THE INTERNATIONAL CRIMINAL TRIBUNAL
FOR THE FORMER YUGOSLAVIA

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

IN TRIAL CHAMBER III

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

Acting Registrar: Mr John Hocking

Date: 8 April 2009

THE PROSECUTOR

v.

RADOVAN KARADŽIĆ

Public

MOTION FOR LEAVE TO REPLY AND REPLY TO PROSECUTION RESPONSE TO PRELIMINARY MOTION TO DISMISS COUNT 11 FOR LACK OF JURISDICTION

The Office of the Prosecutor:

Mr Alan Tieger
Ms Hildegard Uertz-Retzlaff

The Accused:

Dr Radovan Karadžić

Introduction

1. Dr Radovan Karadžić respectfully moves, in accordance with Rule 126 bis, for leave to reply to the Prosecution's "Response to Preliminary Motion to Dismiss Count 11 for Lack of Jurisdiction", filed on 1 April 2009. Dr Karadžić contends that a reply is necessary to address misinterpretations by the Prosecution of the arguments developed by Dr Karadžić in his original motion.

Whether the motion was properly jurisdictional

2. The Prosecution submits that Dr Karadžić's motion "raise[s] definitional issues going to the contours of the crimes. They are not jurisdictional issues".[1] The Prosecution makes the following assertion:

> Karadžić does not dispute the Tribunal's jurisdiction over common Article 3 crimes under Article 3 of the Statute. Instead, Karadžić advances a restrictive interpretation of hostage-taking under common Article 3 that would preclude his criminal responsibility.[2]

3. The first of these propositions is true. But the critical question, which is a question the Prosecution does not address in this part of its response, is what is an Article 3 crime? Certainly it cannot be a crime that has no basis in customary international law. Because a crime is definitionally equivalent to the sum of its legal elements, a customary international law crime must be constituted of customary international law elements.

4. As explained in the original motion, Dr Karadžić's position on Count 11 is that the customary-law crime of hostage-taking has as one of its customary-law elements that the person taken hostage is a "civilian". It is evident from the indictment, however, that the Prosecution is attempting to change this element to "non-civilian"; in essence, the negation of a customary-law element. By definition, this cannot be an Article 3 crime.

5. The Prosecution misrepresents the test in *Gotovina*.[3] There, the Appeals Chamber twice reiterated the rule that where an indictment fails to charge "crimes ... according to their definitions and elements under customary international law", a jurisdictional challenge to the indictment will properly fall to be considered under Rule 72(A)(i).[4] This is precisely what the indictment against Dr Karadžić fails to do for Count 11. As a result, the indictment does not

[1] Response, par. 5.
[2] Response, par. 4.
[3] Response, par. 8.
[4] *Prosecutor v. Gotovina et al.*, "Decision on Ante Gotovina's Interlocutory Appeal Against Decision on Several Motions Challenging Jurisdiction", 6 June 2007, par. 15, 18.

relate to a crime under Article 3 of the Statute, and the Tribunal does not have jurisdiction to prosecute Dr Karadžić for taking non-civilians as hostages.

The interpretation of Common Article 3

6. The Prosecution misrepresents Dr Karadžić's arguments on Common Article 3. It accuses Dr Karadžić of not affording the Article its "ordinary meaning".[5] Surely, though, the Prosecution is aware that if the Article were to be afforded its ordinary meaning it would be confined to "armed conflict not of an international character". Common Article 3 was not intended to apply to international armed conflict at all.[6] So, in that respect, as well as in relation to Article 3 of the ICTY Statute, which makes no mention of Common Article 3, ordinary meaning is the last thing the Prosecution is interested in.

7. The question which the Prosecution refuses to grapple with is how to interpret Common Article 3 once this provision is taken out of its original setting (non-international armed conflict) and allowed to regulate international war.

8. As noted by the Appeals Chamber,[7] the natural direction of rule migration is from the highly regulated context of international war to the relatively unregulated setting of domestic armed conflict. The attempt to move Common Article 3 in the opposite direction is therefore counterintuitive. As a matter of logic, there is only one reason why one would want to do so: to fill a void in the international regime. The Geneva Conventions set up detailed protections for certain classes of individuals, but those classes did not cover the full range of persons affected by warfare. Hence the US Supreme Court utilized Common Article 3 in *Hamdan v. Rumsfeld* to afford minimal protection to "unlawful combatants" in international armed conflict.[8] Another kind of regulatory gap is presented by the situation where it is not possible to tell, or to agree on, the nature of an armed conflict. Common Article 3 has been allowed to fill the void in such cases of uncertainty.

