IT-95-5/18-AR72.5
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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-95-5/18-AR72.5

Date: 09 July 2009

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mehmet Güney
Judge Liu Daqun
Judge Andrésia Vaz
Judge Theodor Meron

Registrar: **Mr. John Hocking**

Decision of: **09 July 2009**

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

DECISION ON APPEAL OF TRIAL CHAMBER'S DECISION ON PRELIMINARY MOTION TO DISMISS COUNT 11 OF THE INDICTMENT

The Office of the Prosecutor:

Mr. Alan Tieger
Ms. Hildegard Uertz-Retzlaff

The Accused:

Mr. Radovan Karadžić

1. The Appeals 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 ("Appeals Chamber" and "Tribunal", respectively) is seized of the Appeal of Trial Chamber's Decision on Preliminary Motion to Dismiss Count 11 for Lack of Jurisdiction ("Appeal"), filed by Radovan Karadžić ("Appellant") on 13 May 2009. On 25 May 2009, the Office of the Prosecutor ("Prosecution") filed its Response.[1] The Appellant filed his Reply on 29 May 2009.[2]

I. BACKGROUND

2. Count 11 of the operative Indictment in this case charges the Appellant with "[t]aking of [h]ostages, a violation of the laws or customs of war, as recognised by [c]ommon Article 3(1)(b) of the Geneva Conventions of 1949, punishable under Article 3, and 7(1) and 7(3) of the Statute".[3] The Indictment identifies the victims of the crime of hostage-taking charged in Count 11 as "UN personnel",[4] notably "UN military observers and peacekeepers",[5] and pleads that they were persons taking no active part in the hostilities.[6]

3. On 18 March 2009, the Appellant filed before Trial Chamber III ("Trial Chamber") his Preliminary Motion to Dismiss Count 11 for Lack of Jurisdiction,[7] submitting that the factual allegations underlying Count 11 do not constitute a crime within the jurisdiction of the Tribunal. He claims that the allegations in Count 11 relate to Prisoners of Wars ("POWs") and that under customary international law, the scope of application of common Article 3 of the Geneva Conventions to international armed conflict is limited to the hostage-taking of civilians.[8]

4. On 28 April 2009, the Trial Chamber rendered the Impugned Decision, whereby it disposed of the Preliminary Motion and five other preliminary motions challenging jurisdiction filed by the

[1] Prosecution Response to "Appeal of Trial Chamber's Decision on Preliminary Motion to Dismiss Count 11 for Lack of Jurisdiction", 25 May 2009 ("Response").
[2] Reply Brief: Appeal of Trial Chamber's Decision on Preliminary Motion to Dismiss Count 11 for Lack of Jurisdiction, 29 May 2009 ("Reply").
[3] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Prosecution's Third Amended Indictment, 27 February 2009 ("Indictment"), para. 87 (emphasis omitted). *See also id.*, paras 25-29, 83-86.
[4] Indictment, para. 25.
[5] Indictment, para. 83. *See also id.*, para. 86.
[6] Indictment, para. 90.
[7] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Preliminary Motion to Dismiss Count 11 for Lack of Jurisdiction, 18 March 2009 ("Preliminary Motion"). *See also Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Prosecution Response to Preliminary Motion to Dismiss Count 11 for Lack of Jurisdiction, 1 April 2009; *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Motion for Leave to Reply and Reply to Prosecution Response to Preliminary Motion to Dismiss Count 11 for Lack of Jurisdiction, 8 April 2009 ("Preliminary Reply").
[8] Preliminary Motion, para. 59. *See also id.*, paras 49-58.

Appellant.[9] After having re-qualified the Preliminary Motion as a motion challenging the form of the Indictment, the Trial Chamber concluded that there is no defect in the Indictment as far as Count 11 is concerned, and denied the Preliminary Motion.[10] In particular, the Trial Chamber observed that the international or non-international nature of the armed conflict is irrelevant to determining the applicability of common Article 3 of the Geneva Conventions, as it is well-established that this provision has effect in all armed conflicts.[11] By relying, *inter alia*, on the *Tadić* Decision on Jurisdiction, the Trial Chamber recalled that common Article 3 is a "minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts".[12] On this basis, it concluded that there is "nothing counter-intuitive" in the application of the minimum protection afforded to all persons taking no active part in hostilities in the context of international armed conflicts and that, therefore, "the Accused's argument that the protections afforded by common Article 3 were not part of customary international law in the context of the international armed conflict in Bosnia and Herzegovina is flawed".[13]

