**UNITED NATIONS**

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| 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-95-5/18-PT<br>Date: 1 April 2009 |

**IN THE TRIAL CHAMBER**

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

**Acting Registrar:** Mr. John Hocking

**THE PROSECUTOR**

**v.**

**RADOVAN KARADŽIĆ**

**PUBLIC**

# PROSECUTION RESPONSE TO PRELIMINARY MOTION TO DISMISS COUNT 11 FOR LACK OF JURISDICTION

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**The Accused:**

Mr. Radovan Karadžić

THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

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

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

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# PROSECUTION RESPONSE TO PRELIMINARY MOTION TO DISMISS COUNT 11 FOR LACK OF JURISDICTION

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# I. OVERVIEW

1. Karadžić's argument about hostage-taking is not a jurisdictional challenge within the meaning of Rule 72(D). In arguing that hostage-taking, as a violation of common Article 3 of the Geneva Conventions and of Article 3 of the Statute, requires the unlawful detention of civilians, Karadžić makes arguments about the contours of the crime and raises factual questions. Karadžić's Motion should be rejected on this basis alone.[1]

2. If the Trial Chamber considers Karadžić's arguments, it should dismiss them because he fails to show that Count 11 falls outside the Tribunal's jurisdiction. In particular:

- Appeals Chamber case-law and customary international law do not limit the crime of hostage-taking under common Article 3 to civilians; and

- Appeals Chamber case-law and customary international law do not require unlawful detention as an element of the crime.

[1] Preliminary Motion to Dismiss Count 11 for Lack of Jurisdiction, 18 March 2009 ("Motion").

## II. COUNT 11 CHARGES KARADŽIĆ WITH A CRIME FALLING WITHIN THE TRIBUNAL'S JURISDICTION

3. To challenge jurisdiction,[2] Karadžić must show that Count 11 does not relate to a crime under the Statute. Instead, Karadžić advances arguments about the contours of the crime charged and factual issues to be resolved at trial.

4. Count 11 charges Karadžić with taking hostages as a violation of common Article 3 of the Geneva Conventions, punishable under Article 3 of the Statute. Karadžić does not dispute the Tribunal's jurisdiction over common Article 3 crimes under Article 3 of the Statute.[3] Instead, Karadžić advances a restrictive interpretation of hostage-taking under common Article 3 that would preclude his criminal responsibility.

5. Karadžić's misinterpretation relies on importing the term "civilians" from Article 2 of the Statute into Article 3 of the Statute and interpreting civilians to exclude UN peacekeepers and military observers as victims. Similarly, he introduces "unlawful detention" as an element of the crime and interprets this element to exclude the detention of the UN peacekeepers and military observers.[4] These arguments raise definitional issues going to the contours of the crimes. They are not jurisdictional issues. Karadžić also raises factual issues, including the status of the UN peacekeepers and military observers and the circumstances of their detention, which are for determination at trial.

### A. Karadžić's arguments concern the contours of the crimes charged – not jurisdiction

6. Instead of raising a jurisdictional challenge, Karadžić argues about the contours of the crime of hostage-taking under Article 3 of the Statute. His challenge does not fall within Rule 72(D).

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2 Motion, paras.4, 61.

3 Motion, paras.2, 60-61. *See Prosecutor v. Tadić*, Case No.IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić* Jurisdiction AD"), para.137.

4 Motion, paras.29-30, 50-51.

7. A valid jurisdictional challenge must focus on whether crimes or forms of responsibility *in toto* come within the Tribunal's jurisdiction.[5] By contrast, challenges to the contours of crimes, although "at first glance somewhat related to [the Tribunal's] subject matter jurisdiction", are not jurisdictional challenges. Rather, they raise "issues of law and evidence which can properly be advanced and argued during the course of trial."[6] Trial Chambers have repeatedly held that questions about the contours of crimes are not challenges to jurisdiction[7] and they have resolved issues about the elements of the crimes at the conclusion of the trial.[8]

8. Karadžić's arguments are strikingly similar to the arguments the *Gotovina* Appeals Chamber dismissed as not amounting to jurisdictional challenges. In *Gotovina*, the Appeals Chamber emphasised that if there is any dispute about the content of the norms covered in Articles 2, 3, 4 and 5 of the Statute, they should be resolved at trial.[9] For example, Gotovina argued that crimes under Articles 3 and 5