9. The latter type of gap is not relevant to the present case, where the alleged conflict is obviously international (NATO forces bombarding the Bosnian-Serb entity). The former type of gap is also not relevant, considering that the alleged detention of "UN personnel" rendered

[5] Response, par. 10.
[6] ICRC Commentary on the First Geneva Convention, pp. 38f.
[7] *Prosecutor v. Tadić*, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", 2 October 1995, par. 126.
[8] 548 U.S. 557 (2006). The minimal protections included being tried by a "regularly constituted court", which the military commissions created by the US government were found not to be.

them prisoners of war, as explained in Dr Karadžić's motion, and hence brought them within the self-contained system of rules for POWs of the Third Geneva Convention.

10. It was because of the irrelevance to his case of both these possible situations of regulatory void that Dr Karadžić suggested in his motion that the only conceivable reason for the Prosecution to seek to peg Count 11 to Common Article 3 is that the UN personnel, as members of the enemy armed forces, were not protected by the Fourth Geneva Convention, whereas the Third Convention, which did protect them, did not prohibit, let alone criminalize, hostage-taking. Yet instead of accepting the limitations of customary international law, and charging Dr Karadžić with an existing offence provided for in the Third Convention, the Prosecution is trying to create new law from Common Article 3.

11. The Prosecution again misinterprets Dr Karadžić's argument when it asserts that his motion "strips common Article 3 of the protections accorded to persons *hors de combat*".[9] Rather, the argument is that where the character of the armed conflict is known, Common Article 3 must be interpreted consistently with the international-law rules governing the conflict. Because the Geneva Conventions proper criminalize hostage-taking only of civilians, if Common Article 3 is allowed to found a charge concerning POWs, and is thereby allowed to be transposed from its original sphere of application, the interpretation of its terms is subject to the pre-existing law of the sphere to which it is transposed. Even so, Common Article 3, being utterly rudimentary, is unable to add anything to – just as it is unable to derogate anything from – the established regulatory categories of international armed conflict. So its utilization in this context really only makes sense in situations like *Hamdan*.

12. The Prosecution's response reveals that it is promoting Common Article 3 as a kind of distillation of the protections created by each of the four Conventions. In this vein, the Prosecution writes that "common Article 3 was intended to apply to the particular category of war victims protected by each Convention",[10] and "the protections 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".[11] This is an entirely novel theory about Common Article 3.

13. Contrary to the Prosecution's theory, the rules of international war and civil strife are not reducible to a common currency. The most fundamental of all distinctions in the Geneva

[9] Response, par. 10.
[10] Response, par. 21.
[11] Response, par. 20.

Conventions is that between civilians and combatants.[12] In Common Article 3, the distinction is between "Persons taking no active part in 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" and those unspecified others taking active part in hostilities. At the time of their adoption, the parties to the Geneva Conventions were not prepared to grant combatant status to those whom they considered rebels.[13] This is why the prohibition of hostage-taking in the context of non-international armed conflict as contained in Common Article 3 does not copy over "civilians" from Article 34 of the Fourth Geneva Convention.

14. In sum, when transposed to international armed conflict, Common Article 3 must be re-interpreted in the context of the pre-existing regimes of the Conventions proper. The thrust of Dr Karadžić's argument finds no opposition in the Prosecution's response.

Whether hostage-taking is an implied offence under the Third Geneva Convention

15. The Prosecution claims to have identified a "governing view"[14] in the *travaux préparatoires* of the Third Geneva Convention, to the effect that that Convention prohibits the use of combatants as hostages. Here is the full extent of the source on which the Prosecution builds its "governing view" theory:

> The Coordination Committee drew attention to the fact that Article 31 of the Civilians Convention: "The taking of hostages is prohibited", had no counterpart in the Prisoners of War Convention.
>
> Mr. GARDNER (United Kingdom) said that the treatment of prisoners of war was so completely covered in the Prisoners of War Convention, 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 would therefore have no practical justification.
>
> The Committee decided to take no action on the observation of the Coordination Committee.[15]

16. This non-committal diplomatic exchange cannot be seen as an adequate substitute for a codified criminalization of specific conduct.

[12] Third Geneva Convention, Art. 4.
[13] The reasons are explained in the ICRC Commentary on the First Geneva Convention, pp. 38f.
[14] Response, par. 20.
[15] *Final Record of the Diplomatic Conference of Geneva of 1949*, Volume II, Section A, pp. 399-400.

Recent evidence of law reform

17. The Prosecution submits that the hostage-taking prohibition has been extended in customary international law, prior to 1995, for the benefit of persons other than civilians.

18. As already demonstrated in the motion, Article 75 of Additional Protocol I to the Geneva Conventions did not relevantly reform the 1949 law. Article 75 comes under Part IV, Civilian population. It is about civilians. The ICRC Commentary on Article 75(c) states that "It seems that in Article 75 this term must be understood in the same way as in Article 34 of the fourth Convention, which prohibits the taking of hostages".[16] And even though the Commentary uses the term "persons" when explaining that "This means that hostages are persons who find themselves, willingly or unwillingly, in the power of the enemy",[17] this cannot be said to refer to persons not falling under the heading Part IV, Civilian population.

