



International Tribunal for the  
Prosecution of Persons  
Responsible for Serious Violations of  
International Humanitarian Law  
Committed in the Territory of the  
Former Yugoslavia since 1991

Case No.: IT-95-17/1-PT  
Date: 29 May 1998  
Original: ENGLISH

**IN THE TRIAL CHAMBER**

**Before:** Judge Florence Ndepele Mwachande Mumba, Presiding  
Judge Antonio Cassese  
Judge Richard May

**Registrar:** Mrs. Dorothee de Sampayo Garrido-Nijgh

**Order of:** 29 May 1998

**PROSECUTOR**

v.

**ANTO FURUNDŽIJA**

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**DECISION ON THE DEFENDANT'S MOTION TO DISMISS COUNTS 13 AND 14  
OF THE INDICTMENT (LACK OF SUBJECT MATTER JURISDICTION)**

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**The Office of the Prosecutor:**

Mrs. Patricia Viseur-Sellers  
Mr. Michael Blaxill  
Mr. Rodney Dixon

**Counsel for the Accused:**

Mr. Luka Misetić

## I. INTRODUCTION

1. Pending before this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("International Tribunal") is the Defendant's Motion to Dismiss Counts 13 and 14 of the Indictment (Lack of Subject Matter Jurisdiction) filed on 21 May 1998 ("Defence Motion") (Official Record at Registry Page ("RP") D770 - D777) and the Prosecution's Response to the Defence Motion filed on 27 May 1998 ("Prosecution's Response") ( RP D813 - D819);

2. The accused, Anto Furundžija, was charged in the Indictment dated 2 November 1995 (RP D36 - D41, D50) ("Indictment") with violations of Article 2 of the Statute of the International Tribunal ("Statute") for allegedly committing acts amounting to grave breaches of the Geneva Conventions of 1949 and under Article 3 of the Statute with alleged violations of the laws or customs of war. On 13 March 1998, this Trial Chamber gave the Prosecution leave to withdraw the charges alleging violation of Article 2 of the Statute, namely those contained in Count 12 of the Indictment.

3. The trial of Anto Furundžija is scheduled to commence on 8 June 1998, on counts 13 and 14 only, both alleging violations of Article 3 of the Statute. His actions are said to amount to involvement in torture and outrages upon personal dignity including rape, triggering individual criminal responsibility under Article 7(1) of the Statute.

4. The Trial Chamber finds that the matters raised in the Defence Motion and the Prosecution's Response are suitable for determination in the absence of oral argument in accordance with the Order for Filing of Motions issued by the Trial Chamber on 19 December 1997 (RP D21-D22).

**THE TRIAL CHAMBER, HAVING CONSIDERED** the written submissions of the parties,

**HEREBY ISSUES ITS WRITTEN DECISION.**

## II. SUBMISSIONS OF THE DEFENCE

5. In challenging the Trial Chamber's jurisdiction over torture and outrages upon personal dignity including rape, the Defence Motion follows several lines of argument.

(a) It is initially argued that "torture and outrages upon personal dignity including rape are not covered by Article 3 of the Statute". These acts are covered instead by Article 2 of the Statute. At a later stage in the Defence Motion, this position is modified to "[t]he crimes of rape and torture can be prosecuted under Article 3 only if the crime occurred in an internal armed conflict".

This reasoning is based on the Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction issued by the Appeals Chamber of the International Tribunal in the case of *Prosecutor v. Duško Tadić* on 2 October 1995 (RP D6413 - D6491) ("Appeals Chamber Decision") and the finding that Common Article 3 of the Geneva Conventions 1949 ("Common Article 3") had been incorporated into Article 3 of the Statute. Common Article 3 specifically prohibits, *inter alia*, violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture, and also prohibits outrages upon personal dignity, in particular humiliating and degrading treatment. Common Article 3 is expressed in the Geneva Conventions as being applicable in the case of "armed conflict not of an international character", that is, internal armed conflicts only. Therefore, Defence Counsel argues, the Prosecution, who continues to insist the conflict was international, cannot rely on Common Article 3 and therefore Article 3 of the Statute.

(b) The Defence argues (without committing itself) that the alleged acts fall within Article 2, the grave breaches regime. With respect to torture, the Defence acknowledges that the position is quite clear: torture is one of the specifically prohibited acts under Article 2(b). The Defence does not take a stand on whether rape is a grave breach.