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[5] *See e.g. Tadić* Jurisdiction AD, para.71 (whether Tribunal has jurisdiction over IHL violations in internal armed conflicts); *Prosecutor v. Milutinović et al.*, Case No.IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003 (whether JCE falls within the Tribunal's jurisdiction); *Karemera et al. v. The Prosecutor*, Case Nos.ICTR-98-44-AR72.5, ICTR-98-44-AR72.6, Decision on Jurisdictional Appeals: Joint Criminal Enterprise, 12 April 2006, para.22 (whether Tribunal has jurisdiction over complicity in genocide under JCEIII).

[6] *Prosecutor v. Tolimir*, Case No.IT-05-88/2-AR72.1, Decision on Tolimir's "Interlocutory Appeal Against the Decision of the Trial Chamber on the Part of the Second Preliminary Motion Concerning the Jurisdiction of the Tribunal", 25 February 2009 ("*Tolimir* AD"), para.10.

[7] *Prosecutor v. Šešelj*, Case No.IT-03-67-T, Decision on Preliminary Motion Filed by the Accused, 27 November 2007, paras.76-78 (dismissing challenge to jurisdiction over "hate speech" as persecution because it involved questions of law and fact); *Prosecutor v. Milutinović et al.*, Case No.IT-05-87-T, Decision on Ojdanić's Motion Challenging Jurisdiction: Indirect Coperpetration, 22 March 2006, para.23 ("like challenges relating to the contours of a substantive crime, challenges concerning the contours of a form of responsibility are matters to be addressed at trial."); *Prosecutor v. Milutinović et al.*, Case No.IT-05-87-T, Decision on Defence Application for Certification of Interlocutory Appeal of Rule 98*bis* Decision, 14 June 2007, para.18 (holding that liability for participating in a joint criminal enterprise by omission was a contextual determination best left for trial); *Prosecutor v. Ngeze*, Case No.ICTR-97-27-T, Decision on the Defence's Motion to Dismiss the Indictment *in toto* for Lack of Subject Matter Jurisdiction and for Lack of Fundamental Fairness for the Accused, 10 May 2000, p.2 (holding that challenge to jurisdiction over criminal responsibility for free speech is a substantive issue going to the merits).

[8] *See Prosecutor v. Gotovina*, Case No.IT-06-90-AR72.1, Decision on Ante Gotovina's Interlocutory Appeal against Decision on Several Motions Challenging Jurisdiction Gotovina, 6 June 2007 ("*Gotovina* AD"), para.18, referring to *Prosecutor v. Furundžija*, Case No.IT-05-17/1-T, Judgement, 10 December 1998 ("*Furundžija* TJ"), paras.172-186 (further defining the elements of rape as a crime against humanity); *Prosecutor v. Kunarac et al.*, Case Nos.IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001, paras.436-460 (further defining the element of "coercion or force or threat of force" for rape as a crime against humanity). *See also Prosecutor v. Galić*, Case No.IT-98-29-A, Judgement, 30 November 2006, para.71; *Prosecutor v. Galić*, Case No.IT-98-29-T, Judgement and Opinion, 30 March 2004, paras.65, 134 (confirming that actual infliction of terror is not an element of the crime); *Prosecutor v. Blaškić*, Case No.IT-95-14-A, Judgement, 29 July 2004 ("*Blaškić* AJ"), paras.34-42 (ascertaining the contours of the mental element of "ordering").

[9] *Gotovina* AD, paras.15, 18, 23.

should be interpreted akin to Article 2 grave breaches and should incorporate the Geneva Convention IV requirement that protected persons be in the hands of a party to the conflict.[10] Here, Karadžić argues that the offence of hostage-taking under Article 3 should incorporate the Geneva Convention IV limitation to civilian victims. Like Gotovina, Karadžić argues a definitional issue that does not fall within Rule 72(D)(iv).[11] Gotovina also argued that the definitions of deportation and forcible transfer under Article 5 of the Statute should incorporate requirements from Geneva Convention IV.[12] Here, Karadžić argues that proof of unlawful detention should be introduced into hostage-taking under Article 3 of the Statute. Again, in accordance with the *Gotovina* Appeals Chamber, this is a definitional issue that does not fall within the scope of Rule 72(D)(iv).[13]

