

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-AR73.9

Date: 11 December 2012

Original: English

IN THE APPEALS CHAMBER

Before:

**Judge Theodor Meron, Presiding
Judge Patrick Robinson
Judge Liu Daqun
Judge Khalida Rachid Khan
Judge Bakhtiyar Tuzmukhamedov**

Registrar:

Mr. John Hocking

Decision of:

11 December 2012

PROSECUTOR

v.

RADOVAN KARADŽIĆ

PUBLIC

**DECISION ON APPEAL
FROM DENIAL OF JUDGEMENT OF ACQUITTAL
FOR HOSTAGE-TAKING**

Office of the Prosecutor

Mr. Alan Tieger
Ms Hildegard Uetz-Retzlaff

The Accused

Mr. Radovan Karadžić

Standby Counsel

Mr. Richard Harvey

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 seised of the “Appeal from Denial of Judgement of Acquittal for Hostage Taking”, filed by Radovan Karadžić (“Karadžić”) on 25 July 2012 (“Appeal”).

I. BACKGROUND

2. Count 11 of the operative Indictment in this case (“Count 11”) charges Karadžić with the “[t]aking of [h]ostages, a violation of the laws or customs of war, as recognised by Common Article 3(1)(b) of the Geneva Conventions of 1949 [(“Common Article 3”)], punishable under Articles 3, and 7(1) and 7(3) of the Statute” of the Tribunal (“Statute”).¹ The Indictment alleges the facts giving rise to the charges in Count 11 as follows:

In response to shelling attacks on Sarajevo and other areas of [Bosnia and Herzegovina] by Bosnian Serb Forces, NATO forces carried out air strikes against Bosnian Serb military targets in [Bosnia and Herzegovina] on 25 and 26 May 1995.²

Between approximately 26 May 1995 and 19 June 1995, Bosnian Serb Forces detained over two hundred UN peacekeepers and military observers in various locations, [...] and held them at various locations including locations of strategic or military significance in order to render the locations immune from NATO air strikes and to prevent air strikes from continuing. Threats were issued to third parties, including NATO and UN commanders, that further NATO attacks on Bosnian Serb military targets would result in the injury, death, or continued detention of the detainees.³

3. The Indictment identifies the victims of the crime charged in Count 11 as United Nations (“UN”) “personnel”,⁴ specifically “UN military observers and peacekeepers”⁵ (collectively, “UN Personnel”), and alleges that the UN Personnel “were persons taking no active part in hostilities”.⁶

4. At a hearing on 28 June 2012, Trial Chamber III of the Tribunal (“Trial Chamber”) orally dismissed Karadžić’s motion⁷ for a judgement of acquittal on Count 11 (“Impugned Decision”).⁸ The Trial Chamber held that “even if the UN [P]ersonnel were combatants immediately before their detention, they were rendered ‘*hors de combat*’ by virtue of their detention and thus were entitled to the minimum protections guaranteed by Common Article 3”, which includes a prohibition against

¹ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-PT, Prosecution’s Marked-Up Indictment, 19 October 2009, Appendix A (“Indictment”), p. 39 (emphasis omitted). *See also id.*, paras 25-29, 83-86.

² Indictment, para. 85.

³ Indictment, para. 86.

⁴ Indictment, para. 25.

⁵ Indictment, para. 83. *See also* Indictment, para. 86.

⁶ Indictment, para. 90.

⁷ T. 11 June 2012 pp. 28568-28569, 28619-28625.

⁸ T. 28 June 2012 pp. 28735-28738, 28774.

hostage-taking.⁹ On the basis of that finding, and additional evidence on the record suggesting, *inter alia*, that Karadžić approved orders to detain the UN Personnel and use them as hostages,¹⁰ the Trial Chamber concluded that there exists evidence based on which, if accepted, a reasonable trier of fact could be satisfied beyond reasonable doubt that: (i) “the crime of taking hostages as a violation of the laws or customs of war under Article 3 of the Statute and specifically Common Article 3 was carried out by Bosnian Serb forces between May and June 1995”;¹¹ (ii) “there existed a joint criminal enterprise, the common purpose of which was to take [the] UN [P]ersonnel hostage in order to compel NATO to abstain from conducting further air-strikes against Bosnian Serb military targets and which involved a plurality of persons, including [Karadžić]”;¹² and (iii) Karadžić “voluntarily participated in [this] joint criminal enterprise” and “shared the intent of the other members of this joint criminal enterprise to carry out its objective.”¹³

