

**UNITED  
NATIONS**



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-95-14/2-PT

Date: 2 March 1999

Original: English

**IN THE TRIAL CHAMBER**

**Before:** Judge Richard May, Presiding  
Judge Mohamed Bennouna  
Judge Patrick Robinson

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

**Decision of:** 2 March 1999

**PROSECUTOR**

**v.**

**DARIO KORDIĆ  
MARIO ČERKEZ**

**DECISION ON THE JOINT DEFENCE MOTION TO DISMISS THE AMENDED  
INDICTMENT FOR LACK OF JURISDICTION BASED ON THE LIMITED  
JURISDICTIONAL REACH OF ARTICLES 2 AND 3**

**The Office of the Prosecutor**

**Mr. Geoffrey Nice  
Mr. Rodney Dixon**

**Counsel for the Accused**

**Mr. Mitko Naumovski, Mr. Leo Andreis, Mr. David F. Geneson, Mr. Turner T. Smith, Jr.,  
and Ms. Ksenija Turković, for Dario Kordić**

**Mr. Božidar Kovačić, for Mario Čerkez**

## I. INTRODUCTION

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 (“the International Tribunal”), is the “Jurisdictional Motion #2 – Joint Defense Motion to Dismiss the Amended Indictment Based on the Limited Jurisdictional Reach of Articles 2 and 3” filed by counsel for the two accused, Dario Kordić and Mario Čerkez, (together “the Defence”) on 22 January 1999 (“the Defence Motion”). The Office of the Prosecutor (“Prosecution”) responded to the Defence Motion on 5 February 1999 (“the Prosecutor’s Response”). On 15 February 1999 the Defence filed an application for leave to file a reply to the Prosecutor’s Response, with a “Joint Defence Reply in Support of Jurisdictional Motion #2” (“the Defence Reply”) attached. The Defence application was granted orally on 16 February 1999.

**THE TRIAL CHAMBER, HAVING CONSIDERED** the written submissions and oral arguments of the parties heard on 16 February 1999,

**HEREBY ISSUES ITS WRITTEN DECISION.**

## II. SUBMISSIONS

### A. Arguments of the Defence

1. The Defence challenges the jurisdiction of the International Tribunal on the grounds that:
  - first, the scope of Article 3 of the Statute of the International Tribunal ("Statute") is limited to matters covered by the "Hague law"<sup>1</sup>, which is concerned with the conduct of hostilities, and therefore does not cover common article 3 of the 1949 Geneva Conventions<sup>2</sup> and their Additional Protocols<sup>3</sup>,
  - second, Articles 2 and 3 of the Statute are only applicable to international armed conflicts.
  
2. As to its first argument, the Defence requests that the Trial Chamber dismiss the counts of the indictment based on Article 3<sup>4</sup>, or in the alternative, strike all references to the Geneva Conventions of 12 August 1949 and Additional Protocols I and II. As to its second argument, the Defence requests the Trial Chamber to dismiss the charges brought under Articles 2 and 3 on the ground that there was no international armed conflict, at the time and place relevant to the indictment. In its brief, the Defence recognises that this second issue involves mixed questions of fact and law that may more properly be resolved at trial.
  
3. The Defence puts emphasis on the principle of *nullum crimen sine lege*<sup>5</sup>, which underlies all of its arguments. Accordingly, it submits that the International Tribunal is only empowered to prosecute serious violations of international humanitarian law which are covered by the language of its Statute, and which beyond any doubt codify customary international law.

<sup>1</sup> 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, and annexed Regulations.

<sup>2</sup> 1949 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; 1949 Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; 1949 Geneva Convention III Relative to the Treatment of Prisoners of War; 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War ("Geneva Conventions").

<sup>3</sup> 1977 Geneva Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts; 1977 Geneva Protocol II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts ("Protocols").

<sup>4</sup> Counts 3, 4, 5, 6, 9, 13, 16, 20, 24, 26, 28, 32, 34, 36.