### B. Karadžić attempts to raise factual issues that must be determined at trial

9. Karadžić does not challenge jurisdiction, but raises factual issues, or mixed questions of law and fact for determination at trial. These include the status of the UN personnel taken hostage, the circumstances under which they were held hostage and the circumstances surrounding – and legal significance of – the presence of NATO personnel among the UN personnel. Factual issues and mixed questions of fact and law are not jurisdictional issues within the ambit of Rule 72(D)(iv).[14]

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10 *Gotovina* AD, para.16.
11 *Gotovina* AD, para.18.
12 *Gotovina* AD, para.11.
13 *Gotovina* AD, para.15.
14 *Gotovina* AD, para.21; *Prosecutor v. Boškoski and Tarčulovski,* Case No.IT-04-82-AR72.1, Decision on Interlocutory Appeal on Jurisdiction, 22 July 2005, paras.11-13; *Prosecutor v. Šešelj,* Case No.IT-03-67-AR72.1, Decision on the Interlocutory Appeal Concerning Jurisdiction, 31 August 2004, para.14; *Tolimir* AD, para.10.

# III. ALTERNATIVELY, NONE OF KARADŽIĆ'S SUBSTANTIVE ARGUMENTS HAVE MERIT

## A. The crime of hostage-taking under Article 3/common Article 3 is not limited to civilian victims

### 1. Common Article 3 expressly prohibits taking persons *hors de combat* as hostages

10. Karadžić argues that common Article 3 only protects civilians – in the sense of non-members of the armed forces – from hostage-taking.[15] This interpretation is contrary to the provision's express terms. Common Article 3(b) prohibits taking as hostages "[p]ersons 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." Karadžić's interpretation strips common Article 3 of the protections accorded to persons *hors de combat*, which is untenable in light of the Article's ordinary meaning.

11. The Prosecution has correctly relied on common Article 3 as the basis for Count 11 of the Indictment. By 1995, violations of common Article 3 entailed individual criminal responsibility in customary international law, whether committed in international or non-international armed conflict. These violations come within the Tribunal's jurisdiction under Article 3.[16]

### 2. The Appeals Chamber has not limited hostage-taking to civilian victims

12. In *Blaškić*, the Appeals Chamber did not limit hostage-taking under Article 3/ common Article 3 to civilian victims.[17] In considering hostage-taking both as a grave breach of the Geneva Conventions (Article 2) and as a violation of the laws or customs of war (Article 3),[18] it found that

> the essential element in the crime of hostage-taking is the use of a threat concerning *detainees* so as to obtain a concession or gain an advantage; a situation of hostage-taking exists when a person seizes

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15 Motion, paras.56, 59.
16 *Tadić* Jurisdiction AD, paras.102, 134, 137.
17 *Contrast* Motion, para.38.
18 *Blaškić* AJ, para.638.

> or detains and threatens to kill, injure or continue to detain another *person* in order to compel a third party to do or to abstain from doing something as a condition for the release of that person.[19]

13. This conclusion is not altered by the Trial Chamber case-law Karadžić cites. In so far as trial level authority may be contrary to Appeals Chamber case-law, the Appeals Chamber decision prevails.[20]

14. In addition, Karadžić misconstrues the *Blaškić* Trial Judgement by implying that the findings on hostage-taking were limited to civilian victims.[21] On the contrary, the *Blaškić* Trial Chamber found that persons *hors de combat* were victims of hostage-taking. It found that a threat was issued that detained Bosnian Muslims, particularly those at the Vitez cultural centre, would be killed unless the ABiH halted its advance[22] and that, "[a]lthough not all were necessarily civilians," since all were persons placed *hors de combat*, the offences under Article 2(h) and Article 3 had been made out.[23]

15. Blaškić's conviction was overturned because the Appeals Chamber was not satisfied he had ordered the hostage-taking.[24] The Appeals Chamber did not take issue with *hors de combat* victims and instead articulated a definition of hostage-taking that would include them.[25]