5. On 6 May 2009, the Appellant sought certification to appeal the Impugned Decision pursuant to Rule 72(B)(ii) of the Rules of Procedure and Evidence of the Tribunal ("Rules").[14] With its oral decision rendered on 6 May 2009, the Trial Chamber granted certification to appeal.[15]

6. In his Appeal, the Appellant submits that the Trial Chamber incorrectly interpreted the governing law and thus made a discernible error.[16] Specifically, the Appellant contends that the Trial Chamber erred in deciding that the crime charged in Count 11 of the Indictment exists in custom.[17] He submits that under customary international law, the crime of hostage-taking is limited, in the context of international armed conflicts, to the taking of civilians.[18] He claims therefore that Count 11 of the Indictment "which concerns non-civilians only", should be dismissed as defective.[19]

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[9] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Decision on Six Preliminary Motions Challenging Jurisdiction, 28 April 2009 ("Impugned Decision").
[10] Impugned Decision, paras 58, 66.
[11] Impugned Decision, para. 59.
[12] Impugned Decision, para. 59, referring to *Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić* Decision on Jurisdiction"), paras 102, 109 (case number corrected from Impugned Decision).
[13] Impugned Decision, para. 59.
[14] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Application for Certification to Appeal Decision on Six Preliminary Motions, 6 May 2009.
[15] *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, T. 227.
[16] Appeal, para. 14. The Appellant specifies that his Appeal only refers to paragraphs 13-15, 58-66, 82(b) and 82(d) of the Impugned Decision, and that he "does not appeal that portion of the [Impugned Decision] which held that the motion did not challenge a jurisdictional matter"; *id.*, paras 1, 12.
[17] Appeal, paras 19, 32.
[18] Appeal, paras 2, 28.
[19] Appeal, paras 2, 34.

7. In its Response, the Prosecution submits that the Trial Chamber did not commit any error when it found that protection against hostage-taking in common Article 3 extends to both civilians and persons *hors de combat* regardless of the nature of the armed conflict, and that the Appeal should therefore be dismissed.[20] It avers that the Appellant's submissions reveal a number of legal and factual misconceptions[21] and that customary international law and the jurisprudence of the Tribunal confirm the position adopted in the Impugned Decision.[22]

II. STANDARD OF REVIEW

8. The Appeals Chamber notes that Trial Chamber decisions with regard to amendments of indictments are discretionary.[23] The Appeals Chamber will only overturn a Trial Chamber's decision where it is found to be: (i) based on an incorrect interpretation of governing law; (ii) based on a patently incorrect conclusion of fact; or (iii) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion.[24]

9. In the present case, the Appeals Chamber will consider whether the Trial Chamber committed a discernible error by basing the Impugned Decision on an incorrect interpretation of the governing law.[25]

III. DISCUSSION

A. Preliminary Issues

1. The Brevity of the Impugned Decision

10. As a preliminary matter, the Appellant alleges that the Impugned Decision's "timing and content reveal a hurried approach to a multitude of complex matters" and a failure to adequately consider some important defence arguments.[26] In particular, the Appellant emphasises that the discussion of Count 11 of the Indictment only takes one paragraph of the Impugned Decision.[27] The

[20] Response, paras 1, 25.
[21] Response, paras 2, 7-24.
[22] Response, paras 6-24.
[23] *See Prosecutor v. Ante Gotovina & Prosecutor v. Ivan Čermak and Mladen Markač,* Case Nos IT-01-45-AR73.1, IT-03-73-AR73.1, IT-03-73-AR73.2, Decision on Interlocutory Appeals Against the Trial Chamber's Decision to Amend the Indictment and for Joinder, 25 October 2006 ("*Gotovina* Decision"), para. 6.
[24] *Gotovina* Decision, para. 6.
[25] Appeal, para. 14; Response, para. 3. The Prosecution submits that the Appellant erroneously suggested that the applicable standard of review for this appeal is whether the Trial Chamber abused its discretion; Response, para. 3, referring to Appeal, paras 13-14. The Appeals Chamber considers that the Appellant does not make any such suggestion as, after having summarised the general standard of review for interlocutory appeals, the Appellant claims that the Trial Chamber incorrectly interpreted the governing law; *see* Appeal, paras 13-14, 32.
[26] Appeal, para. 20.
[27] Appeal, para. 20, referring to Impugned Decision, para. 59.

