THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

IN TRIAL CHAMBER III

Before: Judge Iain Bonomy, Presiding
Judge Michèle Picard
Judge Christoph Flügge

Acting Registrar: Mr John Hocking

Date: 18 March 2009

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

Case No. IT-95-05/18-PT

Public

PRELIMINARY MOTION TO DISMISS COUNT 11 FOR LACK OF JURISDICTION

The Office of the Prosecutor

Mr Alan Tieger
Mr Mark Harmon

The Accused

Dr Radovan Karadžić

I. Introduction

1. Count 11 of the Third Amended Indictment ("indictment") purports to charge the accused, Dr Karadžić, with the crime of "taking of hostages".

2. The purported charge is brought pursuant to Article 3 of the ICTY Statute (violations of the laws or customs of war), and in particular pursuant to Common Article 3(1)(b) of the Geneva Conventions of 1949. The ICTY Appeals Chamber has stated that Article 3 of the ICTY Statute implicitly encompasses Common Article 3 of the Geneva Conventions.[1]

3. The factual allegations underlying Count 11 are that:

- NATO forces carried out air strikes against Bosnian-Serb military targets on 25 and 26 May 1995 (par. 85 of the indictment);
- Dr Karadžić participated in a joint criminal enterprise ("JCE") to take UN personnel hostage in order to compel NATO to abstain from the air strikes (par. 25 and 84);
- between approximately 26 May and 19 June 1995, Bosnian-Serb forces detained over 200 UN peacekeepers and military observers, including persons serving in the armed forces of NATO member states (par. 86);
- the UN personnel were held at various locations in the Republika Srpska, including locations of strategic or military significance (par. 86);
- threats were issued (the indictment does not allege by whom) to third parties, including NATO and UN commanders, to the effect that further NATO attacks on Bosnian-Serb military targets would result in the injury, death, or continued detention of the detainees (par. 86);
- the UN personnel were taking no active part in hostilities (par. 90).

4. In the sections that follow, Dr Karadžić demonstrates that Count 11 of the indictment charges conduct which does not relate to Article 3 of the Tribunal's statute. Therefore, the Tribunal does not have jurisdiction to try him on Count 11. This being

[1] *Prosecutor v. Tadić*, Decision on Interlocutory Appeal on Jurisdiction, 2 October 1995, par. 89, 91, 102, 137.

so, Dr Karadžić requests the Trial Chamber to dismiss Count 11 pursuant to Rule 72(A)(i) and 72(D)(iv) of the ICTY Rules.

II. The law

5. This section overviews the provisions of international law relating to hostage-taking, from the end of the Second World War until 1995 (the year of the acts alleged against Dr Karadžić), as well as the relevant ICTY case law. The purpose of this section is to determine the law as it stood in 1995.

6. The ICTY may apply only customary substantive international law. Sources for this law include rules enunciated in judicially decided cases, and in treaties, to the extent that, in either case, they are representative of a broader state practice and opinio juris. Isolated pronouncements do not amount to state practice or opinio juris, and therefore do not amount to international law. An act that is shown to have been lawful in international law remains lawful until such time as the law is specifically modified to render it unlawful. Extreme care is required in international criminal law to avoid holding criminal proceedings against a person on the basis of ill-defined charges. Filling in perceived gaps in substantive criminal law is beyond the power of Tribunal judges.

Second World War and the List *case*

7. In deciding what was customary international law in 1995, it is necessary to consider the state of the law at the end of the Second World War and how it has been specifically modified since.

8. Article 6(b) of the Nuremberg Charter of 1945 listed "killing of hostages" among the war crimes for which the International Military Tribunal had jurisdiction. These crimes, which the Charter also referred to as violations of the laws or customs of war, were crimes committed in the context of international armed conflict. Control Council Law No. 10 of 1945 mirrors the Charter in this respect.

9. The 1948 judgement of a US military tribunal in the case of *Wilhelm List and others ("Hostages Trial")*[2] made several pronouncements on hostages law as it applied in the context of international armed conflict.