16. Contrary to Karadžić's submissions,[26] statements in the case-law that the elements of hostage-taking under Article 3 are "similar"[27] or "essentially the same"[28] as the elements of taking civilians as hostages under Article 2 do not mean they are

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19 *Blaškić* AJ, para.639 (emphasis added).
20 *Prosecutor v. Aleksovski*, Case No.IT-95-14/1-A, Judgement, 24 March 2000 ("*Aleksovski* AJ"), para.113.
21 *See* Motion, paras.39, 43.
22 *Prosecutor v. Blaškić*, Case No.IT-95-14-T, Judgement, 3 March 2000 ("*Blaškić* TJ"), paras.706, 708.
23 *Blaškić* TJ, para.708. *See also* para.696 (referring to ABiH members imprisoned in the Vitez cultural centre in April 1993).
24 *Blaškić* AJ, paras.644, 646.
25 The Appeals Chamber acknowledged that the Trial Chamber had found Blaškić guilty on all detention-related counts, including hostage-taking under Articles 2 and 3, on the basis that "non-combatant Bosnian Muslims, both civilians and prisoners of war, were detained during the conflict in the Lašva Valley region of Central Bosnia, and in Vitez on particular." *Blaškić* AJ, para.574.
26 Motion, paras.40-41, 46-47.
27 *Blaškić* TJ, para.158. *See also*, para.187.
28 *Prosecutor v. Kordić and Čerkez*, Case No.IT-95-14/2-T, Judgement, 26 February 2001 ("*Kordić and Čerkez* TJ"), para.320.

identical in all respects. As shown, the *Blaškić* Trial Chamber found that persons *hors de combat* had been taken hostage. Further, the *Kordić and Čerkez* Trial Chamber recognised that the two offences were *not* identical when it held in the context of cumulative convictions that they "are similar except for the requirement that the victims be protected persons contained in Article 2."[29]

3. Other international tribunals have not limited hostage-taking to civilian victims

17. In *Sesay*, the Special Court for Sierra Leone (SCSL) Trial Chamber found that the crime of hostage-taking is not limited to civilians but applies to all persons not taking a direct part in the hostilities at the time they were held hostage.[30] The Trial Chamber applied the offence of hostage-taking as a violation of common Article 3 and of Additional Protocol II, found in Article 3(c) of the SCSL Statute.[31] It held that the "prohibition against hostage-taking existed in customary international law and was deemed a war crime entailing individual criminal responsibility" at the time of the crimes charged.[32] Although the relevant date was the year 2000, customary international law was no different in 1995 when the events in the present case occurred.

18. The *Sesay* Trial Chamber found that the first element of hostage-taking (that the accused seized, detained, or otherwise held hostage one or more persons not taking direct part in the hostilities)[33] had been made out where it was shown "that RUF fighters seized hundreds of UNAMSIL peacekeepers in eight attacks and detained them"[34] because the victims were not taking direct part in hostilities.[35] It was not satisfied the full offence had been made out because there was no proof of "an

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29 *Kordić and Čerkez* TJ, para.825. *Contrast* Motion, para.47.

30 *Prosecutor v. Sesay et al.*, Case No.SCSL-04-15-T, Judgement, 2 March 2009 ("*Sesay* TJ"), para.241. The *Sesay* Trial Chamber treated as synonymous the phrases in common Article 3 ("taking no active part in the hostilities") and in Article 4 of Additional Protocol II ("persons who do not take a direct part or who have ceased to take part in hostilities"). *Sesay* TJ, para.102, citing *Prosecutor v. Fofana et al.*, Case No.SCSL-04-14-T, Judgement, 2 August 2007 ("*Fofana* TJ"), para.131.

31 The Statute was adopted in 2002 and granted jurisdiction for events from 30 November 1996: SCSL Statute, Article 1(1).

32 *Sesay* TJ, para.239. *See also* para.236.

33 *Sesay* TJ, paras.240-241.

34 *Sesay* TJ, para.1962.

35 *Sesay* TJ, paras.964, 968, 990.

essential element of the crime of hostage-taking, namely, the use of a threat against the detainees so as to obtain a concession or gain an advantage."[36]

4. Under customary international law the crime of hostage-taking is not limited to civilian victims

(a) Common Article 3 does not impermissibly extend protection against hostage-taking to persons *hors de combat*

19. In addition to the plain meaning of common Article 3, "the context and history of the Geneva Conventions as a whole"[37] demonstrate that civilians and persons *hors de combat* are protected against hostage-taking. This protection applies in both international and non-international armed conflicts.