Prosecution responds that the Appellant does not establish any specific error in this approach by the Trial Chamber, as the Impugned Decision includes both a summary of the defence arguments and the exposition of their flaws.[28] The Prosecution further stresses that discussion on Count 11 of the Indictment takes up not one, but nine paragraphs of the Impugned Decision.[29]

11. The Appeals Chamber observes, at the outset, that, as it previously held in the *Kvočka* Judgement,

> [...] it is necessary for any appellant claiming an error of law because of the lack of a reasoned opinion to identify the specific issues, factual findings or arguments, which he submits the Trial Chamber omitted to address and to explain why this omission invalidated the decision. General observations on the length of the Judgement, or of particular parts of the Judgement, or of the discussion of certain parts of the evidence, do not qualify, except in particularly complex cases, as the basis of a valid ground of appeal.[30]

The Appellant does not claim an error of law based on this alleged brevity, nor does he identify specific issues, findings or arguments which the Trial Chamber did not address. In view of this, the Appeals Chamber declines to consider this matter. It does note, however, that a Trial Chamber's efficiency in dealing with the motions pending before it cannot be regarded as a symptom of superficiality, and that the brevity or length of a decision depends upon a number of factors, including the nature of the issue in dispute and the quality of the parties' arguments.

2. Incorporation of Arguments by Reference

12. In his Appeal, the Appellant requests that the Appeals Chamber also take into account arguments and references included in his Preliminary Motion and Preliminary Reply, as restating or summarising them in the Appeal would be "wasteful and ultimately unhelpful".[31] The Prosecution notes that according to the relevant Practice Direction, an appellant must set out the grounds on which an appeal is made in the interlocutory appeal brief.[32] It further avers that by incorporating the submissions presented to the Trial Chamber, the Appellant fails to meet his burden.[33] The Applicant replies that the Appeal actually sets out the grounds of appeal.[34] He further argues that the word

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[28] Response, para. 5.
[29] Response, para. 5.
[30] *Prosecutor v. Miroslav Kvočka et al.*, Case No. IT-98-30/1-A, Judgement, 28 February 2005 ("*Kvočka* Judgement"), para. 25 (citations omitted); *see also Prosecutor v. Momčilo Krajišnik*, Case No. IT-00-39-A, Judgement, 17 March 2009, para. 142.
[31] Appeal, para. 21.
[32] Response, para. 4, referring to Practice Direction on Procedure for the Filing of Written Submissions in Appeal Proceedings before the International Tribunal, IT/155/Rev. 3, 16 September 2005 ("Practice Direction"), para. 9(d).
[33] Response, para. 4, referring to *Prosecutor v. Enver Hadžihasanović and Amir Kubura*, Case No. IT-01-47-A, Judgement, 22 April 2008 ("*Hadžihasanović and Kubura* Appeal Judgement"), para. 46.
[34] Reply, para. 5.

limit would not have prevented him from including the entire Preliminary Motion in the Appeal, but that he refrained from doing so in order to avoid wasting the Tribunal's resources.

13. The Appeals Chamber notes that paragraph 9(d) of the Practice Direction states that an interlocutory appeal shall contain "the grounds on which the appeal is made".
in the well-established practice of the Tribunal, appellants substantiate their arguments in support of each ground of appeal in their appeal briefs and not by reference to submissions made elsewhere.
In addition, the Appeals Chamber recalls that, "[o]n appeal, a party may not merely repeat arguments that did not succeed at trial, unless the party can demonstrate that the Trial Chamber's rejection of them constituted such an error as to warrant the intervention of the Appeals Chamber".[38] It further considers that the Appeal and the Reply autonomously contain the grounds on which the appeal is made and are not defective in any respect.
Chamber will take into consideration the Preliminary Motion and Preliminary Reply as part of the record of the case, the Appeals Chamber will not treat the arguments put forward in the Preliminary Motion and Preliminary Reply as incorporated in the Appeal.

B. Arguments of the Parties

14. The Applicant contends that in the Impugned Decision "the [Trial] Chamber relied on its 'intuition' to decide this question,
submits that Count 11 of the Indictment pertains to crimes that allegedly occurred in an international armed conflict where the "'hostages' [*sic*] alleged to have been taken comprise wholly of non-civilians and, in part at least, of belligerents".
as POWs, covered by the Third Geneva Convention.
hostage-taking contained in common Article 3 of the Geneva Conventions to international armed conflicts would introduce a protection for POWs that is not found in the Third Geneva Convention.