5. On 18 July 2012, the Trial Chamber certified an interlocutory appeal of the Impugned Decision.¹⁴ Following the filing of the Appeal, the Office of the Prosecutor (“Prosecution”) submitted its Response on 6 August 2012,¹⁵ and Karadžić filed his Reply on 10 August 2012.¹⁶

II. STANDARD OF REVIEW

6. Neither the Rules of Procedure and Evidence of the Tribunal (“Rules”) nor the Statute specify the standard by which the Appeals Chamber is to review the denial of a motion for acquittal under Rule 98 *bis* of the Rules. However, in previous rulings on interlocutory appeals from decisions on Rule 98 *bis* motions, the Appeals Chamber has reviewed trial chambers’ legal conclusions to determine whether the trial chamber committed errors of law.¹⁷ Accordingly, the Appeals Chamber will review, as relevant, the Impugned Decision to determine whether the Trial Chamber committed an “error on a question of law invalidating [its] decision”.¹⁸

⁹ T. 28 June 2012 p. 28735 (emphasis added).

¹⁰ See T. 28 June 2012 pp. 28734-28738.

¹¹ T. 28 June 2012 p. 28736.

¹² T. 28 June 2012 p. 28737.

¹³ T. 28 June 2012 p. 28738.

¹⁴ *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-T, Decision on Accused’s Application for Certification to Appeal Denial of Motion for Judgement of Acquittal under Rule 98 *bis* (Count 11), 18 July 2012, para. 10.

¹⁵ Prosecution Response to Appeal from Denial of Judgement of Acquittal for Hostage Taking, 6 August 2012 (“Response”).

¹⁶ Reply Brief: Appeal from Denial of Judgement of Acquittal for Hostage Taking, 10 August 2012 (“Reply”).

¹⁷ See *Prosecutor v. Enver Hadžihasanović and Amir 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, para. 15; *Prosecutor v. Radoslav Brđanin*, Case No. IT-99-36-A, Decision on Interlocutory Appeal, 19 March 2004, paras 5-10. Cf. *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-AR98bis, Decision on Appeal of Decision Denying the Motion for Judgement of Acquittal, 11 November 2009, paras 9-14.

¹⁸ Statute, Article 25(1). See also *Prosecutor v. Ante Gotovina and Mladen Markač*, Case No. IT-06-90-A, Judgement, 16 November 2012, para. 10.

III. APPLICABLE LAW

7. The Appeals Chamber has held that in the time period relevant to the Appeal, Common Article 3 reflected customary international law, applicable to both international and non-international conflicts.¹⁹ Common Article 3 provides, in relevant part:

(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:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) *taking of hostages;*

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.²⁰

8. The Appeals Chamber further recalls that it has found that Common Article 3's protections are not limited to civilian hostages but also apply to "any person taking no active part in hostilities".²¹

IV. DISCUSSION

A. Submissions

9. Karadžić asserts that the Trial Chamber erred in denying his motion for acquittal on Count 11. In particular, Karadžić contends that the Trial Chamber erred in concluding that the UN Personnel were entitled to the protections of Common Article 3.²² He submits that the UN Personnel were taking an active part in hostilities – *i.e.*, serving as combatants – and that even if they were not, he had reason to believe they held this status.²³ Karadžić further submits that the manner in which the UN Personnel were taken hostage did not trigger Common Article 3's protections.²⁴

¹⁹ See *Prosecutor v. Radovan Karadžić*, Case No. IT-95-5/18-AR72.5, Decision on Appeal of Trial Chamber's Decision on Preliminary Motion to Dismiss Count 11 of the Indictment, 9 July 2009 ("2009 Hostage Decision"), paras 21, 25.

²⁰ Emphases added.

²¹ 2009 Hostage Decision, para. 22 (emphasis in original).

²² Appeal, paras 35, 41.

²³ Appeal, paras 42-59.

²⁴ Appeal, paras 33-41.