20. As for international armed conflicts, even though there is no express provision on hostage-taking in Geneva Convention III dealing with prisoners of war (POWs), this conduct is covered by other general prohibitions.[38] The drafting history of the Conventions illustrates that, when attention was drawn to the fact that the prohibition against hostage-taking in (current) Article 34 of Geneva Convention IV had no counterpart in Geneva Convention III,[39] the governing view was that

> the treatment of prisoners of war was so completely covered in [Geneva Convention III], that it was impossible to imagine circumstances in which hostages could be taken without infringing one or more of the existing Articles. The suggested addition [to prohibit taking prisoners of war as hostages] would therefore have no practical justification.[40]

Against this backdrop – and contrary to Karadžić's argument[41] – the inclusion of persons *hors de combat* within the common Article 3 prohibition of hostage-taking is not a departure from the law applicable in international armed conflict. Rather, the drafting history to the Conventions confirms that, in substance, the protections

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36 *Sesay* TJ, para.1969.
37 *Contrast* Motion, para.30.
38 *E.g.* Articles 13, 87 and 130 of Geneva Convention III.
39 *Final Record of the Diplomatic Conference of Geneva of 1949*, Volume II, Section A, (Federal Political Department Berne), (W. S. Hein & Co, reprint, 2004), ("Final Record of the Diplomatic Conference"), p.399.
40 Final Record of the Diplomatic Conference, p.400.

provided in common Article 3 are consistent with the protections afforded to both civilians and persons *hors de combat*/POWs in IHL regulating international armed conflicts.

21. ICRC Commentary confirms that common Article 3 was designed to protect the entire range of persons specified in it.[42] Karadžić wrongly suggests that, because common Article 3 appears as a "standardized text"[43] in all four Geneva Conventions, protection against hostage-taking was only intended for civilians in accordance with the express prohibition in Geneva Convention IV. However, the Commentary shows that common Article 3 was intended to apply to the particular category of war victims protected by each Convention.[44]

22. By 1995, common Article 3 applied irrespective of the character of the armed conflict.[45] So long as they are taking no active part in hostilities, civilians as well as members of the armed forces *hors de combat* are protected against hostage-taking in both international and non-international conflicts.

23. Karadžić erroneously suggests that the Prosecution relies on common Article 3 because it is more expansive than the laws regulating international armed conflict.[46]

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41 Motion, para.53.

42 "Article 3 has an extremely wide field of application, embracing persons who do not take part in the hostilities as well as members of the armed forces who have laid down their arms or have been placed '*hors de combat*'." ICRC Commentary to Geneva Convention III, p.40.

43 Motion, para.18.

44 ICRC Commentary to Geneva Convention III, pp.38-39 ("In view of the fact that four Geneva Conventions were being drawn up, each providing protection for a particular category of war victims, it might be thought that each Convention should merely have referred to the relevant category of victims. It was thought preferable, however, in view of the indivisible nature of the principle proclaimed, and its brevity, to enunciate it in its entirety and in an absolutely identical manner in all four Conventions. In this Commentary, we shall confine ourselves to points which more particularly concern the treatment of prisoners of war, who are covered by the Third Convention [...] Item[ ] (b)(taking of hostages) [...] prohibit[s] practices which have in the past been fairly general in war-time. But although they were common practice, they are nevertheless shocking to the civilized mind [...]") *See also e.g* p.40 (on whether an insurgent falling into the hands of the opposing side is protected from prosecution for fighting, and on whether reprisals against prisoners of war are allowed in non-international armed conflicts).

45 *Tadić* Jurisdiction AD, para.102 (citing ICJ *Nicaragua* case, para.218). *See also Prosecutor v. Delalić et al.*, Case No.IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* AJ"), paras.140, 143-150.

46 *See* Motion, paras.24, 29, 53, 57-58.