19. Both *Blaškić*[18] and *Kordić*,[19] on which the Prosecution here relies, dealt with civilian victims, at least as far as the crime of taking hostages is concerned. While in the former case there may have been "non-civilians" among the detained persons,[20] the question of whether belligerents as such could be held hostages was not confirmed by *Blaškić* but was left unexamined.[21] Those cases and the pronouncements they occasioned by the Appeals Chamber are thus distinguishable from the present case, as the issue of belligerent hostages was not briefed, and anything said in that respect must be considered obiter dicta.

20. Citing the ICRC Commentary to Geneva Convention IV, both the Trial Chamber and the Appeals Chamber in the *Blaškić* case held that "the word 'hostages' must be understood in the widest possible sense".[22] However, it is clear from the Commentary that the cited paragraph refers exclusively to taking civilians as hostages, as this part is a comment on Article 34 of the Fourth Geneva Convention.[23]

[16] ICRC Commentary to Additional Protocol I of 1977 to the Geneva Conventions of 1949, N 3051.
[17] Ibid., N 3052.
[18] *Prosecutor v. Blaškić*, Trial Judgement, 3 March 2000, par. 701f, 739, 750; *Prosecutor v. Blaškić*, Appeal Judgement, 29 July 2004.
[19] *Prosecutor v. Kordić et al.*, Trial Judgement, 26 February 2001, par. 10, 311f, 319f, 784f; *Prosecutor v. Kordić et al.*, Appeal Judgement, 17 December 2004, par. 691, 932f.
[20] *Blaškić* Trial Judgement, par. 708; *Blaškić* Appeal Judgement, par. 574.
[21] *Blaškić* Trial Judgement, par. 708; *Blaškić* Appeal Judgement, par. 574.
[22] *Blaškić* Trial Judgement, par. 187; *Blaškić* Appeal Judgement, fn. 1333; ICRC Commentary on the Fourth Geneva Convention of 1949, p. 230.
[23] ICRC Commentary on the Fourth Geneva Convention of 1949, pp. 229-30.

21. The trial judgement of the SCSL in *Sesay* addressed the crime of hostage-taking in the context of an armed conflict not of an international character.[24] Therefore the application of Common Article 3 in that case is distinguishable. Moreover, the relevant events in *Sesay* took place in the period 15 April to 15 September 2000.[25]

22. The passage from the ICRC Study on Customary International Humanitarian Law quoted by the Prosecution[26] merely confirms Dr Karadžić's position that the *established* rule is that only civilian hostage-taking is the operative offence, and that any expansion of the law beyond this basic position by 2005 (the date of the Study) was still uncertain. The authors of the Study, as evidence that Rule 96 ("Hostage-taking") might by that point in time have come to apply to non-civilians, list Common Article 3, the Rome Statute, the ICC's Elements of Crimes, and the 1979 Hostage Convention.[27] The irrelevance or inconclusiveness of these instruments to the issue at hand has been dealt with by Dr Karadžić in his motion.

Whether "unlawful detention" is an element of the crime

23. The Trial Chamber in *Kordić* unequivocally held that "unlawful confinement" is an element of the crime.[28] This finding has not been rebutted by the *Kordić* Appeals Chamber, for it did not address this element. The Appeals Chamber in *Blaškić* did not reject the finding of the *Kordić* Trial Chamber either.[29] Nothing in the Prosecution's response refutes Dr Karadžić's argument that "unlawful confinement" is an element of the crime of hostage-taking in the practice of the Tribunal.

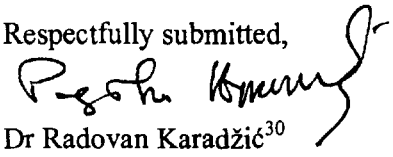
[24] *Prosecutor v. Sesay et al.*, Trial Judgement, 2 March 2009, par. 447, 977.
[25] Ibid., par. 236.
[26] Response, par. 25.
[27] Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, Vol. 1: Rules*, Rule 96.
[28] It held that "the crime of taking civilians as hostages consists of the deprivation of liberty, including the crime of unlawful confinement". *Kordić* Trial Judgement, par. 312.
[29] *Blaškić* Appeal Judgement, par. 639.

Conclusion

24. For the above reasons, Dr Karadžić respectfully requests the Chamber to grant his motion and dismiss Count 11 for lack of jurisdiction.

Word count: 2,512

Respectfully submitted,



Dr Radovan Karadžić[30]

[30] 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 reply.