ANNEX 5

2. The Rome Conference

At the Conference, discussions appeared to be more politicized, and the informal consultations, though ably led by Tanzania, did not bring delegations any closer to agreement. First, positions on the role of the Security Council *vis-à-vis* the crime of aggression seemed to have hardened. Several States from the non-aligned movement opposed any role for the Security Council, not only in relation to the crime of aggression, but any reference made to it throughout the Statute.[14] The permanent members of the Security Council regarded this role of the Security Council as a *conditio sine qua non* for the inclusion of the crime of aggression. Second, on the issue of definition, some States found the German proposal too restrictive, and insisted on a broader definition encompassing situations "depriving other peoples of their right to self-determination, freedom and independence" and "by resorting to armed force to threaten or violate the sovereignty, territorial integrity or political independence of that State or the inalienable rights of those people".[15] Supporters of the German approach were concerned that such a broad definition might in practice lead to politicized complaints and therefore found it unacceptable. Given these incompatible positions, many delegations saw little hope in reaching agreement on these issues and feared that the controversy could upset efforts to develop a "package deal" on the entire Statute.[16] A Bureau Discussion Paper of 6 July 1998 attempted to focus discussions on two options: either a provision based on the German draft, or no provision on aggression at all. However, the ensuing discussions brought the Conference no closer to agreement, deepening the Bureau's concern that no generally agreeable definition could be developed by the close of the Conference. In its Proposal of 10 July, the Bureau suggested that delegations should develop a generally acceptable definition by 13 July, or, failing that, "the Bureau will propose that the interest in addressing these crimes be reflected in some other manner, for example, by a Protocol or review conference."[17]

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[14] For example, Mexico proposed to delete reference to the Security Council throughout the text of the statute: A/CONF.183/C.1/L.81 of 15 July 1998.

[15] A/CONF.183/C.1/L.37/Corr. 1 of 10 July 1998 submitted by Algeria, Bahrain, Iran, Iraq, Kuwait, Lebanon, Libya, Oman, Qatar, Saudi Arabia, Sudan, Syria, Tunisia, the United Arab Emirates and Yemen.

[16] Such a package would include the role of the Security Council in submitting situations to the Court (Article 13 (b), Rome Statute) and in deferring cases pending before the Court (Article 16, Rome Statute).

[17] Bureau Proposal on Part 2 (Jurisdiction, admissibility and applicable law), Commit-

This attempt to force a resolution was not well received, and was particularly opposed by some Arab and non-aligned States that remained committed to the idea of including the crime in the Statute. However, as it became increasingly clear that no compromise could be developed on the definition of the crime or the appropriate role of the Security Council, these delegations suggested a new approach. On 14 July, the non-aligned States proposed to include the crime of aggression in the Statute, but to leave the elaboration of a definition to a later stage. The Court would not exercise jurisdiction over the crime until a definition was agreed upon.[18]

As a possible compromise, some members of the Bureau suggested that the Conference adopt a resolution noting the importance of the crime and mandating further work on the definition. This proposal was rejected because it did not involve a reference to the crime in the Statute.

The final proposal of the Bureau, as now contained in the Statute, reflects the outcome of further discussions and is largely based on the proposal of the Nonaligned Movement.[19] However, an important difference between the two proposals is that the Statute contains an additional sentence at the end of Article 5(2), providing that the definition "shall be consistent with the relevant provisions of the Charter of the United Nations". This carefully constructed phrase was understood as a reference to the role the Council may or should play in relation to this crime. The result of this compromise is that the Court's jurisdiction over the crime is recognized, at least theoretically, but that jurisdiction cannot be exercised until the definition and appropriate preconditions are developed and agreed upon.

C. Treaty Crimes

Throughout the preparatory negotiations, discussions on the subject-matter jurisdiction had focused on the core crimes, with less attention

tee of the Whole, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, 15 June-27 July 1998, A/CONF.183/C.1/L.59 (9 July 1998) and Corr. 1 [hereinafter Bureau Proposal on Part 2.]

[18] Amendments submitted by the Nonaligned Movement to the Bureau Proposal, A/CONF.183/C.1/L.75.