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[35] Reply, paras 4-5.
[36] Practice Direction, para. 9(d): "Where certification has been granted by a Trial Chamber, a party shall [...] file an interlocutory appeal containing: [...] (d) the grounds on which the appeal is made".
[37] *See, e.g.*, among the most recent motions: *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74-AR65.14, Jadranko Prlić's Appeal Against the *Décision relative à la demande de mise en liberté provisoire de l'accusé Prlić*, 16 April 2009; *Prosecutor v. Jadranko Prlić et al.*, Case No. IT-04-74AR-73.15, Jadranko Prlić's Interlocutory Appeal Against the *Decision Regarding Supplement to the Accused Prlić's Rule 84 bis Statement*, 11 March 2009; *Prosecutor v. Ante Gotovina et al.*, Case No. IT-06-90-AR73.3, Defendant Ante Gotovina's and Defendant Mladen Markač's Request for a Writ of *Mandamus*, 4 March 2009; *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-AR73.4, Interlocutory Appeal on Behalf of Ljubiša Beara Against the *Decision on Prosecution Motion for Admission of Evidence Pursuant to Rule 92Quater*, 26 May 2008.
[38] *Hadžihasanović and Kubura* Appeal Judgement, para. 46.
[39] Appeal, para. 24, referring to Impugned Decision, para. 59.
[40] Appeal, para. 17.
[41] Appeal, para. 29.
[42] Appeal, paras 25, 27-29; *see also* Reply, para. 22.

conclusions from the *Tadić* Decision on Jurisdiction.
Jurisdiction only intended to affirm that,
armed conflict, some of the protections which historically only existed in the context of international armed conflicts were progressively extended to non-international armed conflicts, as enshrined in common Article 3.
the Trial Chamber that the protections in common Article 3 may be extended from non-international armed conflicts to international armed conflicts.

15. However, the Applicant denies that he makes any argument to the effect that the protections afforded by common Article 3 were not part of customary international law in the context of the international armed conflict in Bosnia and Herzegovina.
to understand the Applicant's argument, and specifies that "even if [c]ommon Article 3 applies to all armed conflict irrespective of its character [*sic*], and even if it thereby applies to the international armed conflict as alleged in Count 11 of the [I]ndictment, the Chamber must *interpret* [c]ommon Article 3 within the context and history of the Geneva Convention as a whole".
Appellant, the correct interpretation should take into account that the Third Geneva Convention is *lex specialis* to [c]ommon Article 3.
provided for international conflicts may not be replaced by a "vague and underdeveloped rule such as [c]ommon Article 3".
"Common Article 3 comes to the aid of persons in categories not already covered by the elaborate regimes of the Geneva Conventions and their Protocols – that is, it comes to the aid of persons unprotected by *lex specialis* rules".
Article 3 can apply in both non-international and international armed conflicts,
that its applicability "is not automatic" and that the prohibition on hostage-taking of persons not taking active part in the hostilities other than civilians cannot be applied in international armed conflict, notwithstanding the fact that this prohibition is included in common Article 3.

16. The Prosecution responds that the Appellant's argument that protections provided for under common Article 3 go beyond the protections set out in the Third Geneva Convention is misplaced. It submits that,

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[43] Appeal, para. 23, referring to *Tadić* Decision on Jurisdiction, paras 99-100, 102.
[44] Appeal, paras 24-25.
[45] Appeal, para. 26.
[46] Appeal, para. 26, referring to Preliminary Motion, para. 30.
[47] Appeal, para. 27; *see also* Reply, paras 21-22.
[48] Appeal, para. 27.
[49] Appeal, para. 28.
[50] Appeal, para. 31.
[51] Appeal, paras 30-31; *see also* Reply, para. 23.

are found in all four Geneva Conventions and are afforded to all categories of protected persons in international armed conflicts.

Geneva Convention expressly deals with hostage-taking does not alter this conclusion,

provisions of the Third Geneva Convention mandating the humane treatment of POWs necessarily entail the prohibition of hostage-taking.

Geneva Convention and common Article 3, as well as the ICRC Commentary in support of its assertions.[54] It concludes that as the Third Geneva Convention and common Article 3 are consistent with each other, the *lex specialis* principle has no application,

conflicting provisions.

introduced additional protections to those included in the Third Geneva Convention, the *lex specialis* principle would not find application, as it is accepted that international humanitarian law ("IHL") is supplemented by general human rights norms during armed conflicts,

norms do not undermine IHL.