Removing the twin count under Article 2 from the indictment expedites the proceedings by eliminating the need for conflict classification at trial.[47]

(b) Additional Protocol II expressly forbids taking hostage any person not directly participating in the hostilities

24. The fundamental guarantee in Article 4(2)(c) of Additional Protocol II (1977) prohibiting taking hostage "persons who do not take a direct part or who have ceased to take part in hostilities" is not limited to civilians. Violation of the prohibitions in Article 4(2)(c) entail individual criminal responsibility as reflected by the inclusion of this provision in the Statutes of the ICTR (adopted 1994 -with jurisdiction between 1 January 1994 and 31 December 1994)[48] and the SCSL (adopted 2002 -with jurisdiction from November 1996).[49] Karadžić's claim that the weight of Additional Protocol II as a source of customary international law is "heavily qualified,"[50] is contradicted by ICTR and SCSL case-law that Article 4 of Additional Protocol II entailed individual criminal responsibility under customary international law at the time relevant to their indictments.[51]

(c) The ICRC Study confirms that under customary international law the crime of hostage-taking is not limited to civilian victims

25. Rule 96 of the ICRC Customary Law Study (2005), citing to state practice, reflects that hostage-taking is prohibited in customary international law and that the victims are not limited to civilians.[52] The Study confirms that

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47 *Contrast* Motion, para.24. *See Prosecutor v. Karadžić and Mladić*, Case No.IT-95-5-I, Indictment, 24 July 1995, Count 13: a grave breach as recognised by Articles 2(h) (taking civilians as hostage), 7(1) and 7(3) and Count 14: a violation of the laws or customs of war (taking of hostages) as recognised by Articles 3, 7(1) and 7(3).

48 *Prosecutor v. Akayesu,* Case No.ICTR-96-4-T, Judgement, 2 September 1998 ("*Akayesu* TJ"), para.610.

49 *Sesay* TJ, para.92.

50 Motion, para.34.

51 *Akayesu* TJ, paras.610, 616. *Sesay* TJ, para.60; *Prosecutor v. Fofana*, Case No.SCSL-04-14-AR72(E), Decision on Preliminary Motion on Lack of Jurisdiction *Materiae*: Nature of the Armed Conflict, 25 May 2004, para.24.

52 Jean-Marie Henckaerts and Louise Doswald-Beck, Customary *International Humanitarian Law*, Volume 1: Rules, International Committee of the Red Cross (Cambridge: Cambridge University Press, 2005) ("ICRC Customary Law Study"). Tribunal case-law confirms that the ICRC Customary Law Study, particularly the underlying state practice and *opinio juris* cited, is a useful guide to the status of customary law. *See e.g. Prosecutor* v. *Hadžihasanović and Kubura*, Case No.IT-01-47-AR73.3, Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98*bis* Motions for Acquittal, 11 March 2005, paras.29-30, 46.

> [a]lthough the prohibition of hostage-taking is specified in the [Geneva Convention IV] and is typically associated with the holding of civilians as hostages, there is no indication that the offence is limited to taking civilians hostage.[53]

In addition, the Study states that the prohibition of hostage-taking, "applicable in both international and non-international armed conflicts," "is now firmly entrenched in customary international law and is considered a war crime."[54]

(d) The ICC Statue and Elements of Crimes do not limit the crime of hostage-taking to civilian victims

26. According to the ICC Statute (1998)[55] and Elements of Crimes (2002),[56] taking hostages in armed conflicts not of an international character applies to persons not taking active part in hostilities including civilians and persons *hors de combat.*

27. While Karadžić argues that the ICC Statute "represents treaty law postdating the events alleged in the indictment,"[57] Tribunal case-law has found it to possess "significant legal value," in so far as it may be "taken to express the legal position *i.e. opinio iuris* of [the majority of States attending the Rome Conference]."[58]

**B. The crime of hostage-taking under Article 3 does not require proof that the victims were unlawfully detained**

1. The Appeals Chamber has not specified that unlawful detention is an element of hostage-taking under Article 3 of the Statute

28. In *Blaškić*, the Appeals Chamber did not specify unlawful detention as an element of the crime. Rather, it stated that "a situation of hostage-taking exists when a person seizes or detains and threatens to kill, injure or continue to detain another

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53 ICRC Customary Law Study, p.336.