[19] Article 5(1) and 5(2), Rome Statute, in combination with Resolution F, Para. 7, of the Final Act of the Conference, A/CONF.183/10 (17 July 1998). In this resolution, in addition to developing Draft Rules of Procedure and Evidence, Elements of Crimes and other documents, the Preparatory Commission is mandated to elaborate a definition of aggression for consideration by a review conference.

given to the treaty crimes.[20] Although there was a clear trend not to include the treaty crimes, the insistence by a significant number of States on inclusion of the crimes of terrorism and drug trafficking made the issue too political to be settled during the preparatory process. The most important reasons advanced for excluding these crimes were the different character of these crimes; the danger of overburdening the Court with relatively less important cases; and the ability of States to deal effectively with these crimes through international cooperation agreements.[21]

At the Rome Conference, discussions again focused more on the core crimes than the treaty crimes. Barbados, Dominica, Jamaica and Trinidad and Tobago submitted a proposal on drug trafficking.[22] India, Sri Lanka, Algeria and Turkey proposed to include the act of "terrorism" in the definition of the crimes against humanity.[23] No proposals were submitted for the inclusion of attacks against the United Nations and associated personnel as treaty crimes (although this was eventually addressed in the war crimes provisions[24]). A completely new proposal was submitted by the Comoros and Madagascar to include the crime of "mercenarism" in the statute.[25] However, none of these proposals attracted sufficient support. Even after the Bureau indicated that agreements on treaty crimes would have to be reached before the end of 13 July,[26] no progress was made.

On 14 July, the delegations that had submitted proposals on terrorism and drug trafficking proposed that the same approach be adopted for those crimes as was adopted for the crime of aggression, i.e. to refer to the two

[20] See Decisions Taken by the Preparatory Committee at its session held from 11 to 21 February 1997, A/AC.249/1997/L.5 (1997) [hereinafter 1997 PrepCom Decisions (February)], p. 16, where proposals for definitions of crimes of terrorism, crimes against United Nations and associated personnel and crimes involving the illicit traffic in narcotic drugs were included but with a footnote that the Working Group considered these crimes without prejudice to a final decision on their inclusion in the Statute.

[21] For a general discussion on these crimes, see 1995 Ad Hoc Committee Report, paras. 82-84 and 1996 PrepCom Report, Vol. I, paras. 106-107 and 111-113.

[22] Proposal submitted by Barbados, Dominica, Jamaica, and Trinidad and Tobago on Article 5, A/CONF.183/C.1/L.48 of 3 July 1998.

[23] Proposal submitted by Algeria, India, Sri Lanka and Turkey on Article 5, A/CONF.183/C.1/L.27/Corr.1 of 29 June 1998.

[24] See Article 8(2)(b)(iii), Rome Statute.

[25] Proposal by Comoros and Madagascar on Article 5, A/CONF.183/C.1/L.46 and Corr.1 of 3 and 7 July 1998.

[26] Bureau Proposal on Part 2, at 1.

crimes in Article 5, but with the definitions to be elaborated at a later stage.[27] This proposal found little support.

At the insistence of interested States, particularly Turkey, a resolution was included in the Final Act of the Conference, which recommends that a future Review Conference "consider the crimes of terrorism and drug crimes with a view to arriving at an acceptable definition and their inclusion in the list of crimes within the jurisdiction of the Court".[28]

D. Elements of Crimes

The ILC Draft Statute listed the crimes within the Court's jurisdiction but did not define them. The ILC took this approach because it was still in the process of elaborating a Draft Code of Crimes against the Peace and Security of Mankind and the crimes were to be elaborated there. From the outset of the preparatory negotiations, States indicated very clearly that they wanted the crimes articulated in the statute, though they disagreed over the degree of detail. A majority of States considered that the definitions in the statute would suffice for the interpretation and application by the Court. Some other States, however, preferred to supplement the definitions with "Elements of Crimes" elaborating upon each crime.