[2] *United States v. Wilhelm List and others*, Judgement, 19 February 1948, US Military Tribunal, Nuremberg, *Law Reports of Trials of War Criminals*, Vol. VIII, case No. 47, 38-91 (also printed in *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, Vol. XI).

10. The allegations in the *List* case, so far as they are relevant, were that the defendants had issued orders for the execution of a fixed number of hostages in retaliation for each German soldier killed or wounded by renegade action in German-occupied territories.[3] The hostages were taken from the civilian population: "The major issues involved in the present case gravitate around the claimed right of the German Armed Forces to take hostages from the innocent civilian population to guarantee the peaceful conduct of the whole of the civilian population".[4] Thus the *Hostages Trial* is directly about the law, as it stood in the course of the Second World War, and up to 1948, on civilian hostages used for the purposes of reprisal.[5]

11. The *Hostages Trial* judges stated the applicable law on civilian hostages as follows: "hostages may be taken in order to guarantee the peaceful conduct of the populations of occupied territories and, when certain conditions exist and the necessary preliminaries have been taken, they may, as a last resort, be shot."[6]

12. The law did prohibit purely *arbitrary* hostage-taking from within the civilian population under occupation, requiring some connection between the persons taken hostage and the crimes committed against the occupation forces.[7] Nevertheless, the notable points about the law at the time are that:

(i) international customary law in 1948 allowed for the taking of civilians as hostages from territories occupied in the course of international armed conflict, and for executing such hostages in reprisal for unlawful attacks against the occupier under certain conditions;

(ii) the US military tribunal applied customary international law, not the law of the Nuremberg Charter or Control Council Law No. 10, both of which prohibited "killing of hostages"; this statutory prohibition was seen by the

[3] *Hostages Trial*, p. 3.
[4] *Hostages Trial*, p. 60.
[5] *Hostages Trial*, p. 60 ("We limit our discussion to the right to take hostages from the innocent civilian population of occupied territory as a guarantee against attacks by unlawful resistance forces, acts of sabotage and the unlawful acts of unknown persons and the further right to execute them if the unilateral guarantee is violated").
[6] *Hostages Trial*, p. 61.
[7] *Hostages Trial*, p. 62.

judges as legally inaccurate or groundless, and was therefore put to one side in preference of customary international law;[8]

(iii) the law of hostages exclusively concerned civilians.

The Four Geneva Conventions

13. Dissatisfaction with this and other rules of international armed conflict began a process of ICRC-driven law reform which aimed, among other things, to afford greater protection to the civilian population in occupied territory. The first major reform occurred one year after the *List* judgement, with the Geneva Conventions of 1949.

14. The Geneva Conventions created rules applying almost exclusively to international armed conflict (the only exception is Article 3, common to the four Conventions). International war was understood to require regulation by international legal rules. Armed conflict between government forces and armed groups within the territory of a sovereign state was seen to present, by contrast, an altogether different type of legal problem, a difference that has remained entrenched up to the present.

15. The Fourth Geneva Convention, which aims to protect civilians in international armed conflict, states at Article 34: "The taking of hostages is prohibited." Article 147 of the same Convention declares the "taking of hostages" to be a grave breach of the Convention. In contemporary parlance, Article 147 has the effect of "criminalizing" any breach of the Article 34 prohibition.

16. It bears reiterating that the Fourth Convention's Article 34 prohibition is limited to civilians. The term here is to be understood in its ordinary sense, meaning persons who take no part in hostilities and who perform no work of a military character. "Civilians" in this context does not extend to prisoners of war. Article 4 of the Fourth Convention provides that "Persons protected by [...] the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949 [the Third Convention], shall not be considered as protected persons within the meaning of the present Convention."

17. Hence the formulation in Article 2 of the ICTY Statute, which gives the Tribunal jurisdiction over certain grave breaches in international armed conflict, accurately inserts the word "civilians" into the original wording of Articles 34 and 147 of the

[8] *Hostages Trial*, pp. 79-88.