10. More specifically, Karadžić acknowledges that Common Article 3 prohibits hostage-taking with respect to individuals not taking an active part in hostilities.²⁵ However, he submits that the UN Personnel undertook acts of force for reasons other than self-defence and, accordingly, became combatants taking an active part in hostilities, thus falling outside the protective scope of Common Article 3.²⁶ Karadžić further submits, *inter alia*, that even if the UN Personnel were not combatants, he had reason to believe that the UN Personnel held combatant status.²⁷ Karadžić suggests that the Trial Chamber erred by not addressing this latter issue in the Impugned Decision.²⁸ He further suggests that his beliefs about the combatant status of the UN Personnel demonstrate he did not have the *mens rea* required for a conviction under Count 11.²⁹

11. Karadžić also contends that the process by which Bosnian Serb forces acquired control over the UN Personnel did not trigger the protections of Common Article 3. In this regard, Karadžić submits that Bosnian Serb forces formed and expressed the intent to use the UN Personnel as hostages prior to assuming control over these individuals, and thus the act of hostage-taking was completed at the moment the UN Personnel were detained.³⁰ In these circumstances, Karadžić contends that the UN Personnel went directly from being combatants to being hostages and, therefore, were never rendered *hors de combat* upon detention, as required to trigger Common Article 3's prohibition on hostage-taking.³¹

12. Karadžić maintains that the Trial Chamber's interpretation of Common Article 3's scope renders some parts of Common Article 3 superfluous, and that this demonstrates the erroneous nature of the Trial Chamber's analysis.³² More specifically, Karadžić asserts that the *chapeau* of Common Article 3 ("Chapeau Requirement"), which limits the protective scope of Common Article 3 to individuals taking no active part in hostilities would become meaningless as to hostage-taking under the Trial Chamber's interpretation, as any combatants taken hostage would automatically become *hors de combat*.³³

13. The Prosecution responds that the Appeal should be dismissed.³⁴ The Prosecution submits that the hostage-taking was not completed at the moment that Bosnian Serb forces assumed control over the UN Personnel,³⁵ and that, in any event, the act of taking a combatant hostage automatically

²⁵ See Appeal, paras 11(a), 28, 32, 33-34, 38.

²⁶ Appeal, paras 43-51.

²⁷ Appeal, paras 53-57.

²⁸ Appeal, paras 59-60.

²⁹ Appeal, paras 53-60.

³⁰ Appeal, paras 36, 40.

³¹ See Appeal, paras 36-41.

³² Appeal, para. 38.

³³ Appeal, paras 38-39.

³⁴ Response, paras 1, 25.

³⁵ Response, para. 12.

renders him *hors de combat*.³⁶ The Prosecution further submits that the Impugned Decision did not render the Chapeau Requirement superfluous, even if this requirement was “automatically satisfied by other elements of the crime of hostage-taking”.³⁷ In the circumstances of this appeal, the Prosecution contends, *inter alia*, that: (i) it is irrelevant whether the UN Personnel were combatants;³⁸ (ii) Karadžić knew of the factual circumstances rendering the UN Personnel *hors de combat*;³⁹ (iii) Karadžić’s belief that the UN Personnel were combatants would not justify taking them hostage;⁴⁰ and (iv) all that Karadžić was required to know was that the UN Personnel were unable to defend themselves because of their detention.⁴¹

14. Karadžić replies, *inter alia*, that the Prosecution’s position would make “it impossible to commit the crime of hostage taking on a person taking an active part in the hostilities”⁴² and would nullify a finding by the Pre-Trial Judge in his case that unlawful detention was an element of the crime of hostage-taking.⁴³ He contends that “[i]f all combatants are held to be *hors de combat* by detention, then every detention is necessar[ily] unlawful.”⁴⁴ Karadžić further submits that the “absurdity” of the Prosecution’s interpretation of hostage-taking is illustrated by the fact that actions taken by UN peacekeepers at the same time as the events at issue would also qualify as hostage-taking.⁴⁵ Finally, Karadžić reiterates his position that there was no evidence showing that he knew that the UN Personnel were not combatants.⁴⁶

B. Analysis

15. The Appeals Chamber observes that Karadžić’s assertions in the Appeal rest primarily on his claim that the UN Personnel were never entitled to the relevant protections of Common Article 3. He supports this position by contending that the UN Personnel were combatants and that the specific circumstances in which the UN Personnel were taken hostage failed to trigger the protections of Common Article 3.⁴⁷ The Appeals Chamber further observes that the Impugned Decision did not take a position on whether the UN Personnel were combatants, finding that even if they were, the protections of Common Article 3 still applied.⁴⁸ Accordingly, the Appeals Chamber

³⁶ Response, paras 11, 13-16.