17. The Prosecution further submits that,

customary law applicable to both non-international and international armed conflicts. Accordingly, the Prosecution observes, the lack of an express prohibition in the Third Geneva Convention against taking of POWs hostage is further shown to be irrelevant.[58] In addition, it underlines that this excludes the possibility of interpreting common Article 3 differently depending on the classification of the conflict as national or international.

18. Finally, contrary to the Appellant's submission, the Prosecution refutes the notion that Count 11 of the Indictment "concerns non-civilians only".

the victims of hostage-taking as UN personnel, and pleads that they were "persons taking no active part in hostilities".

the Impugned Decision suggesting that the non-civilian status of victims is established on the face

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[52] Response, paras 8, 17.
[53] Response, paras 8, 10-11.
[54] Response, paras 10-11, 17, referring to the Final Record of the Diplomatic Conference of Geneva of 1949, Volume II, Section A, (Federal Political Department Berne, W.S. Hein & Co., Reprint, 2004) ("Record of Geneva Conference"), pp. 399-400; Jean de Preux et al., III Geneva Convention Relative to the Treatment of Prisoners of War: Commentary, 3 Commentary on the Geneva Conventions of 12 August 1949 (Geneva: International Committee of the Red Cross, 1960) ("ICRC Commentary"), pp. 28-35.
[55] Response, para. 19.
[56] Response, para. 20, referring to International Court of Justice, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 8 July 1996, para. 25; International Court of Justice, Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004, paras 102-106.
[57] Response, para. 13.
[58] *See* Response, paras 12-13.
[59] Response, paras 15-18.
[60] Response, para. 22, referring to Appeal, para. 2.
[61] Response, para. 22, referring to Indictment, para. 90.

of the Indictment.

to be determined at trial.

19. In his Reply,

conclude that the crime of hostage-taking is not limited to civilian victims whether in international or non-international armed conflicts,

authority.

common Article 3 and the Third Geneva Convention is incorrect,

reading of the ICRC Commentary and of the drafting history of the Geneva Conventions.[66] He restates his argument on *lex specialis*[67] and further clarifies that,

hostage-taking in common Article 3 reiterates the prohibition of *civilian* hostage-taking as included in the Fourth Geneva Convention,

prevent violent attacks is simply not in the same category [as the acts prohibited in paragraph 1, subparagraphs (a) to (d) of common Article 3], for the intention in this case is the very opposite of harm – that is,

C. Analysis

20. At the outset,

that the Trial Chamber relied on its intuition rather than on customary law to reach its conclusions to be without merit.

expression "it is not counter-intuitive" the Trial Chamber simply meant to say that the applicability of the crime of hostage-taking to all persons taking no active part in the hostilities *logically follows* the premise that common Article 3 is applicable in both international and non-international armed conflicts.

Reply[70] and the Trial Chamber was merely responding to the arguments,

Appellant.

consider the Appellant's submissions on the merits of the Impugned Decision.

21. First, the Appeals Chamber considers that the prohibition of hostage-taking cannot be considered as extraneous to the Third Geneva Convention.

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[62] Response, paras 23-24.
[63] Response, paras 2, 22.
[64] Reply, paras 7-16, 18-19.
[65] Reply, paras 20-23.
[66] Reply, paras 11-15, 18-19.
[67] Reply, paras 20-21.
[68] Reply, para. 11.
[69] Reply, para. 16.
[70] *See* Preliminary Reply, para. 8.

the protection of POWs is covered by an extensive net of provisions within the Third Geneva Convention which, read together, lead to the conclusion that any conduct of hostage-taking involving POWs could not but be in violation of the Third Geneva Convention. Although not *per se* conclusive, the analysis of the drafting of the Geneva Conventions further substantiates this consideration.[72] The main point confirming the relevance of the prohibition of hostage-taking under the Third Geneva Convention is the very existence of common Article 3, which expresses the shared principles which govern the Conventions and establishes a minimum set of mandatory rules in non-international armed conflict.[73]