Fourth Convention, with the result that the prohibition in ICTY Article 2 is narrowed to "the following acts against persons or property protected under the provisions of the relevant Geneva Convention: [...] (h) taking *civilians* as hostages."[9]

18. The Third Geneva Convention, which provides for the protection of prisoners of war, makes no reference to hostage-taking in its provisions concerning international armed conflict. The only reference to hostages in the body of the Third Convention is in the standardized text of Common Article 3.

19. The Third Geneva Convention does require the humane treatment of prisoners of war at all times and prohibits their use for reprisal purposes (Article 13). It also places the following requirements on states:

> Article 19. Prisoners of war shall be evacuated, as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger. [...]
>
> Article 23. No prisoner of war may at any time be sent to, or detained in areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points or areas immune from military operations. [...]

20. The grave breaches provision of the Third Convention does not criminalize a breach of Article 19 or of Article 23. The provision reads in full:

> Article 130: Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

21. The non-criminalization of Articles 19 and 23 of the Third Convention may be due to the fact that it is not always reasonably practicable to comply with these rules. For example, a party to an armed conflict controlling a small expanse of territory may have no location in its territory suitable for holding prisoners of war which is also buffered

[9] Emphasis added.

from the combat zone. This problem is exacerbated in cases where the opponent is conducting an aerial campaign of bombing, and where there is no actual front line.

22. Next for consideration is Common Article 3 of the Geneva Conventions, which by its terms applies to armed conflict not of an international character. It forms the basis of Count 11 of the indictment, and states in relevant part:

> 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 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: [...]
>
> (b) taking of hostages; [...]

Why the Prosecution chose Common Article 3

23. The indictment against Dr Karadžić is vague about the character of the armed conflict in connection with Count 11. The indictment alleges only "a state of armed conflict" (par. 89) and no more. At the same time, Count 11 alleges a military attack by NATO forces against the Bosnian-Serb entity. It necessarily follows from this allegation that the resulting armed conflict was international in character. As stated by the ICTY Appeals Chamber:

> an armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State.[10]

[10] *Prosecutor v. Tadić*, Appeals Judgement, 15 July 1999, par. 84.

24. Dr Karadžić anticipates that the Prosecution's position will be that Common Article 3 offers minimum guarantees which apply to every armed conflict irrespective of its character. However, the real reason why the Prosecution is relying on Common Article 3 through Article 3 of the ICTY Statute, despite the obvious international character of NATO's attack on the Bosnian Serbs, is that the Prosecution seeks to avoid to have to rely on Article 2 of the ICTY Statute with its limiting reference to "taking *civilians* as hostages".

25. As discussed above, the wording of the ICTY's statutory prohibition is derived from the Fourth Geneva Convention, which concerns civilians in the ordinary sense. It does not cover the "UN personnel" referred to in Count 11. The UN personnel in question consisted of members of the armed forces of several states, including NATO states engaged in the attack against the Bosnian-Serb entity.

26. As belligerents, or suspected belligerents, the UN personnel were reasonably subject to arrest.[11] As noted earlier, the Fourth Convention does not cover prisoners of war. To craft a charge under Article 2 of the ICTY Statute, the Prosecution would have had to rely on the Third Convention. Yet the Third Convention contains no reference whatsoever to "hostages", except for the occurrence of the term in Common Article 3, which of course is not specific to the Third Convention but rather a common appendage to the Conventions covering non-international armed conflict.

27. The prohibitions of Common Article 3 are minimal and incidental to the Geneva Conventions, which are about war between states. Minimalism in the law is very close to vagueness. It is against the dangers of legal vagueness that Dr Karadžić must now defend himself. Dr Karadžić believes that the Prosecution has sought refuge in the lack of specificity of Common Article 3 to avoid the strictures and limitations of bringing a charge pursuant to Article 2 of the ICTY Statute.