It is argued that rape and torture in an international armed conflict can only be prosecuted under Article 2 of the Statute, that is, they are grave breaches or nothing at all in an international armed conflict. Applying the Appeals Chamber Decision, torture can only be

prosecuted under Article 2 as a grave breach. If rape is a grave breach of the Geneva Conventions (it is not specifically mentioned), then under this decision it cannot be prosecuted under Article 3 because grave breaches can be prosecuted only under Article 2.

(c) According to the Defence, proper application of the Appeals Chamber Decision must mean that crimes listed in Article 2 of the Statute cannot be brought under Article 3. Several extracts of the Appeals Chamber Decision dealing with Article 3 are quoted in support of this interpretation.

### III. SUBMISSIONS OF THE PROSECUTION

6. In the Prosecution Response, the arguments of the Defence are countered as follows:

(a) The offences charged in Counts 13 and 14 of the Indictment constitute violations of the laws or customs of war, as recognised by Article 3 of the Statute. Torture and outrages upon personal dignity, including rape, are prohibited under international humanitarian law as distinct offences for all armed conflicts, whether internal or international. These offences are properly charged under Article 3 of the Statute.

(b) The Appeals Chamber in the *Tadić* case held that the prohibitions contained in Common Article 3, which include torture and outrages against personal dignity, including rape, are applicable to all conflicts whether international or internal. Violations of Common Article 3 may properly be prosecuted under Article 3 of the Statute. The test for determining the applicability of Article 3 of the Statute is that set out in the Appeals Chamber Decision:

- (i) the violation must constitute an infringement of a rule of international humanitarian law;
- (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;
- (iii) the violation must be “serious”, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim;
- (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

In that case, the Prosecution argues, it was confirmed that violations of Common Article 3 satisfied the conditions for prosecution under Article 3 of the Statute.

(c) Rape is prohibited in international armed conflicts, as demonstrated by Article 27 of Geneva Convention IV and Article 76 of Additional Protocol II. Article 4 of Additional Protocol II, which elaborates upon the offences contained in Common Article 3, prohibits rape in internal armed conflict. These prohibitions were recognised in the Appeals Chamber

Decision as being part of customary international law and are applicable in international and internal armed conflicts. They are therefore validly charged under Article 3.

(d) By describing Article 3 as a “residual” clause, the Appeals Chamber in *Tadić* did not preclude charging violations of torture and outrages upon personal dignity, including rape, thereunder. In the present case, these actions have been charged under Article 3 of the Statute as violations of Common Article 3 and other rules of humanitarian law, and are separate substantive offences with separate elements to the grave breaches offences and crimes against humanity. The ruling of this Trial Chamber in the case of *Prosecutor v. Kupreskić et al* in its Decision on Defence Challenges to Form of Indictment issued on 15 May 1998 (RP D1074 - D1076) is cited in support of this proposition.

(e) The effect of the Appeals Chamber’s ruling (that Article 3 of the Statute is a general clause covering all serious violations of international humanitarian law not falling under Article 2 or covered by Article 4 or 5) is that Article 3 cannot be relied upon to prosecute grave breaches, crimes against humanity or genocide. It does however, permit the charging of torture and outrages upon personal dignity, including rape.

#### IV. DISCUSSION

7. Both parties have relied on Articles 2 and 3 of the Statute, which provide as follows:

##### **Article 2 Grave breaches of the Geneva Conventions of 1949**

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

- (a) wilful killing;
- (b) torture or inhuman treatment, including biological experiments;
- (c) wilfully causing great suffering or serious injury to body or health;
- (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
- (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
- (g) unlawful deportation or transfer or unlawful confinement of a civilian;
- (h) taking civilians as hostages.

##### **Article 3 Violations of the laws or customs of war**

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
- (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
- (e) plunder of public or private property.

8. Common Article 3 is also highly relevant to the issue at hand:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria .

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliation and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized people.

(2) The wounded and sick shall be collected and cared for.

....

9. Much reliance has also been placed upon the Appeals Chamber Decision, relevant extracts of which are quoted below:

Paragraph 87: **“....Considering this list in the general context of the Secretary-General’s discussion of the Hague Regulations and international humanitarian law, we conclude that this list may be construed to include other infringements of international humanitarian law. The only limitation is that such infringements must not be already covered by Article 2 (lest this latter provision should become superfluous). Article 3 may be taken to cover all violations of international humanitarian law other than the “grave breaches” of the four Geneva Conventions falling under Article 2 (or, for that matter, the violations covered by Articles 4 and 5, to the extent that Articles 3, 4 and 5 overlap).”**

[Extracts quoted by the Defence are in bold].