<sup>5</sup> As referred to in paragraph 34 of the Report of the Secretary-General submitted pursuant to paragraph 2 of Security Council Resolution 808 (1993), and Annex thereto, U.N. Doc. S/25704 ("Report of the Secretary-General").

4. Starting with its second argument, and only addressing it briefly, the Defence submits that Article 2 of the Statute refers to the “grave breaches” provisions of the Geneva Conventions, and thus is only applicable to international conflicts. Likewise, it contends that Article 3 is based on the Hague Conventions, which are only applicable to international conflicts. In the opinion of the Defence, “at trial, the facts will show that there was no international armed conflict connected with the allegations in the Amended Indictment, that there was no armed conflict at all during a large part of the time period covered by such allegations...”<sup>6</sup>.

6. As to its first contention, concerning the scope of Article 3 of the Statute, the Defence contends that Article 3 can be construed as referring to “Hague law” only (arguments relying on interpretation of the Security Council’s intent), which is only applicable to international armed conflicts. The Defence further state that violations of common article 3 of the 1949 Geneva Conventions cannot be included within the ambit of Article 3 of the Statute, as common article 3 is not part of customary international law and does not entail individual criminal responsibility. The Defence relies on a wide range of arguments and expands the argument to discuss the scope of Article 2 of the Statute as regards the requirement of the existence of an international conflict. It also discusses serious violations of the Geneva Conventions and the Additional Protocols.

7. The Defence *inter alia* relies on the following arguments, mainly discussing the Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (“*Appeals Chamber Decision on Jurisdiction*”) in the *Tadić* case<sup>7</sup>, which the Defence claims “is in serious fundamental and widely acknowledged error”<sup>8</sup>:

- Article 3 is based on “Hague law” and does not mention the type of conflict it is applicable to: if the intention of the drafters of the Statute was to render it applicable also to internal conflicts, it would have been specifically mentioned, since “Hague law” is traditionally only applicable to international conflicts;
- The conclusion of the Appeals Chamber as to the residual character of Article 3, and its broad interpretation of the scope of Article 3, based on its interpretation of the term “international humanitarian law”, is in violation of the principle of legality;

<sup>6</sup> Joint Defence Motion to dismiss the amended indictment for lack of jurisdiction based on the limited jurisdictional reach of Articles 2 and 3 (“*Defence Motion*”).

<sup>7</sup> Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Duško Tadić*, Case IT-94-1-AR72, A. Ch., 2 Oct. 1995 (“*Appeals Chamber Decision on Jurisdiction*”).

<sup>8</sup> Unofficial transcript of the hearing on 16 February 1999, pp. 472-73.

- The Security Council did not intend to criminalize through Article 3 of the Statute all violations of international humanitarian law not covered by the other subject-matter Articles of the Statute;
- The Security Council intended a distinction between “Hague law” and “Geneva law”: referring to the approach taken by the Statute of the International Criminal Court (“ICC Statute”), the Defence asserts that it is “a completely novel approach, which has no basis in customary law.”
- The statements of certain Security Council’s members after the Security Council approved the Statute, to which the Appeals Chamber referred to support its conclusion, “do not reflect the Security Council intent” and only constitute “carefully manufactured *ex post facto* legislative history”;
- The Appeals Chamber’s conclusion is not supported by commentators;
- The Appeals Chamber’s conclusions (as to all infringements of provisions of Geneva Conventions other than grave breaches being part of customary law; serious breaches of the Geneva Conventions and certain Hague rules being applicable to non-international conflicts; common article 3 and Additional Protocol II not being part of customary law; common article 3 being applicable to international as well as to internal conflicts) are not justified under customary law and “represent progressive development of law”; the Defence further contends that the Appeals Chamber instead of relying on State practice “relied principally on perceived changes in *opinio juris*”;
- Provisions of common article 3, Additional Protocol II, serious breaches of the Geneva Conventions, and violations of certain Hague rules, do not entail individual criminal responsibility, and thus cannot fall within the scope of the jurisdiction of the International Tribunal;
- The standard established by the International Court of Justice (“ICJ”) in its Decision in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, (“*Nicaragua Decision*”)<sup>9</sup>, as relied on by the Trial Chamber in its Judgement in the *Tadić* case<sup>10</sup>, should be applied by this Chamber to assess the existence of an international armed conflict.