28. Dr Karadžić invites the Chamber to approach Common Article 3 cautiously. It is a fact that, because of its nature, Common Article 3 is regarded with suspicion by sovereign states. For this reason, its prohibitions have remained underdeveloped for

[11] In addition to the presence of NATO servicemen among UN personnel, the UN backed NATO's aggression. For example, on 4 June 1993, the UN Security Council, in Resolution 836, authorized UN forces to take "the necessary measures, including the use of force, in reply to bombardments against the safe areas by any of the parties or to armed incursion into them" (S/RES/836 (1993), par. 9).

close to sixty years. At the urging of the ICRC an attempt was made in 1977 to expand them, but the resulting Additional Protocol II failed by a long stretch to gain universal support. What this means for the present purposes is that the terms of Common Article 3 are deserving of the most conservative interpretation.

29. Moreover, Common Article 3 must never be interpreted in such a way as to afford *greater* protection to individuals than that which is afforded by the body proper of the Conventions. It would be absurd for a minute appendage to a treaty to generate more protection for persons affected by non-international armed conflict than the treaty itself generates for persons affected by war proper.

30. Therefore, even if Common Article 3 applies to all armed conflict irrespective of its character, and even if it thereby applies to the international armed conflict as alleged in Count 11 of the indictment, the Chamber must interpret Common Article 3 within the context and history of the Geneva Conventions as a whole.

Elaboration of Common Article 3 prior to establishment of ICTY

31. It is possible that the meaning of Common Article 3 did not remain frozen in 1949, and has been developed since by state practice and opinio juris. Any such developments are, however, relevant only to the extent that they had achieved customary law status by 1995, the date of the relevant events alleged in the indictment.

32. The 1977 text of Additional Protocol I to the Geneva Conventions of 1949 does not further elaborate the prohibition of hostage-taking in the original Conventions. This Protocol relates to the conduct of international armed conflict. Part IV of Protocol I is about the "Civilian Population", and Section III of this Part is about the "treatment of persons in the power of a party to the conflict". The provisions of this section "are additional to the rules concerning humanitarian protection of civilians and civilian objects in the power of a Party to the conflict contained in the Fourth Convention" (Article 72). Thus, this section, and indeed the whole of Part IV, concerns *civilians* in the same sense as the Fourth Geneva Convention.

33. Article 75(2)(c) of the First Protocol, which is also in Section III, prohibits "the taking of hostages". In context, this is no different than the prohibition as expressed in Article 2 of the ICTY Statute, namely "taking civilians as hostages".

34. The Second Additional Protocol relates to non-international armed conflict. Due to in part to the relative paucity of ratifications, Additional Protocol II (like Protocol I) is of much lesser authority than the original Conventions. The weight to be given to its rules as sources of customary international law is therefore heavily qualified.

35. Additional Protocol II states in Article 1 that it "develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions or application". Article 4 of Protocol II provides as follows:

> 1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. [...]
>
> 2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever: [...]
>
> (c) taking of hostages; [...]

36. This text is little different from the corresponding provisions of Common Article 3, quoted earlier, and therefore does not evince any development in the law.

37. There were no further authoritative attempts to develop Common Article 3 prior to 1995. Following the establishment of the ICTY, Common Article 3 became subject to extensive interpretation.[12]

"Hostages" in ICTY case law

38. The ICTY has not finally convicted any person for "taking civilians as hostages" under Article 2 of the Statute, or for "taking of hostages" under Article 3. These charges

[12] Dr Karadžić is aware of the existence of the 1979 International Convention Against the Taking of Hostages, which came into force in respect of 22 states on 3 June 1983. However, Article 12 of that Convention states that "the present Convention shall not apply to an act of hostage-taking committed in the course of armed conflicts as defined in the Geneva Conventions of 1949". The 1979 Convention was not intended to modify the international laws of war. Dr Karadžić also does not find it necessary to explore the implications of the Rome Statute of 1998, as that represents treaty law postdating the events alleged in the indictment. Finally, Dr Karadžić wishes to distinguish the Canadian case of *R. v. Ribic*, [2005] O.J. No. 4261, 67 W.C.B. (2d) 523, which applied national law (s. 279.1 of the Canadian Criminal Code). That section, like the International Convention, but unlike Article 3, did not require that the crime occur in connection with an armed conflict. In addition, the Canadian law did not reflect international law, and did not modify international law, for a single case of state practice or opinio juris, which moreover dates from 2005, cannot have that effect.

have been considered on the merits in two cases before the ICTY. Both of these cases are distinguishable from the present case in terms of the factual allegations involved. They support, rather than oppose, the jurisdictional argument developed here.