54 ICRC Customary Law Study, p.334. *See also* Rule 156, recognising hostage-taking as a war crime in internal and international armed conflicts at pp.574, 590.

55 ICC Statute, Article 8(2)(c)(iii).

56 ICC Elements of the Crimes, Article 8(2)(c)(iii), element 4.

57 Motion, fn.12.

58 *Prosecutor v. Tadić,* Case No.IT-94-1-A, Judgement, 15 July 1999 ("*Tadić* AJ"), para.223, citing to *Furundžija* TJ, para.227. *See also* Preliminary Motion to Dismiss JCE III –Special-Intent Crimes, 30 March 2009, para.31 (relying on the ICC Statute as evidence of customary international law).

person in order to compel a third party to do or to abstain from doing something as a condition for the release of that person."[59] Tribunal case-law confirms that the protection against hostage-taking must be given the widest possible application.[60]

2. Other international tribunals have not required unlawful detention as an element of the crime of hostage-taking

29. In *Sesay*, the SCSL Trial Chamber did not require that hostages be unlawfully detained. Instead, it found that persons taken hostage "must be 'seized, detained, or otherwise held hostage" (first element).[61] As noted, it found this element had been met upon proof that "RUF fighters seized hundreds of UNAMSIL peacekeepers in eight attacks and detained them at [several] locations."[62] It did not enter any findings on whether or not their detention was unlawful. It eventually found that the offence of hostage-taking was not made out for the reasons explained earlier.

3. Common Article 3 protection against hostage-taking does not depend on unlawful detention

30. The terms of common Article 3 implicitly protect persons lawfully detained, including members of the armed forces "placed *hors de combat* by [...] detention". Given that members of the armed forces can be lawfully detained, it is obvious that unlawful detention is not a prerequisite for the Article's application.

4. Commentary to Article 4 of Additional Protocol II confirms that the protection against hostage-taking does not depend on unlawful detention

31. According to the ICRC Commentary on Article 4(2)(c) of Additional Protocol II, hostages are "persons who are in the power of a party to the conflict or its agent, willingly or unwillingly, and who answer with their freedom, their physical integrity or their life for the execution of orders given by those in whose hands they have fallen, or for any hostile acts committed against them."[63] Put simply, hostages

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59 *Blaškić* AJ, para.639.
60 *See Blaškić* AJ, fn.1333, citing ICRC Commentary to Geneva Convention IV, p.230; *Kordić and Čerkez* TJ, paras.319-320. *See also Sesay* TJ, para.241.
61 *Sesay* TJ, para.241, citing to ICC Elements of Crime for Article 8(2)(a)(viii). *See also Sesay* TJ, para.240.
62 *Sesay* TJ, para.1962.
63 ICRC Commentary to Additional Protocol II, para.4537.

are "taken by an authority –and not by individuals- and [...] are detained for the purpose of obtaining certain advantages."[64]

5. The ICC Statue and Elements of Crimes do not require unlawful detention as an element of the crime of hostage-taking

32. The ICC Elements of the Crimes require, for the crime of hostage-taking, that "[t]he perpetrator seized, detained or otherwise held hostage one or more persons."[65] Unlawful detention is not required.

6. Alternatively, if unlawful detention is required, detention that was initially lawful could become unlawful if carried out contrary to IHL

33. Even if the crime of hostage-taking requires the unlawful detention of the persons used as hostages, an initially lawful detention becomes unlawful if it was conducted in a way contrary to IHL. For example, the lawful detention of civilians can become unlawful if the procedural safeguards of Geneva Convention IV are not complied with.[66]

34. Accordingly, recognising that civilians may be lawfully detained in some circumstances, the *Blaškić* Trial Chamber required the Prosecution to "establish that, at the time of the supposed detention, the allegedly censurable act was perpetrated in order to obtain a concession or gain an advantage."[67] When threats are issued to kill or injure persons lawfully detained to compel a third party to do or to abstain from doing something as a condition for their release, their detention *ipso facto* becomes unlawful. In this sense, the *Blaškić* Trial Chamber regarded hostages as "persons unlawfully deprived of their freedom."[68]

35. The *Blaškić* Trial Chamber's finding is not limited to civilians. It included persons *hors de combat* who were threatened with death as victims of hostage-taking.