5. In the Defence Reply, the Defence discusses the Prosecution argument that the Trial Chamber is bound by the *Appeals Chamber Decision on Jurisdiction*, and responds to the

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<sup>9</sup> (Nicar. v U.S.) (Merits) 1986 I.C.J. Reports, 14.

submissions as to the proper interpretation of Article 3 of the Statute and the applicability of the *Nicaragua Decision* to the present case.

### B. Arguments of the Prosecution

8. The Prosecution submits two arguments in support of its contention that the Defence Motion should be denied.

(a) A decision as to the scope of Article 3 of the Statute, discussing and rejecting the same arguments as those raised by the Defence, has already been rendered by the Appeals Chamber in the *Tadić* case. The Trial Chamber is bound by this decision and should uphold it. The Prosecution refers to paragraphs 87-89, 90-94, 103, 127, 134, and 143 of the *Appeals Chamber Decision on Jurisdiction*.

(b) The Defence “offers no compelling arguments for limiting the scope of Article 3 to the offences listed in the Statute.” In support of its arguments, the Prosecution *inter alia* states the following:

- “all of the rules incorporated in Article 3 must either have been part of customary law or conventional law, binding on the parties, at the time the offences were committed”. Thus common article 3 and Additional Protocols I and II “fall within the scope of Article 3 on the basis that they are clearly part of customary law, and in any event are binding on the parties as a matter of treaty law.”

- The Defence arguments that the Security Council did not intend Article 3 to cover more than the Hague law are erroneous. Statements of members of the Security Council “demonstrate that the Council intended Article 3 to incorporate a broad range of offences”, and the fact that no other members disagreed “adds extra weight to the interpretative value of the statements.”

- “An expansive interpretation of Article 3 is justified by taking account of the context of the Statute as a whole”. “Laws and customs of war” cover in fact “violations of international humanitarian law”, which refer to “all violations of the rules of international and internal armed conflict.”

- The Security Council intended to put an end to all serious violations of international humanitarian law, not just grave breaches and the Hague law.

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<sup>10</sup> Opinion and Judgment, *Prosecutor v. Duško Tadić*, Case No. IT-94-I, T.Ch. II, 7 May 1997.

- Even though common article 3 provides that it applies to non-international armed conflicts, the rules contained “within” common article 3 are applicable to all conflicts as a matter of customary law.
- The fact that a treaty provision or rule itself does not mention criminal liability will not preclude punishment for breaches thereof (referring to the Nürnberg Judgment<sup>11</sup>).
- The issue of the correct standard for assessing whether an international conflict exists, argued by the Defence which relied on the *Nicaragua Decision*, “is a legal dispute to be litigated at trial in relation to the facts of the case.” The Prosecution submits that the “precise elements and proof of this requirement can only be determined at trial.” The Prosecution further disputes the Defence contention that the *Nicaragua Decision* establishes the correct standard for assessing the existence of an international armed conflict.

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<sup>11</sup> Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, Germany (1947).

### III. DISCUSSION

#### A. Applicable law

9. Both parties rely 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.



10. Common article 3 of the 1949 Geneva Conventions, as well as Articles 51(2) and 52(1) of Additional Protocol I and Article 13(2) of Additional Protocol II are also relevant to the issue at hand:

### **Article 3 common to the Geneva Conventions**

In the case of an 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 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 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 humiliating 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 recognised as indispensable by civilised peoples.
- (2) The wounded and the sick shall be collected and cared for.

...