22. Common Article 3 clearly states that the conduct listed in subparagraphs (a) to (d) of paragraph 1, including in subparagraph (b) the "taking of hostages", is prohibited "with respect to the above-mentioned persons", that is "[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' [...]". In light of the clear definition of the reach of this paragraph, which according to its plain wording applies without exception to all of the prohibitions listed in subparagraphs (a) to (d) of paragraph 1, the Appeals Chamber considers that the Appellant's argument that the prohibition of hostage-taking in common Article 3 "is no other than the prohibition of *civilian* hostage-taking in the Fourth Geneva Convention"[74] is unsubstantiated. Conversely, common Article 3 clearly refers the prohibition on taking hostage of *any* person taking no active part in the hostilities.[75]

23. The well-established jurisprudence of the Tribunal has repeatedly affirmed that the body proper of the Geneva Conventions cannot be interpreted in such a way as to afford *lesser* protection to individuals than that which is afforded by common Article 3.
unnecessary to restate here the thorough reasoning expressed in its previous jurisprudence, and will limit itself to recalling that:

> It is indisputable that common Article 3, which sets forth a minimum core of mandatory rules, reflects the fundamental humanitarian principles which underlie international humanitarian law as a whole, and upon which the Geneva Conventions in their entirety are based. These principles, the object of which is the respect for the dignity of the human person, developed as a result of centuries of warfare and had already become customary law at the time of the adoption of the Geneva Conventions because they reflect the most universally recognised humanitarian principles. These principles were codified in common Article 3 to constitute the minimum core applicable to

[71] *See* Impugned Decision, para. 59.
[72] *See* Record of Geneva Conference, pp. 399-400:
"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".
[73] ICRC Commentary, pp. 34-35.
[74] Reply, para. 11.
[75] *See* ICRC Commentary, p. 40.

> internal conflicts, but are so fundamental that they are regarded as governing both internal and international conflicts. In the words of the ICRC, the purpose of common Article 3 was to "ensur(e) respect for the few essential rules of humanity which all civilised nations consider as valid everywhere and under all circumstances and as being above and outside war itself". These rules may thus be considered as the "quintessence" of the humanitarian rules found in the Geneva Conventions as a whole.[76]

24. The Appellant, in his submissions, seems to refuse to appreciate this point. Thus, for example, the Applicant misconstrues part of the ICRC Commentary. In his Reply, the Appellant particularly emphasises this passage of the ICRC Commentary:

> The value of the provision is not limited to the field [of non-international armed conflict] dealt with in Article 3. Representing, as it does, the minimum which must be applied in the least determinate of conflicts, its terms must *a fortiori* be respected in the case of international conflicts proper, when all the provisions of the Convention are applicable. For "the greater obligation includes the lesser", as one might say.[77]

The Applicant reads this paragraph by arguing that

> [t]he greater obligation is the specific rules of each Convention proper. The lesser obligation is the general principle of humane treatment. Just as the general rule finds expression through the application of the specific rules, the lesser obligation is realized through the discharge of the greater obligation. The relationship is one of *lex specialis*.[78]

The Applicant has misinterpreted the meaning of the reasoning *a fortiori* contained in the passage of the ICRC Commentary quoted above. In plain language, this argument means that the protections enshrined in common Article 3 are included in all four Geneva Conventions, as the Geneva Conventions proper provide a higher, rather than lower, level of protection than that offered in common Article 3.
framework, the *lex specialis* argument is inevitably irrelevant, as the Third Geneva Convention must be interpreted in light of common Article 3,

25. In any event, the Appeals Chamber recalls that the well-established jurisprudence of the Tribunal confirms that, under customary international law, the protections enshrined in common

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[76] *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001 ("*Čelebići* Appeal Judgement"), para 143, citing, *inter alia,* ICRC Commentary, p. 44. *See also Čelebići* Appeal Judgement, para. 147, reading that "[c]ommon Article 3 may thus be considered as the 'minimum yardstick' of rules of international humanitarian law of similar substance applicable to both internal and international conflicts. It should be noted that the rules applicable to international conflicts are not limited to the minimum rules set out in common Article 3, as international conflicts are governed by more detailed rules. The rules contained in common Article 3 are considered as applicable to international conflicts because they constitute the core of the rules applicable to such conflicts". The Appeals Chamber continued by stating that "[i]t is both legally and morally untenable that the rules contained in common Article 3, which constitute mandatory minimum rules applicable to internal conflicts, in which rules are less developed than in respect of international conflicts, would not be applicable to conflicts of an international character. The rules of common Article 3 are encompassed and further developed in the body of rules applicable to international conflicts. It is logical that this minimum be applicable to international conflicts as the substance of these core rules is identical. In the Appeals Chamber's view, something which is prohibited in internal conflicts is necessarily outlawed in an international conflict where the scope of the rules is broader. The Appeals Chamber is thus not convinced by the arguments raised by the appellants and finds no cogent reasons to depart from its previous conclusions"; para. 150.
[77] ICRC Commentary, p. 38.
[78] Reply, para. 21.