39. The *Blaškić* case involved the taking of Bosnian-Muslim civilians as hostages between January 1993 and January 1994 to obtain prisoner exchanges and the cessation of Bosnian-Muslim military operations against Bosnian-Croat forces. Hostage-taking charges were laid pursuant to both Article 2 and Article 3 of the ICTY Statute.[13]

40. The *Blaškić* Trial Chamber, in giving its interpretation of "hostages" in Common Article 3 of the Geneva Conventions, stated:

> The definition of hostages must be understood as being similar to that of civilians taken as hostages within the meaning of grave breaches under Article 2 of the Statute, that is, persons unlawfully deprived of their freedom, often wantonly and sometimes under threat of death.
>
> The parties did not contest that to be characterised as hostages the detainees must have been used to obtain some advantage or to ensure that a belligerent, other person or other group of persons enter into some undertaking.[14]

41. Dr Karadžić makes two observations. First, the *Blaškić* Trial Chamber used Article 2(h) of the ICTY Statute, and therefore the Fourth Geneva Convention, to interpret Common Article 3(1)(b). Second, a hostage-taking act in the sense of Common Article 3 is, according to the *Blaškić* Trial Chamber, constituted by proof of two elements: (i) the person (hostage) was unlawfully deprived of his or her freedom; (ii) he or she was used to obtain some advantage in relation to a belligerent.

42. The unlawfulness which is part of the first element is significant. The *Blaškić* Trial Chamber said of the Bosnian Muslims interned by the Bosnian-Croat forces: "Although not all were necessarily civilians, all were persons placed hors de combat. Moreover, the Trial Chamber is of the opinion that, in this instance, detention could in no way be deemed lawful because its main purpose was to compel the ABiH to halt its advance."[15]

43. While the Appeals Chamber quashed the Trial Chamber's conviction of the accused, Blaškić, for the crime of taking hostages pursuant Common Article 3 (and

[13] *Blaškić* Trial Judgement, 3 March 2000, par. 16.
[14] *Blaškić* Trial Judgement, 3 March 2000, par. 187.
[15] *Blaškić* Trial Judgement, 3 March 2000, par. 708.

Article 3 of the ICTY Statute), this had to do with the Trial Chamber's definition of "ordering". The aforementioned statement of the law on hostages was not disturbed.[16]

44. In the other ICTY case, *Kordić and Čerkez*, the accused were charged, as in *Blaškić*, with taking Bosnian Muslims as hostages, pursuant to both Article 2 and Article 3 of the ICTY Statute.[17] The Trial Chamber quoted with approval the ICRC's commentary on Article 147 of the Fourth Geneva Convention:

> Hostages might be considered as persons illegally deprived of their liberty, a crime which most penal codes take cognizance of and punish. However, there is an additional feature, i.e. the threat either to prolong the hostage's detention or to put him to death. [...] the fact of taking hostages, by its arbitrary character, especially when accompanied by a threat of death, is in itself a very serious crime; it causes in the hostage and among his family a mortal anguish which nothing can justify.[18]

45. This passage reflects the two elements by which the hostage-taking act is defined in *Blaškić*, namely unlawful deprivation of liberty coupled with a threat to cause further harm to the unlawfully (or arbitrarily) detained person.