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64 ICRC Commentary to Additional Protocol I, para.3051.
65 ICC Elements of the Crimes, Article 8(2)(c)(iii), element 1. *See also* Article 8(2)(a)(viii), element 1.
66 *See Prosecutor v. Kordić and Čerkez*, Case No.IT-95-14/2-A, Judgement, 17 December 2004 ("*Kordić and Čerkez* AJ"), para.73; *Čelebići* AJ, para.322.
67 *Blaškić* TJ, para.158.
68 *Blaškić* TJ, paras.158, 187.

Their "detention could in no way be deemed lawful because its main purpose was to compel the ABiH to halt its advance."[69]

### C. The Motion is based on erroneous legal assumptions

1. Common Article 3 does not have a different interpretation depending on whether the conflict is international, non-international or unclassified

36. The fundamental base-line protections of common Article 3 are applicable in all types of conflicts regardless of whether they are international, non-international or unclassified. Case-law from both the Tribunal and the International Court of Justice confirms this principle. Karadžić's argument that common Article 3 is regarded with "suspicion" by sovereign states or considered to be a "minute appendage"[70] is contradicted by its status as a provision setting out "elemental considerations of humanity."[71]

37. The Appeals Chamber has established that "with respect to the minimum rules in common Article 3, the character of the conflict is irrelevant."[72] Referring to the ICJ's finding in the *Nicaragua* case, it found that:

> in the event of international armed conflict, these rules [contained in Common Article 3] 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 [...] reflect [...] "elemental considerations of humanity."[73]

Common Article 3 has been applied independently from the nature of the underlying conflict.[74]

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69 *Blaškić* TJ, para.708.
70 Motion, paras.28-29.
71 *Below*, para.37.
72 *Tadić* Jurisdiction AD, para.102. *See also Čelebići* AJ, paras.140-150, 420.
73 *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, 27 June 1986, para.218.
74 *See e.g. Prosecutor v. Delalić et al.*, Case No.IT-96-21-T, Judgement, 16 November 1998 ("*Čelebići* TJ"), para.314 (upheld in *Čelebići* AJ, paras.151-152) and *Prosecutor v. Naletilić and Martinović*, Case No.IT-98-34-T, Judgement, 31 March 2003 ("*Naletilić* TJ"), para.202 where the Chambers found an international armed conflict existed. Convictions for common Article 3 violations

2. IHL regulating international armed conflicts also contains a base-line prohibition against hostage-taking that protects persons *hors de combat*

38. Karadžić's argument that common Article 3 should be interpreted restrictively is dependent on his mistaken claim that, during international armed conflicts, "non-civilians" have no protection against being taken hostage.[75] This premise is flawed for two reasons.

39. First, as shown above, under Geneva Convention III, the framework of protection for POWs in international armed conflict prohibits hostage-taking, even if that particular term is not used.

40. Second, the prohibition in Article 75(2)(c) of Additional Protocol I, applicable in international armed conflict, is not limited to "taking civilians as hostages."[76] Article 75(2)(c) provides that, in so far as they are affected by international armed conflict and partial or total occupation, taking hostage "persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under [Additional Protocol I]" is "prohibited at any time and in place whatsoever". The very purpose of Article 75 was to ensure a base-line protection to all persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or the Protocol.[77]

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were not entered under Article 3 of the Statute because they would have been impermissibly cumulative with those under Article 2: *see Čelebići* AJ, paras.420 *et seq.*

75 Motion, paras.50-51, 53.

76 *Contrast* Motion, para.33.

77 *See Čelebići* AJ, para.147. *See also* ICRC Commentary to Additional Protocol I, para.3006. *See further*, para.3146 ("if greater protection results from another Convention or from customary law, those provisions must apply, even if the persons concerned are covered by Article 75.")

# IV. CONCLUSION

41. The Chamber should dismiss Karadžić's Motion.

Word Count: 5,180[78]

Alan Tieger
Senior Trial Attorney

Dated this 1st day of April 2009
At The Hague, The Netherlands

[78] The Chamber granted the Prosecution leave to exceed the word limit by up to 2,500 words: Decision on Accused's Motion Seeking Authorization to Exceed the Word Limit, 30 March 2009, para.3.