At the Rome Conference, the United States delegation attached the utmost importance to Elements of Crimes, arguing that these were necessary to provide the requisite certainty and clarity. It thus proposed a draft which would have made the Elements binding on the Judges.[29] The majority of delegations were concerned about constricting the Judges with a "checklist" approach to international humanitarian law, but in the interest of reaching general agreement were prepared to agree to undertake this task at a future time. However, most of them found the suggested binding character of such Elements clearly unacceptable.

Article 9 reflects the compromise that was reached. It is phrased along similar lines as Article 51, relating to the Rules of Procedure and Evidence, but it deliberately deviates in two respects from Article 51. First, the words

[27] Proposal submitted by Barbados, Dominica, India, Jamaica, Sri Lanka, Trinidad and Tobago and Turkey on Article 5, A/CONF.183/C.1/L.71 of 14 July 1998.
[28] Final Act of the Conference, Resolution E, A/CONF.183/C.1/L.76/Add. 14, at 8.
[29] Proposal submitted by the United States concerning the Bureau Proposal on Article xx, A/CONF.183/C.1/L.69 of 14 July 1998.

Genocide Convention. Only the words "For the purpose of this Statute" were added, in order to bring the structure of this article in line with the other articles containing definitions of crimes.[38]

IV. Crimes Against Humanity

A. Background

During both the preparatory negotiations and the Rome Conference, delegations had no difficulty agreeing that crimes against humanity were serious crimes warranting inclusion in the Statute.[39] However, the task of reaching agreement on the precise definition of the crime was much more challenging. The delegations found the relevant precedents to be vague and, in many respects, contradictory. These precedents included the Nürnberg and Tokyo Charters, Allied Control Council Law No. 10, the ICTY and ICTR Statutes and other documents such as the Draft Code of Crimes pre-

[38] Article I of the Genocide Convention, which declares that conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide are also punishable acts, has not been included in the definition (as had been done in the definitions of genocide in the Statutes of the ICTY and the ICTR). See Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991, established by the Security Council acting under Chapter VII of the United Nations Charter, 25 May 1993, Security Council Resolution 827 (1993), United Nations Security Council Official Records, Forty-eighth Session, 3217th Meeting, S/RES/827 (1993), reprinted in 32 International Legal Materials (hereinafter I.L.M.) 1203 (1993) [hereinafter ICTY Statute]; and Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, between 1 January 1994 and 31 December 1994, established by the Security Council acting under Chapter VII of the United Nations Charter, 8 November 1994, Security Council Resolution 955 (1994), United Nations Security Council Official Records, Forty-ninth Session, 3453rd Meeting, S/RES/955 (1994), reprinted in 33 I.L.M 1598 (1994) [hereinafter ICTR Statute]). These acts are, however, covered by Part 3 on General principles of criminal law, in Article 25, Rome Statute, on individual criminal responsibility.

[39] 1996 PrepCom Report, Vol. I, para. 82.

pared by the International Law Commission, jurisprudence of the various tribunals and courts, and relevant treaties. The inconsistencies between these authorities complicated the task of reaching agreement on a definition based on existing customary international law.[40]

Many delegations insisted on a much more precise and detailed definition of crimes against humanity than previous instruments offered, since the International Criminal Court — unlike previous international tribunals, which were created to deal with already identified situations — would have prospective jurisdiction that was potentially global in scope. Many States therefore required a definition that was as clear as possible and that would not inadvertently encompass situations unworthy of international adjudication. There was an equally strong impetus from other States, particularly the like-minded States, to ensure a broad definition reflecting recent positive developments observed in relevant authorities.

The definition of crimes against humanity finally agreed upon appears now in Article 7 of the Rome Statute. Paragraph 1 of Article 7 has a structure similar to the provisions on crimes against humanity in the ICTY and ICTR Statutes, featuring a list of inhumane acts and a chapeau setting out the conditions under which the commission of such acts constitutes a crime against humanity ("the threshold test"). As several delegations required further clarification of the definition, Paragraphs 2 and 3 of Article 7 elaborate on some of the terms used in Paragraph 1.