### **Additional Protocol I Article 51 Protection of the civilian population**

1. ...

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. ...

### **Additional Protocol I Article 52 General protection of civilian objects**

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.

2. ...

**Additional Protocol II**  
**Article 13**  
**Protection of the civilian population**

1. ...
2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
3. ...

11. Both parties also rely on paragraphs 89, 91, 94, 103, 127, 134 and 143 of the *Appeals Chamber Decision on Jurisdiction*.

B. Analysis

12. This Trial Chamber is of the view that it may not disregard a previous ruling of the Appeals Chamber that has already discussed in depth most of the arguments presently put forward by the Defence, and in this regard it notes the *Appeals Chamber Decision on Jurisdiction*. The Trial Chamber has nonetheless carefully reviewed the arguments presented by the Defence in support of its Motion, as well as the arguments submitted by the Prosecution in response.

13. The Trial Chamber will first address the second argument of the Defence as to the applicability of Articles 2 and 3 of the Statute to international armed conflicts, before turning to its first argument concerning the scope of Article 3 of the Statute.

14. As to the argument concerning Article 2 of the Statute raised in the Defence Motion, this is not, as argued by the Defence during the hearing, an issue of scope only, which can be addressed at the pre-trial stage, as the arguments of the Defence also pertain to the applicability of Article 2 insofar as they relate to the existence of an international armed conflict. The Defence contends that “at trial, the facts will show that there was no international armed conflict connected with the allegations in the amended indictment”<sup>12</sup>. The Defence itself acknowledges that the Trial Chamber “may choose to defer factual determinations at trial”. The Trial Chamber is of the view that this is

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<sup>12</sup> Defence Motion, *supra* n. 6, at p. 3.

an issue that will be more properly addressed at trial as it depends on the assessment of a factual situation which can only be properly made after hearing the evidence submitted by both parties.

15. According to the jurisprudence of the International Tribunal, Article 2 of the Statute is applicable to international armed conflicts. This is not put into question here, although the Appeals Chamber in the *Appeals Chamber Decision on Jurisdiction* and Trial Chamber II in *Prosecutor v. Delalić et al.*<sup>13</sup> did not exclude the possibility that customary law may be evolving to apply the system of grave breaches to internal conflicts as well. However, the question of the applicability of Article 2 of the Statute in the present case is an issue that will be addressed at trial, as this Trial Chamber is not in a position, at this stage of the proceedings, to decide whether to dismiss or not charges brought under Articles 2 and 3 of the Statute on the ground that there was no international armed conflict in Central Bosnia at the time and place relevant to the indictment<sup>14</sup>.

16. The Trial Chamber is also of the opinion that the applicable standard to assess the existence of an international armed conflict, and in particular whether, as argued by the Defence, the standard set out in the *Nicaragua Decision* should be applied, should not be discussed at this stage but would be more properly addressed at trial, as suggested by the Prosecution.

17. As to the scope of Article 3 of the Statute, the Trial Chamber is of the view that it is not necessary to respond to all the arguments raised by the Defence, as it finds that the relevant main issue as to the scope of Article 3 of the Statute at this stage, is, as stated in the *Appeals Chamber Decision on Jurisdiction*, whether the relevant norms are customary in nature, and whether they entail individual criminal responsibility<sup>15</sup>.

18. In the *Appeals Chamber Decision on Jurisdiction*, the Appeals Chamber held that Article 3 “is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 and 5”<sup>16</sup>, and that it “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.”<sup>17</sup> The

<sup>13</sup> Judgement, *Prosecutor v. Delalić et al.*, Case No. IT-96-21, T.Ch. II, 16 Nov. 1998 (“*Čelebići Judgement*”) at para. 202.

<sup>14</sup> Defence Motion, *supra* n. 6, at p. 3.

<sup>15</sup> It is not appropriate to discuss the other criteria set out by the Appeals Chamber in paragraph 94 of the *Appeals Chamber Decision on Jurisdiction* at this pre-trial stage, as they involve questions of facts.