³⁷ Response, para. 17.

³⁸ Response, para. 18.

³⁹ Response, para. 20.

⁴⁰ Response, para. 21.

⁴¹ Response, para. 22.

⁴² Reply, para. 11.

⁴³ Reply, para. 12.

⁴⁴ Reply, para. 12.

⁴⁵ Reply, para. 17. *See also* Reply, paras 14-16.

⁴⁶ Reply, paras 19-30.

⁴⁷ *See* Appeal, paras 36-51.

⁴⁸ T. 28 June 2012 p. 28735.

will first consider whether the UN Personnel were entitled to the full protections of Common Article 3 when they fell under the control of Bosnian Serb forces.

16. As a preliminary matter, the Appeals Chamber recalls that under Common Article 3, detention of a combatant during an armed conflict automatically renders him or her *hors de combat*, and that taking any individual hostage is among the acts which “are and shall remain prohibited at any time and in any place whatsoever”.⁴⁹ The plain text of Common Article 3 thus indicates that the prohibition on hostage-taking is both absolute and without exception. The Appeals Chamber further recalls that “any conduct of hostage-taking involving [Prisoners of War] could not but be in violation of the Third Geneva Convention” and that “[t]he main point confirming the relevance of the prohibition of hostage-taking under the Third Geneva Convention is the very existence of [C]ommon Article 3, which expresses the shared principles which govern the Conventions”.⁵⁰

17. Karadžić suggests that the pre-announced intention to take enemy combatants hostage if certain conditions are not met allows a military force to assume control over these individuals in a way that completes the crime of hostage-taking without triggering the protections of Common Article 3.⁵¹ However, Karadžić does not identify any aspect of the text or history of Common Article 3 or any jurisprudence supporting his contention that in particular circumstances, detention of combatants falls outside the scope of Common Article 3 protections. Karadžić cites the *Sesay* Judgement, rendered by the Appeals Chamber of the Special Court for Sierra Leone,⁵² which does not contradict the Appeals Chamber’s analysis here, because, even if the act of hostage-taking was completed upon the detention of the UN Personnel, as Karadžić asserts,⁵³ their detention by Bosnian Serb forces still triggered the protections of Common Article 3.

18. Insofar as Karadžić asserts that the prohibition on hostage-taking is less broad than other prohibitions in Common Article 3, that contention contravenes the Appeals Chamber’s holding that “[t]he prohibition of hostage-taking shares the very same scope of application with the remaining

⁴⁹ Common Article 3, para. 1. See also *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-A, Judgement, 17 July 2008, para. 179 n. 460 (“if a victim was found to be detained by an adverse party at the time of the alleged offence against him, his status as either a civilian or combatant would no longer be relevant because a detained person cannot, by definition, directly participate in hostilities.”).

⁵⁰ 2009 Hostage Decision, para. 21. See also *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Judgement, 5 May 2009 (“*Mrkšić* Judgement”), para. 70 (“Common Article 3 [...] reflects the same spirit of the duty to protect members of armed forces who have laid down their arms and are detained as the specific protections afforded to prisoners of war in Geneva Convention III as a whole, particularly in its Article 13”). Cf. Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, 75 U.N.T.S. 135, Article 13 (“Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention.”).

⁵¹ See Appeal, paras 36-40; Reply, para. 4.

⁵² Appeal, para. 39, quoting *Prosecutor v. Issa Hassan Sesay et al.*, Case No. SCSL-04-15-A, Judgment, 26 October 2009 (“*Sesay* Judgement”), para. 597.