Paragraph 89: “In light of the above remarks, it can be held that Article 3 is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5, more specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as “grave breaches” by those Conventions; (iii) violations of common Article 3 and other customary rules on internal conflicts; (iv) violations of agreements binding upon the parties to the conflict, considered *qua* treaty law, i.e., agreements which have not turned into customary international law....”.

Paragraph 91: **“Article 3 thus confers on the International Tribunal jurisdiction over any serious offence against international**



*humanitarian law* not covered by Article 2, 4 or 5. Article 3 is a fundamental provision laying down that any “serious violation of international humanitarian law” must be prosecuted by the International Tribunal. In other words, **Article 3 functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal. Article 3 aims to make such jurisdiction watertight and inescapable.**“

[Extracts quoted by the Defence are in bold].

#### 10. The Appeals Chamber Decision

The Appeals Chamber’s interpretation of the International Tribunal’s subject matter jurisdiction is based on a study of the norms prohibiting certain conduct in armed conflict and where they fall in the Statute. The norms prohibiting conduct such as rape and torture of protected persons which are incorporated into Article 2 of the Statute, are of a specialised nature and only apply upon satisfaction of the criteria set out in the Geneva Conventions 1949. The norms prohibiting such conduct in armed conflict, irrelevant of whether international or internal, are encompassed in Article 3. Article 3 contains the prohibitions of those serious violations of international humanitarian law which do not fall within the specialised provisions contained in Articles 2, 4 or 5.

The Trial Chamber emphasises that the International Tribunal has jurisdiction over all serious violations of international humanitarian law in accordance with its Statute, and that Article 3 is designed to ensure that the mandate of the International Tribunal can be achieved and that all such acts are indeed prosecuted.

11. The Appeals Chamber viewed the International Tribunal’s subject matter jurisdiction as encompassing all serious violations of international humanitarian law committed in the former Yugoslavia since 1991. These norms fall into different categories: (i) acts committed in circumstances amounting to grave breaches under Article 2, (ii) acts amounting to genocide under Article 4 and (iii) acts meeting the criteria for crimes against humanity under Article 5. There are also acts amounting to serious violations of international humanitarian law which do not fall into the specialised categories: these are the violations of the laws or customs of war under Article 3. The relationship between Article 2 and 3 can be described as one of concentric circles: grave breaches are a species of violation of the laws or customs of

war. The Appeals Chamber held that when an act meets the criteria of a grave breach under Article 2 and therefore also Article 3, it falls within the subject matter jurisdiction of the more specific clause, namely Article 2. This finding is vital to the Defence challenge to the Trial Chamber's jurisdiction over torture and outrages upon personal dignity including rape under Article 3.

12. The application of the Appeals Chamber's finding by the Defence is flawed. All grave breaches are violations of the laws and customs of war. Theoretically, they can be charged as both if the criteria are satisfied. However, there is a general principle of international law (the doctrine of speciality/*lex specialis derogat generali*) which provides that in a choice between two provisions where one has a broader scope and completely encompasses the other, the more specific charge should be chosen. Nevertheless, the situation at hand is not one where the Trial Chamber is faced with different charges under separate articles of the Statute. The Prosecution has already made a choice and has withdrawn the specific charge alleging grave breaches of the Geneva Conventions. It is the finding of the Trial Chamber that the Prosecution is justified in relying on the residual clause to ensure that no serious violation of international humanitarian law escapes the jurisdiction of the International Tribunal. This is fully in line with the reasoning of the Appeals Chamber Decision.

13. The submission of the Defence that torture and outrages upon personal dignity including rape are not covered by Article 3 of the Statute

The argument that "torture and outrages upon personal dignity including rape are not covered by Article 3 of the Statute" is a misinterpretation of the Statute. Such acts are prohibited under customary international law at all times. As the Prosecution points out, in times of armed conflict, they also amount to violations of the laws or customs of war, which include the prohibitions in the Hague Conventions of 1907 and Common Article 3.