<sup>16</sup> *Appeals Chamber Decision on Jurisdiction*, *supra* n. 7, at para. 89.

<sup>17</sup> *Ibid.*, at para. 91.

Appeals Chamber then went on to spell out four requirements that must be met in order for a violation of international humanitarian law to be subject to Article 3 of the Statute<sup>18</sup>.

19. To support its argument that the Appeals Chamber Decision is in error, the Defence relies on the Report of the Secretary-General and, in particular on paragraph 34: "...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...".

20. The Trial Chamber agrees that the principle of legality is the underlying principle that should be relied on to assess the subject-matter jurisdiction of the International Tribunal, and that the International Tribunal only has jurisdiction over offences that constituted crimes under customary international law at the time the alleged offences were committed. Thus the arguments of the parties were examined in the light of this principle.

21. As stated by the Appeals Chamber in the *Appeals Chamber Decision on Jurisdiction*, Article 3 of the Statute has a "residual character"<sup>19</sup>. It means, practically, that Article 3 covers the list of offences enumerated in the provision as well as other serious violations of international humanitarian law provided they are customary in nature and entail individual criminal responsibility. Thus, Article 3 is not only based on conventional rules, such as the Hague Conventions, which are now part of customary law, but also "refers" to customary international law.

22. Indeed, this interpretation of the scope of Article 3 concerned with the "Violations of the laws or customs of war" is consistent with contemporary customary law as it stood at the time the alleged offences were committed. This is evidenced by the codification process that has taken place in the last decades since the adoption of the Hague Conventions in 1907. Violations of the laws or customs of war encompass what is called "war crimes" in contemporary customary law. It follows that the term "Violations of the laws or customs of war" cannot be limited to "Hague Law". It is encompassed in the larger "generic" term of "war crimes", as is evidenced by the codification of the notion of war crimes. The term "war crimes" is now considered as covering violations of customary norms of humanitarian law entailing individual criminal responsibility. It encompasses both grave breaches of the Geneva Conventions and violations of the laws and customs of war.

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<sup>18</sup> See *Appeals Chamber Decision on Jurisdiction*, *supra* n. 7, at para. 94.

23. That this was the approach taken by the drafters of the Statute of the International Tribunal has subsequently been confirmed by the work of the United Nations International Law Commission ("ILC") on the draft Statute of an International Criminal Court ("draft ICC Statute") adopted in 1994. The draft ICC Statute listed among the offences subject to the jurisdiction of the Court "serious violations of the laws and customs of war applicable in armed conflicts". In its commentary under Article 20 entitled "Crimes within the jurisdiction of the Court", the Commission stated that subparagraph (c) concerning "serious violations of the laws and customs of war applicable in armed conflicts" reflects the provisions contained in Article 2 and 3 of the International Tribunal, adding the "Commission shares the widespread view that there exists the category of war crimes in customary international law. That category overlaps with but is not identical to the category of grave breaches of the 1949 Geneva Conventions and Additional Protocol I of 1977."<sup>20</sup> It is also worth mentioning Article 85(5) of Additional Protocol I which states that grave breaches are to be regarded as war crimes. This can be considered as reflecting a consensus among the States participating in the 1977 Diplomatic Conference that adopted the Additional Protocols to the Geneva Conventions, that it is accepted that "war crimes" is a broad category, and that it covers crimes based on Geneva rules as well as crimes based on Hague rules.

24. The Draft Code of Crimes against the Peace and Security of Mankind adopted by the ILC in 1996 contains Article 20 concerned with "War crimes". The Commission stated in its report that although it retained the expression "war crimes" as the title of the provision, the "expressions 'violations of laws and customs of war' and 'violations of the rules of humanitarian law applicable in armed conflicts' are ... also used in the body of the report"<sup>21</sup>. According to the ILC, war crimes in the context of Article 20 refer, among others, to violations covered by the 1907 Hague Convention and annexed Regulations, the grave breaches provisions of the 1949 Geneva Conventions and of Additional Protocol I, violations of common article 3 of the four 1949 Geneva Conventions, and to Additional Protocol II.