⁵³ See Appeal, paras 36-40.

rules enshrined in [C]ommon Article 3.”⁵⁴ Furthermore, Karadžić’s interpretation of Common Article 3 would allow for situations where detainees could not be assured of basic protections. This risks undermining a fundamental purpose of Common Article 3: providing minimum and absolute protections to detained individuals, whether combatants or not.⁵⁵

19. Karadžić is unconvincing in suggesting that the Impugned Decision is erroneous because it renders the Chapeau Requirement of Common Article 3 superfluous.⁵⁶ The Appeals Chamber recalls that the Impugned Decision addresses only one aspect of Common Article 3’s protections: the taking of hostages.⁵⁷ However, Common Article 3’s protections extend beyond hostage-taking and are also triggered in circumstances other than when an individual is detained and thus placed *hors de combat*. The Chapeau Requirement is indisputably meaningful and relevant to the other crimes prohibited under Common Article 3. For example, a sick soldier who has laid down his arms or is unable to fight because of sickness is a “[p]erson[] taking no active part in the hostilities” under Common Article 3 and may not be murdered or subjected to humiliating treatment; the Impugned Decision does not purport to apply to, nor does it affect, such situations.

20. Karadžić also fails to explain his assertion that considering all detained combatants to be *hors de combat* would render all detentions of combatants unlawful.⁵⁸ The fact that detainees are considered *hors de combat* does not render their detention unlawful in itself. Rather, their *hors de combat* status triggers Common Article 3’s protections, including the prohibition on their use as hostages. Likewise unconvincing is Karadžić’s argument that the similarity of his actions to those allegedly taken by UN troops at the same time as Bosnian Serb forces detained the UN Personnel somehow proves the lawfulness of Karadžić’s actions.⁵⁹ Karadžić’s speculative allegations on actions supposedly taken by UN troops are not relevant to Karadžić’s individual criminal responsibility, nor do they demonstrate any error in the Trial Chamber’s analysis about the UN Personnel’s *hors de combat* status after their detention.

21. Accordingly, the Appeals Chamber holds that Common Article 3’s prohibition on hostage-taking applies to all detained individuals, irrespective of whether their detention is explicitly sought in order to use them as hostages and irrespective of their prior status as combatants. Karadžić has not demonstrated that the Trial Chamber erred in finding that “even if the UN [P]ersonnel were combatants immediately before their detention, they were rendered ‘*hors de*

⁵⁴ 2009 Hostage Decision, para. 26.

⁵⁵ See 2009 Hostage Decision, paras 21, 23, 25-26.

⁵⁶ Appeal, para. 38; Reply, para. 13.

⁵⁷ See T. 28 June 2012 pp. 28735-28738.

⁵⁸ Reply, para. 12.

⁵⁹ See Reply, paras 14-16.

combat’ by virtue of their detention and thus were entitled to the minimum protections guaranteed by Common Article 3.”⁶⁰

22. Finally, turning to Karadžić’s contentions with respect to *mens rea*,⁶¹ the Appeals Chamber recalls that “the principle of individual guilt requires that the perpetrator of a Common Article 3 crime knew or should have been aware that the victim was taking no active part in the hostilities when the crime was committed.”⁶² Insofar as Karadžić contends that the Impugned Decision should be reversed because it did not respect this principle, the Appeals Chamber is not persuaded by his contentions. Even if Karadžić had believed that the UN Personnel were taking active part in the hostilities prior to their detention and thus were not entitled to protection under Common Article 3, his erroneous belief about the legal significance of the UN Personnel’s status would not shield him from criminal liability for using them as hostages after their detention. As explained above, Common Article 3 would apply to the detained UN Personnel irrespective of their status prior to detention,⁶³ and any misunderstanding by Karadžić with respect to this issue is not a valid defence.⁶⁴

V. DISPOSITION

23. For the foregoing reasons, the Appeals Chambers hereby **DISMISSES** the Appeal.

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


Judge Theodor Meron
Presiding

Dated this 11th day of December 2012
At The Hague,
The Netherlands

[Seal of the Tribunal]

⁶⁰ T. 28 June 2012 p. 28735 (emphasis added).

⁶¹ Appeal, paras 53-60; Reply, paras 19-30.

⁶² *Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-A, Judgement, 19 May 2010, para. 66.

⁶³ *See supra*, paras 16-17.

⁶⁴ *Cf. In the Case Against Florence Hartmann*, Case No. IT-02-54-R77.5-A, 19 July 2011, para. 147, citing *Prosecutor v. Josip Jović*, Case No. IT-95-14 & 14/2-R77-A, Judgement, 15 March 2007, para. 27 (rejecting the mistake of law defence in contempt cases).