As in the preparatory negotiations,[41] the major controversies in the negotiations in Rome concerned the threshold test: namely, whether such crimes could only occur in armed conflict, whether such crimes could only be committed on discriminatory grounds and whether the threshold test should be conjunctive (*e.g.* widespread *and* systematic) or disjunctive (*e.g.* widespread *or* systematic). These issues were eventually resolved as part of a single "package".

Defining the "inhumane acts" also raised difficult issues, such as

[40] It was understood that the Rome Statute was to be a "procedural, adjectival" instrument, i.e. an instrument creating a new institution with jurisdiction over existing international crimes. The task facing the delegations at the Rome Conference was to reflect the definition of those crimes under customary international law. See, for example, 1996 PrepCom Report, Vol. I, paras. 51-54, at 78.

[41] 1996 PrepCom Report, Vol. I, paras. 83-102.

whether to recognize "enforced disappearance" and "the crime of apartheid" as inhumane acts, whether the terms "persecution" and "other inhumane acts" were too vague to be included as such, and how to define each of these terms. Delegations were able to agree to include each of these acts by developing more precise definitions drawn from a variety of sources.

B. The Threshold Test

The *chapeau* of Article 7(1) states the criteria for crimes against humanity as follows:

> For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

This was based on an informal compromise proposal put forward by Canada. The explanation below is divided into the various areas of controversy, namely (i) the absence of a requirement of nexus to armed conflict, (ii) the absence of a requirement of discrimination, (iii) the disjunctive "widespread or systematic" test, (iv) the meaning of "attack directed against any civilian population", and (v) the *mens rea* requirement.

1. No nexus to armed conflict

The most important issue in the debate on crimes against humanity was whether such crimes require a "nexus" to armed conflict, or whether such crimes are applicable even in the absence of an armed conflict. While the preparatory negotiations had by no means settled the issue,[42] many participants were surprised when a significant number of delegations argued vigorously that crimes against humanity could only be committed during an armed conflict.[43] Some even went so far as to require a nexus to *interna-*

[42] 1996 PrepCom Report, Vol. I, paras. 88-90.

[43] Several delegations of the Arab Group advanced this view, as did some other African and Asian delegations.

tional armed conflict. Delegations supporting a nexus to armed conflict noted that such a nexus was required in the Nürnberg and Tokyo Charters and also in the ICTY Statute.

However, the clear majority of delegations were of the view that current customary international law did not require a nexus to armed conflict. These delegations argued that the nexus requirement in the Nürnberg and Tokyo Charters was a limitation on the jurisdiction of those Tribunals, rather than an element of the definition of crimes against humanity. This view was bolstered by the absence of a nexus in instruments such as Allied Control Council Law No. 10, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, and the Genocide Convention (addressing a particularly odious form of crime against humanity), as well as the commentaries of the International Law Commission and distinguished jurists. The nexus requirement in the ICTY Statute was regarded as flowing from an excess of caution, a view supported by the ICTR Statute and statements of the ICTY itself.[44]

In the final compromise, the majority view prevailed and no nexus to armed conflict is required for crimes against humanity. It appears that this outcome was essential to the utility of Article 7. If a nexus to armed conflict had been included, the crimes against humanity provision would have been largely redundant as much of the conduct would be subsumed under the war crimes definition contained in Article 8 of the Statute.

2. No discriminatory element

A few delegations, notably France, suggested that crimes against humanity required an element of discrimination (for example, that they must be committed on national, political, ethnic, racial or religious grounds) as

[44] In this connection, the ICTY *Tadić Opinion and Judgement* was often noted. That decision observed (in paragraph 627), that "the inclusion of the requirement of an armed conflict deviates from the development of the doctrine after the Nürnberg Charter, beginning with Control Council Law No. 10, which no longer links the concept of crimes against humanity with an armed conflict". ICTY Decision, Prosecutor v. Duško Tadić, Opinion and Judgement, No. IT-94-1-T (Feb. 13, 1995), amended, No. IT-94-1-T (Sept. 1, 1995), amended, No. 17-94-1-T (Dec. 14, 1995), Opinion and Judgement, No. 17-94-1-T (May 7, 1997), 36 I.L.M. 908 (1997) [hereinafter Tadić Judgement]. See also the Report of the Secretary-General submitted to the Security Council concerning the ICTY Statute, S/25704.

posited in the ICTR Statute. However, the overwhelming majority of delegations were opposed to this requirement. In the view of the majority, customary international law required a discriminatory element only for the inhumane act of "persecution", and not for other crimes against humanity.[45] The majority was concerned that including this element would create an unnecessary burden for prosecutions, and could inadvertently exclude serious crimes against humanity. As part of the compromise agreement on the chapeau, the minority acceded to the majority view on this point.