25. This is finally illustrated by Article 8 of the ICC Statute adopted in Rome on 17 July 1998. It is entitled "War Crimes", and covers both "grave breaches" of the Geneva Convention and

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<sup>19</sup> "caractère supplétif" in French.

<sup>20</sup> Commentary under Article 20 of the Draft Statute for an International Criminal Court at page 74, in *Report of the I.L.C. on the work of its Forty-ninth Session*, (1994) G.A.O.R., 49<sup>th</sup> sess., Supp. No. 10, U.N. Doc. A/49/10.

<sup>21</sup> Commentary under Article 20 of the Draft Code of Crimes against the Peace and Security of Mankind, in *Report of the I.L.C. on the work of its Forty-ninth session* (1996), G.A.O.R., A/51/10.

violations of the laws and customs of war. The ICC Statute subjects to individual criminal responsibility violations of common article 3. It can be considered as reaffirming without any doubt a customary norm. Further, it is accepted that fundamental norms of international humanitarian law that are customary in nature are applicable to all types of armed conflicts, excluding situations of internal disturbances and tensions.

26. As also pointed out by the Prosecution, the customary status of common article 3 of the Geneva Conventions, which requires that parties abide by certain minimum fundamental humanitarian standards, was confirmed by the International Court of Justice in the *Nicaragua* case in 1986. The Court held:

Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity' (*Corfu Channel*, Merits, I.C.J. Reports 1949, p. 22).<sup>22</sup>

27. In its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons<sup>23</sup>, the International Court of Justice also confirmed the customary nature of the Hague and Geneva law. The Court stated:

It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" (...), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.

28. The scope of Article 3 of the Statute, and the customary status of certain provisions of humanitarian law are also addressed in the jurisprudence of the International Tribunal. As noted in the *Čelebići Judgement*, the Report of the Secretary-General made reference to specified particular norms of humanitarian law as being incorporated in custom: "Included in these are the four Geneva Conventions of 1949, with no mention of the exclusion of certain of their provisions, such as common article 3."<sup>24</sup> In a recent judgement, in *Prosecutor v. Furundžija*, the Trial Chamber also

<sup>22</sup> *Nicaragua Decision*, *supra* n. 9. para. 218.

<sup>23</sup> 8 July 1996, at paragraph 79.

<sup>24</sup> *Čelebići Judgement*, *supra* n. 13, at para. 305.

discussed the scope of Article 3 of the Statute in relation to, among others, Geneva law. It found that “torture”, which is, *inter alia*, mentioned in common article 3, is covered by Article 3 of the Statute, even though it is not specifically prohibited under the Article<sup>25</sup>.

29. The Defence refers to statements made by certain members of the Security Council after the vote on the establishment of the International Tribunal, stating that it is not possible to rely on them to assess the scope of Article 3 of the Statute, as they can only be considered as “carefully manufactured *ex post facto* legislative history”. In the Trial Chamber’s view, this argument cannot stand, since these statements can be considered as an important part of the legislative history of the Statute and due account may be taken of them in assessing the scope of Article 3.

30. Besides common article 3 of the Geneva Conventions, the Defence also disputes that Additional Protocols I and II to the Geneva Conventions are part of customary law, and therefore argues that the International Tribunal is not competent to prosecute persons charged under these provisions. While both Protocols have not yet achieved the near universal participation enjoyed by the Geneva Conventions, it is not controversial that major parts of both Protocols reflect customary law.