14. The Defence's later qualification of this incorrect statement is also mistaken: "[t]he crimes of rape and torture can be prosecuted under Article 3 only if the crime occurred in an internal armed conflict". The Appeals Chamber Decision held that the nature of the armed

conflict is irrelevant when acts are committed in violation of the minimum rules in Common Article 3. It was also held that Article 3 of the Statute implicitly refers, *inter alia*, to the customary rules arising from Common Article 3. Common Article 3 specifically prohibits, *inter alia*, violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture, and also prohibits outrages upon personal dignity, in particular humiliating and degrading treatment.

Common Article 3 is expressed in the Geneva Conventions as being applicable in the case of “armed conflict not of an international character”, that is, internal armed conflicts. However, the Appeals Chamber found that in customary international law, the norms reflected in Common Article 3 applied in all situations of armed conflict. It cited the dicta in the *Case of Paramilitary Activities In and Around Nicaragua*, whereby the International Court of Justice opined that the rules contained in Common Article 3 reflected “elementary considerations of humanity” applicable under customary international law to any armed conflict, whether it is of internal or international character. The Prosecution, which continues to insist the conflict was international, can rely on the rules of customary international law emerging from Common Article 3 and is therefore entitled to charge Anto Furundžija with violating Article 3 of the Statute.

15. The Defence submission that torture and rape in an international armed conflict can only be prosecuted under Article 2 of the Statute

The Defence assertion that torture and rape in an international armed conflict can only be prosecuted under Article 2 of the Statute, that is, they are grave breaches or nothing at all in an international armed conflict, is wrong. Rape and torture committed in circumstances which do not amount to grave breaches under Article 2 may fall under Article 3. This demonstrates the meaning of the Appeals Chamber when it described Article 3 as a residual clause intended to confer jurisdiction over all serious violations of international humanitarian law which would otherwise evade the International Tribunal’s jurisdiction.

16. Equally inappropriate is the Defence argument that using the Appeals Chamber’s reasoning, torture (specifically identified in Article 2(b)) can only be prosecuted under Article

2 as a grave breach. If rape is a grave breach of the Geneva Conventions, then, the Defence argues, under the Appeals Chamber Decision, it cannot be prosecuted under Article 3 of the Statute because grave breaches can be prosecuted only under Article 2.

In the case at hand, grave breaches are no longer charged. The Prosecution, having dropped Count 12 of the Indictment, is proceeding to go to trial on the basis of Article 3 charges, on which a *prima facie* case has already been demonstrated in the course of the Confirmation proceedings. The Appeals Chamber was speaking of norms and not of actual charges. Whilst it is theoretically possible that the offences in this case may have been committed in circumstances such as to amount to grave breaches, the Prosecution has chosen to go to trial on the Article 3 charges. That choice between two provisions having been made, it is not the role of the Trial Chamber to intrude upon the Prosecution's discretion. This is reinforced by the findings in paragraphs 12 and 14 above that, in law, the Prosecutor is indeed entitled to bring charges under Article 3 in respect of the conduct alleged.

17. Test for the applicability of Article 3

The Trial Chamber endorses the submission of the Prosecution that the test to apply in determining the applicability of Article 3 of the Statute is that set out by the Appeals Chamber in the *Tadić* Decision. It also approves the submission of the Prosecution that the acts prohibited by Common Article 3 satisfy the test of the Appeals Chamber Decision.

18. Finding

In sum, the Trial Chamber finds that the Defence is suggesting that allegations of serious violations of international humanitarian law should escape the jurisdiction of the International Tribunal. The arguments raised in support of this do not stand up to close scrutiny and the conclusion that is reached runs contrary to the reasoning of the Appeals Chamber Decision and its very purpose. In consideration of all the foregoing conclusions, the Trial Chamber holds that Article 3 of the Statute covers torture and outrages upon personal dignity including rape, and that the Trial Chamber has jurisdiction to try Anto Furundžija for alleged violations of Article 3 of the Statute.

**V. DISPOSITION**

For the foregoing reasons

**PURSUANT TO RULE 72**

**THE TRIAL CHAMBER DENIES** the Defendant's Motion to Dismiss Counts 13 and 14 of the Indictment (Lack of Subject Matter Jurisdiction) filed on 21 May 1998.

Done in both English and French, the English text being authoritative.



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Florence Ndepele Mwachande Mumba  
Presiding Judge

Dated this twenty-ninth day of May 1998  
At The Hague,  
The Netherlands.

**[Seal of the Tribunal]**