International Tribunal.

c) *Established according to the rule of law.* The Appeals Chamber held that the establishment of the International Tribunal fulfilled this interpretation. “For a tribunal such as this one to be established according to the rule of law, it must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instruments.”⁴³ The Appeals Chamber viewed the safeguards contained in the Statute and the Rules as sufficient to qualify it as an International Tribunal established by law under this interpretation. It noted that the virtual adoption of article 14 of the ICCPR in article 21 of the Statute was indicative of the fact that these internationally recognized principles were actually in place for persons appearing before the International Tribunal.

(b) Trial in Absentia

32. The right of the accused to be tried in his presence in itself does not appear to preclude trial *in absentia*. The Secretary-General, however, stated that “[a] trial should not commence until the accused is physically present before the International Tribunal. There is a widespread perception that trials *in absentia* should not be provided for in the Statute as this would not be consistent with article 14 of the [ICCPR], which provides that the accused shall be entitled to be tried in his presence.”⁴⁴ This view has been respected. The International Tribunal, however, provides in its Rules that if a warrant of arrest cannot be executed, a Rule 61 proceeding may be had to review the indictment in public, which may lead to the reconfirmation of the indictment and the issuance of an international arrest warrant to be transmitted to all States. No conviction results from such a proceeding.

(c) Exclusionary Rules and Attorney-client Privilege

33. The International Tribunal has gone further in providing procedural guarantees to the accused notably in two respects: (a) the application of the exclusionary rules relating to evidence obtained illegally and (b) the recognition of the attorney-client privilege. Rule 95, which is entitled “Evidence Obtained by Means Contrary to Internationally Protected Human Rights”, provides that “[n]o 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.” Rule 97 provides that all communications between a lawyer and his or her client are not subject to disclosure unless the client consents to the disclosure or has voluntarily disclosed the content to a third party.

C. Conclusion

34. As the above discussion indicates, the enumeration of general principles of criminal law can hardly be exhaustive. Nor can the application of such principles be static. It is suggested that judges must have the power to apply such internationally recognised principles in the course of performing their judicial functions as they deem fit.

⁴³ See *Tadic Appeal* at paragraph 45.

⁴⁴ S/25704, paragraph 101.