Article 3 apply in both international and non-international armed conflicts.[79] The Appeals Chamber considers that the Appellant fails to provide any sensible argument suggesting an exception to, or limitation on, the prohibition on hostage-taking for a particular category of persons in a particular type of conflict. Specifically, the Appeals Chamber considers the Applicant's attempt to read the *Tadić* Decision on Jurisdiction as only justifying the extension of protections from the framework of international armed conflicts to the context of non-international armed conflict, and not *vice versa*, as without merit.[80] The Applicant only focuses on one part of the reasoning in the *Tadić* Decision on Jurisdiction, unduly disregarding its ultimate conclusion. In particular, of the entire Appeals Chamber's discussion on the existence of customary rules of international law governing armed conflicts, the Appellant fixates on the Appeals Chamber's observation of a tendency towards the blurring of the distinction between international and non-international armed conflicts in a certain historical moment. However, the Appellant fails to appreciate the full meaning of the Appeals Chamber's conclusive finding that "at least with respect to the minimum rules in common Article 3, the character of the conflict is irrelevant",[81] which unequivocally refers to all of the rules contained in common Article 3, including the prohibition of hostage-taking.

26. The Appeals Chamber reiterates the applicability of common Article 3 under customary international law to both non-international and international armed conflicts, without any exceptions or limitations.[82] The value of common Article 3 as a "*minimum* yardstick" of protections applicable regardless of the nature of the conflict necessarily implies that the protections enshrined therein must be applied in full and cannot be applied in part. The prohibition of hostage-taking shares the very same scope of application with the remaining rules enshrined in common Article 3.[83]

27. In light of the above analysis, the Appeals Chamber finds that the Trial Chamber did not incorrectly interpret the governing law in the relevant part of the Impugned Decision, and that it correctly concluded that there is no defect in the Indictment insofar as Count 11 is concerned. Accordingly, it dismisses the Applicant's appeal in its entirety.

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[79] *See, e.g., Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Judgement, 5 May 2009, ("*Mrkšić* Appeal Judgement"), para. 70; *Prosecutor v. Dragoljub Kunarac et al*, Case No. IT-96-23&IT-96-23/1-A, Judgement, 12 June 2002, ("*Kunarac* Appeal Judgement"), para. 68; *Čelebići* Appeal Judgement, paras 143, 147, 150; *Tadić* Decision on Jurisdiction, paras 89, 98, 102. *See also* International Court of Justice, Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) (Merits), 27 June 1986, para. 219.

[80] *See* Appeal, paras 22-25.

[81] *Tadić* Decision on Jurisdiction, para. 102.

[82] *See, e.g., Mrkšić* Appeal Judgement, para. 70; *Kunarac* Appeal Judgement, para. 68; *Čelebići* Appeal Judgement, paras 143, 147, 150; *Tadić* Decision on Jurisdiction, paras 89, 98, 102.

[83] *See* Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), Customary International Humanitarian Law, Volume 1: Rules, (Cambridge: International Committee of the Red Cross & Cambridge University Press, 2005), pp. 334, 336.

28. As a final note, the Appeals Chamber considers that, contrary to the Applicant's assertion, the Impugned Decision does not contain any finding about the nature of the armed conflict or the precise status of the victims referred to in Count 11 of the Indictment. The Appeals Chamber further emphasises the limited scope of the present Decision. As the Appellant did not make submissions on the Trial Chamber's findings related to the elements of the offence of hostage-taking,[84] the Appeals Chamber does not address those findings in this Decision.

IV. DISPOSITION

29. For the foregoing reasons, the Appeals Chamber **DISMISSES** the Appeal.

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

Done this 9th day of July 2009,
At The Hague,
The Netherlands.

Judge Fausto Pocar
Presiding

[Seal of the Tribunal]

[84] *See,* Impugned Decision, para. 65, reading in its relevant part that "the Chamber is of the view that unlawful detention is indeed an element of the offence of hostage-taking".