46. The Trial Chamber in *Kordić and Čerkez* proceeded to find that "an individual commits the offence of taking civilians as hostages when he threatens to subject civilians, who are unlawfully detained, to inhuman treatment or death as a means of achieving the fulfilment of a condition."[19] The Trial Chamber concurred with the findings of the *Blaškić* Trial Chamber and stated that:

> in the context of an international armed conflict, the elements of the offence of taking of hostages under Article 3 of the Statute are essentially the same as those of the offence of taking civilians as hostages as described by Article 2 (h).[20]

47. Applying the rule against the accumulation of convictions, the *Kordić and Čerkez* Trial Chamber convicted the accused, Čerkez, pursuant to Article 2, and dismissed the Article 3 charge, thus providing further confirmation that the elements of the hostage-taking offence under the two Articles are identical, and that the victims are limited to

[16] *Blaškić* Appeals Judgement, 29 July 2004, par. 641-6.
[17] *Kordić and Čerkez* Trial Judgement, 26 February 2001, par. 304.
[18] The passage from the ICRC's commentary is quoted in *Kordić and Čerkez* Trial Judgement, 26 February 2001, par. 311.
[19] *Kordić and Čerkez* Trial Judgement, 26 February 2001, par. 314.
[20] *Kordić and Čerkez* Trial Judgement, 26 February 2001, par. 320.

civilians.[21] The Appeals Chamber, quashing the Trial Chamber's conviction, gave as its reason the insufficiency of the evidence against Čerkez. It did not disturb the law on hostage-taking as it was stated by the Trial Chamber.[22]

48. Dr Karadžić notes, moreover, that the current ICRC position on hostage-taking is the same as that expounded in *Blaškić* and in *Kordić and Čerkez*:

> ICRC position on hostage-taking – Guidelines
>
> Scope and definition
>
> 1. These guidelines set out the ICRC's position with regard to hostage-taking in situations in connection with which it is conducting operations. The guidelines (including those for hostage-taking committed in another country but linked to violence occurring where the ICRC is operating) apply regardless of whether or not the situation is covered by international humanitarian law.
>
> 2. For the purposes of these guidelines, "hostage-taking" has occurred when both of the following conditions are fulfilled:
>
> - A person has been captured and detained *illegally*.
> - A third party is being pressured, explicitly or implicitly, to do or refrain from doing something as a condition for releasing the hostage or for not taking his life or otherwise harming him physically.
>
> [...] [23]

III. Argument

49. Dr Karadžić submits that the conflict referred to in Count 11 is self-evidently an international armed conflict insofar as it alleges an attack against a constituent national group of Bosnia-Herzegovina (the Bosnian Serbs) by a belligerent party constituted of the armed forces of several foreign states (NATO). This is not a matter of evidence to be determined at trial. It is evident on the face of the indictment.

50. It follows that, to the extent the ICTY has jurisdiction over Common Article 3 violations through Article 3 of the ICTY Statute, and irrespective of the fact that Common Article 3 has been treated at the ICTY as applying to international as well as

[21] *Kordić and Čerkez* Trial Judgement, 26 February 2001, par. 825.
[22] *Kordić and Čerkez* Appeal Judgement, 17 December 2004, par. 933-9.
[23] http://www.icrc.org/Web/Eng/siteeng0.nsf/html/5C6CLN, emphasis added.

non-international armed conflict, Common Article 3 must be interpreted in the light of the law of international armed conflict. This is the approach taken by both the *Blaškić* and the *Kordić and Čerkez* Trial Chambers, quoted above.

51. As demonstrated in the previous section, the law against hostage-taking in international armed conflict has been developed entirely within the context of the Fourth Geneva Convention, that is, with reference to civilians in the ordinary sense, which does not include prisoners of war. This is not surprising, for the tradition of hostage-taking, which was still alive in 1948 (as seen in the *List* case) and which the Conventions of 1949 sought to eliminate, was developed as a mechanism by occupiers to guard themselves against, and to suppress, unlawful attacks by members of the civilian population in occupied territory. Hence the location of the rule in the Fourth Geneva Convention and the complete absence of any reference to hostages in the other three Geneva Conventions.