3. Widespread or systematic

As all delegations recognized, customary international law has never regarded every commission of an inhumane act as a "crime against humanity"; the act must be part of a greater campaign of atrocities against civilians in order to warrant international adjudication.[46] Articulating a threshold test was a very difficult aspect of the negotiations on crimes against humanity.

Many States, particularly "likeminded" States, pressed for a disjunctive test, such as "widespread *or* systematic". These States argued that a disjunctive test was already established in customary international law, as evidenced by the ICTR Statute, the ICTY jurisprudence, and the commentaries of the International Law Commission.

On the other hand, a significant number of States, including many Arab and Asian States as well as the permanent members of the Security Council, pointed out that an unqualified disjunctive test would be so broad as to have absurd consequences. These delegations observed, for example, that a provision requiring only a "widespread" commission of crimes would encompass a "crime wave", even if there was no connection between these crimes. Most delegations acknowledged that a common crime wave was not a "crime against humanity" in customary international law, and that it would not advance the effectiveness or credibility of the Court to give it jurisdiction over such domestic crimes.

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[45] Again, reference was made to the *Tadić Opinion and Judgement*, which reluctantly adopted such a requirement on the strength of a statement in the Secretary-General's Report, but which specifically noted that such a requirement does not appear to be supported by the relevant authorities.

[46] See, for example, 1996 PrepCom Report, Vol. I, at paras. 84-85.

Like-minded States argued that these concerns about "over-inclusiveness" were addressed by the concept of an "attack directed against any population". Thus, unrelated events would not be encompassed, because they could not be said to be part of a greater "attack". This line of thinking eventually formed the basis for general agreement, although it was necessary to develop and record a common understanding of the term "attack" in sub-paragraph 2(a) of Article 7 (see below). In this manner, it was possible to preserve the disjunctive test ("widespread or systematic") recognized in recent authorities. The chapeau of Article 7 must be read in conjunction with sub-paragraph 2(a), as they are closely connected.

4. Attack directed against any civilian population

Sub-paragraph 2(a) of Article 7 draws upon relevant authorities, such as Tribunal jurisprudence and ILC commentaries, to affirm that for all crimes against humanity there must be at least some element of scale and policy. The original informal proposal by Canada, which was based more squarely on the *Tadić* decision, defined "attack directed against any civilian population" as

> a course of conduct involving the commission of multiple acts referred to in paragraph 1 against any civilian population, pursuant to or knowingly in furtherance of a governmental or organizational policy to commit such acts.

After further negotiations, a compromise was reached on the basis of a slightly modified informal proposal, now appearing in sub-paragraph 2(a) of Article 7, which defines "attack directed against any civilian population" as

> a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.[47]

[47] The differences between the two proposals are as follows. First, the phrase "commission of multiple acts" was replaced with "multiple commission of acts", to accommodate the concern that the former wording may have been interpreted as requiring more than one *type* of inhumane act. Second, the requirement of "knowing" furtherance of a policy was removed, because of a concern that this would require proof of the *mens rea* of third parties. Third, the word "governmental", which was used by the International Law

The result is a conjunctive, but low-threshold, test which must be met before establishing one of the disjunctive, but more onerous, requirements of "widespread" or "systematic".