31. It is not appropriate at this stage to embark on a general assessment of the customary status of the Additional Protocols as a whole, as suggested by the Defence arguments. It is sufficient here only to address the provisions of Additional Protocols I and II specifically referred to in the indictment. Counts 3, 4, 5 and 6 of the indictment against Dario Kordić and Mario Čerkez refer specifically to Articles 51(2) and 52(1) of Additional Protocol I, and Article 13(2) of Additional Protocol II. These provisions concern unlawful attacks on civilians or civilian objects and are based on Hague law relating to the conduct of warfare, which is considered as part of customary law. To the extent that these provisions of the Additional Protocols echo the Hague Regulations, they can be considered as reflecting customary law. It is indisputable that the general prohibition of attacks against the civilian population and the prohibition of indiscriminate attacks or attacks on civilian objects are generally accepted obligations<sup>26</sup>. As a consequence, there is no possible doubt as to the customary status of these specific provisions as they reflect core principles of humanitarian law that can be considered as applying to all armed conflicts, whether intended to apply to international or non-international conflicts.

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<sup>25</sup> Judgement, *Prosecutor v. Anto Furundžija*, Case No. IT-95-17/1, T.Ch. II, 10 Dec. 1998, at para. 158.

32. The Trial Chamber will now address the requirement that a customary rule should entail individual criminal responsibility in order to be included in the scope of Article 3 of the Statute. That serious violations of both the Geneva Conventions, outside of the grave breaches provisions, and Hague law entail individual criminal responsibility has, for instance, been recognised by most States when enacting domestic legislation, including the Socialist Federal Republic of Yugoslavia. The ILC also stated in 1994, as to the Draft ICC Statute, that it is “not its function to define new crimes”, thereby acknowledging the prior existence of the offences listed in Article 20 as crimes under customary law. While acknowledging that not every violation of the rules of international humanitarian law is a war crime, it is generally accepted that serious violations of both Geneva and Hague law entail individual criminal responsibility.

33. There can be no doubt that common article 3, and the relevant provisions of Additional Protocols I and II, constitute an appropriate basis to prosecute individuals. As already discussed in the jurisprudence of the International Tribunal, from which this Trial Chamber sees no reason to depart, common article 3 is considered as entailing individual criminal responsibility. Also, as was mentioned before, the relevant provisions of the Protocols are based on Hague law. The Charter of the International Military Tribunal at Nürnberg accepted individual criminal responsibility for violations of Hague rules although the Hague Conventions did not contain specific provisions on individual criminal responsibility. This was subsequently reaffirmed in the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal (“Nürnberg Principles”) adopted by the ILC in 1950<sup>27</sup>.

34. To conclude, this Trial Chamber is in no doubt that common article 3 and the relevant above-mentioned provisions of Additional Protocols I and II, to which counts 3, 4, 5, 6, 9, 13, 16, 20, 24, 26, 28, 32, 34 and 36<sup>28</sup> refer, are covered by Article 3 of the Statute. The principle of legality relied on by the Defence and referred to by the Secretary-General in his Report is respected, and the above-mentioned counts are legally founded. The Trial Chamber has jurisdiction to try the accused Dario Kordić and Mario Čerkez for alleged violations under Article 3 of the Statute.

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<sup>26</sup> See *Appeals Chamber Jurisdiction Decision*, *supra* n. 7, at paras 117-120.

<sup>27</sup> Nürnberg Principles, Ybk I.L.C., 1950, Vols I and II.

<sup>28</sup> Other counts under Article 3 do not refer to provisions not specifically mentioned in the Statute.



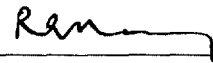
**IV. DISPOSITION**

For the foregoing reasons

**PURSUANT TO** Rule 72 of the Rules of Procedure and Evidence of the International Tribunal,

**THE TRIAL CHAMBER DISMISSES** the Joint Defense Motion to Dismiss the Amended Indictment Based on the Limited Jurisdictional Reach of Articles 2 and 3.

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



Richard May  
Presiding

Dated this second day of March 1999  
At The Hague  
The Netherlands

[Seal of the Tribunal]