52. Also evident on the face of the indictment, and therefore not a matter for trial, is the fact that the UN personnel mentioned in Count 11 were not civilians in the ordinary sense, but rather were members of the armed forces of other states, including NATO states. The alleged arrest of the UN personnel was self-evidently not an unlawful arrest of civilians (this being the first element of hostage-taking according to the definition in *Blaškić* and in *Kordić and Čerkez* and in the ICRC Guidelines). The presence of members of adversary armed forces among the UN personnel was by any measure intolerable to the leaders of a people trying to defend themselves against bombardment by a multinational military force. This point is open to assessment at the jurisdictional, pre-trial phase. The alleged arrests were self-evidently legal and defensive, and the UN personnel became, in the context of an international armed conflict, prisoners of war.[24]

53. With the UN personnel properly considered as prisoners of war, the Third Geneva Convention becomes the dominant reference point through which to interpret the terms of Common Article 3. As indicated in the previous section, great care must be taken in the interpretation of Common Article 3 so as to avoid the illegitimate result of affording greater protection to individuals in non-international armed conflict than to individuals in international armed conflict.

[24] Clearly, Dr Karadžić is here explicating the logic of the indictment; he is not making any admissions.

54. The previous section also explained that while the grave breaches regime of the Third Convention (Article 130) criminalizes "inhuman treatment" of prisoners of war, it does not do the same for breaches of Articles 19 and 23 of the Third Convention, which regard the evacuation and place of detention of prisoners of war. Neither does Article 85 of Additional Protocol I, which supplements the grave breaches regimes of the original Conventions, have any such effect in relation to the rules in Articles 19 and 23.

55. The Prosecution has not charged Dr Karadžić with "inhuman treatment" of the UN personnel, or inhuman treatment of prisoners of war, but rather with hostage-taking.

56. The term "hostage" has a clear meaning in Common Article 3: it is the meaning given to the term by the Fourth Convention, whose Article 147 furthermore criminalizes civilian hostage-taking.

57. The Prosecution, through its purported charge in Count 11, is in effect aiming to expand the meaning of "hostage" in Common Article 3 to cover prisoners of war (or, in the language of non-international armed conflict, lawfully detained persons) who have allegedly been treated in a manner which breaches Articles 19 and 23 of the Third Convention, even though these breaches have not been criminalized by the Convention or, for that matter, by Additional Protocol I.

58. For all of the above reasons, this is an impermissible interpretation of Common Article 3, representing a reckless attempt at expansion of the subject-matter jurisdiction conferred on the ICTY by Common Article 3 through Article 3 of the ICTY Statute.

IV. Relief requested

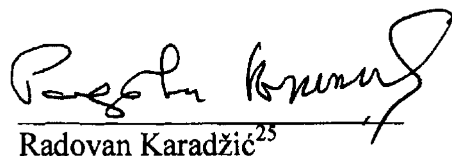
59. In relation to Count 11, Dr Karadžić maintains that the underlying factual allegations do not constitute a crime within the jurisdiction of the Tribunal. Common Article 3 criminalizes civilian hostage-taking. The indictment allegations concern prisoners of war and their localization.

60. The Tribunal may not expand its jurisdiction by analogical reasoning, that is, it may not transform a charge grounded in the unlawful detention and misuse of civilians into a charge referenced to the treatment of (lawfully detained) prisoners of war, merely because the two situations evince certain similarities. The crime of "taking of hostages" in Common Article 3 does not cover the treatment of detained belligerents.

61. As the Tribunal has no subject-matter jurisdiction, Count 11 must be dismissed pursuant to Rule 72(D)(iv) of the ICTY Rules.

Word count: 5,477

Respectfully submitted,



Radovan Karadžić[25]

[25] Dr. Karadžić wishes to acknowledge with gratitude the contribution of Dr. Alexander Zahar of Griffith Law School, Australia, and Roman Graf of the University of Lausanne, Switzerland to the conception, research, and preparation of this motion.