The first aspect of paragraph 2(a), a course of conduct involving the commission of multiple inhumane acts, was not controversial.[48] This element of scale was understood to be considerably lower than the "widespread" requirement in the chapeau, which poses a very stringent test.[49]

The second aspect of paragraph 2(a), the policy element, was far more controversial and attracted sustained criticism from non-governmental organizations. This concern was understandable, as the policy element does not explicitly appear on the face of previous instruments. However, as several delegations noted, the policy element of crimes against humanity — a requirement of planning, direction or instigation from some source — is not novel. The provision was based on ILC commentary and the *Tadić* decision, which, in turn, were consistent with the jurisprudence of post-World War II international tribunals and national tribunals and courts, as well as the work of Commissions of Experts and commentaries on crimes against humanity.[50] Moreover, explicit recognition of this policy element

Commission and the *Tadić* decision, was replaced with the word "State". Fourth, the phrase "policy to commit such acts", drawn from the *Tadić* decision, was replaced with "policy to commit such attack", in order to accommodate the concern raised by the Women's Caucus of the coalition of the non-governmental organizations that the former phrase might have been construed as requiring a policy to commit rape specifically in order to secure a conviction for a crime against humanity based on rape. (This change may not have been strictly necessary, since the words "such acts" clearly referred to the acts comprising the attack rather than the acts of the accused. It is to be hoped that the Court will not interpret the phrase "policy to commit such attack" as imposing a higher standard than "policy to commit such acts".)

[48] As some delegations observed, the phrase "against any civilian population" has been consistently regarded as requiring an element of scale, whether in post-World War II jurisprudence or in more recent jurisprudence and commentaries.

[49] The term "widespread" is not defined in Article 7, so the Court must refer to relevant authorities such as the jurisprudence of the ICTY and ICTR. Delegations understood the term "widespread" to pose a much more demanding threshold than the "multiple commission" requirement.

[50] A review of these authorities is beyond the scope of this chapter; for more information see Darryl Robinson, *Defining Crimes Against Humanity at the Rome Conference*, (1999) 93 A.J.I.L. 43.

was essential to the compromise on crimes against humanity. It is the existence of a policy that unites otherwise unrelated inhumane acts, so that it may be said that in the aggregate they collectively form an "attack".

Delegations supporting the compromise explained that the policy element was intended as a flexible test,[51] of a lower threshold than the term "systematic", which was understood as a much more rigorous test.[52] Sub-paragraph 2(a) affirms that the policy need not be that of a State; non-State actors may also instigate an attack against a civilian population.[53]

Finally, several delegations made clear that the term "attack directed against any civilian population" was not meant in the sense used in Article 8, but rather as a term of art as explained in sub-paragraph 2(a) and in the relevant jurisprudence.[54]

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[51] Delegations referred to jurisprudence explaining that a policy need not be formal, and observed that in historical examples of crimes against humanity, there has been a readily identifiable underlying policy, such as ethnic cleansing, persecution of a minority, or elimination of a group. It was also observed that nothing in Article 7 requires that the accused participated in the formation of the policy.

[52] The "systematic" requirement was understood as a very stringent requirement, involving not only an underlying "policy", but also highly organized and orchestrated execution of those acts in accordance with a developed plan.

[53] Although earlier authorities have suggested that crimes against humanity require a State policy, there was a surprising readiness to adopt the view expressed in more recent authorities that policies of non-state organizations will also suffice. These authorities included the 1996 ILC Draft Code of Crimes and the *Tadić Opinion and Judgement*. It must be noted that although the ILC contemplated instigation by a "government, organization or group", Article 7 refers only to policies of a State or organization, as delegations felt that, if there is indeed a difference between the terms "group" and "organization", then the higher degree of organization connoted by the latter term would be necessary to instigate or direct crimes against humanity. Full citation of the ILC Draft Code of Crimes is available in Key Terms and References.

[54] While the word "attack" does not imply a military attack, it must also be recorded that some delegations supported the term "attack" because they felt it connoted a violent aspect to the campaign against civilians. It should also be recorded that some delegations would have preferred to refer to "any population" rather than "any civilian population", but as part of the compromise the latter term was maintained, as it was consistent with customary international law. Moreover, as some delegations pointed out, the term has been judicially interpreted in a flexible manner, so that combatants do not necessarily lose all protection (reference was made to the *Barbie* decision of the French *Cour de cassation* and the *Tadić Opinion and Judgement*).