A. Appeals Chamber, Decision on Interlocutory Appeal

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[**Source**: *Prosecutor v. Pavle Strugar*, IT-01-42-AR72 (Decision on Interlocutory Appeal) 22 November 2002 [on lack of jurisdiction over violations of Protocols I and II]; footnotes omitted.]

IN THE APPEALS CHAMBER Decision on Interlocutory Appeal: 22 November 2002 PROSECUTOR v. PAVLE STRUGAR

MIODRAG JOKIC & OTHERS

[...]

1. Articles 51 and 52 of Additional Protocol I and, to a lesser extent, Article 13 of Additional Protocol II consist of a number of provisions focusing on but not limited to the prohibition of attacks on civilians and civilian objects cited in the relevant counts of the Indictment. [...] [T]he Trial Chamber did not pronounce on the legal status of the whole of the relevant Articles, as, having found that they did not form the basis of the charge against the Appellant, it was not obliged to do so. It rather examined "whether the *principles contained* in the relevant provisions of the Additional Protocols have attained the status of customary international law" (emphasis added), and in particular the principles explicitly stated in the Indictment: the prohibition of attacks on civilians and of unlawful attacks on civilian objects. It held that they had attained such a status, and in this it was correct.
2. Therefore [...] the Trial Chamber made no error in its finding that, as the Appeals Chamber understood it, the principles prohibiting attacks on civilians and unlawful attacks on civilian objects stated in Articles 51 and 52 of Additional Protocol I and Article 13 of Additional Protocol II are principles of customary international law. Customary international law establishes that a violation of these principles entails individual criminal responsibility.

B. Trial Chamber, Judgement - Paras 1 to 214

[**Source**: Prosecutor **v**. *Pavle Strugar*, IT-01-42-T (Trial Chamber Judgement) 31 January 2005; footnotes partially omitted.]

IN TRIAL CHAMBER II

JUDGEMENT

31 January 2005 PROSECUTOR v. PAVLE STRUGAR

1. The Accused, Pavle Strugar, a retired Lieutenant-General of the then Yugoslav Peoples' Army (JNA), is charged in the Indictment with crimes allegedly committed from 6 to 31 December 1991, in the course of a military campaign of the JNA in and around Dubrovnik in Croatia in October, November and December of 1991.
2. The Indictment, as ultimately amended, alleges that in the course of an unlawful attack by the JNA on the Old Town of Dubrovnik on 6 December 1991, two people were killed, two were seriously wounded and many buildings of historic and cultural significance in the Old Town, including institutions dedicated to, *inter alia*, religion, and the arts and sciences, were damaged. These allegations support six counts of violations of the laws or customs of war under Article 3 of the Statute of the Tribunal, namely murder, cruel treatment, attacks on civilians, devastation not justified by military necessity, attacks on civilian objects and destruction of institutions dedicated to, *inter alia*, religion, and the arts and sciences. The Accused is charged with individual criminal liability under Article 7(1) of the Statute for allegedly ordering, and aiding and abetting, the aforementioned crimes, as well as with superior responsibility pursuant to Article 7(3) of the Statute for the crimes of his subordinates. The Accused's liability is alleged to arise out of the position he then held as commander of the Second Operational Group (2 OG). It is alleged that it was, *inter alia*, forces of the 3rd Battalion of the 472nd Motorised Brigade (3/472 mtbr) under the command of Captain Vladimir Kovacevic, which unlawfully shelled the Old Town on 6 December 1991. The battalion commanded by Captain Kovacevic was at the time directly subordinated to the Ninth Military Naval Sector (9 VPS), commanded by Admiral Miodrag Jokic, and the 9 VPS, in turn, was a component of the 2 OG, commanded by the Accused. [...]

IV. THE ATTACK ON 6 DECEMBER 1991

[...]

B. The attack on the Old Town on 6 December 1991 – the experience of the residents

1. Well before sunrise, at around 0550 hours on the morning of 6 December 1991, residents of the Old Town of Dubrovnik awoke to the sound of explosions. An artillery attack had commenced. It continued for most of the day with a brief but not complete lull a little after 1115 hours. Especially in the afternoon, it tended to be somewhat sporadic. Initially, the firing was mainly concentrated on, but not confined to,

the area around Mount Srdj, the prominent geographical feature of Dubrovnik located nearly one kilometre to the north of the Old Town. There was a Napoleonic stone fortress, a large stone cross and a communications tower at Srdj. [...]

2. [...] [S]ome shelling occurred on residential areas of Dubrovnik, including the Old Town and on the port of the Old Town, virtually from the outset of the attack, notwithstanding an initial primary concentration on Srdj. However, the focus of the attack came to shift from Mount Srdj to the wider city of Dubrovnik, including the Old Town. [...]
3. The attack on Dubrovnik, including the Old Town, on 6 December 1991 inevitably gave rise to civilian casualties. [...] [T]he Third Amended Indictment charges the Accused only in relation to two deaths and two victims of serious injuries, both alleged to have occurred in the Old Town. [...] Civilian, religious and cultural property, in particular in the Old Town, also suffered heavy damage as a result of the attack.

C. The attack on the Old Town of Dubrovnik on 6 December 1991 – the attackers

1. The Chamber finds that on 6 December 1991, units of the 9 VPS of the JNA [...] attempted to take Mount Srdj, which was the dominant feature and the one remaining position held by Croatian forces on the heights above Dubrovnik. [...]
2. The JNA plan was to take Srdj quickly, certainly before 1200 hours, when a ceasefire was anticipated to come into force in the area. The capitulation of the Croatian defenders of Srdj during the morning appears to have been anticipated by Captain Kovacevic who had the immediate command of the attacking troops and who coordinated the artillery and ground forces from Zarkovica, a position which gave him an excellent overview of both Srdj and Dubrovnik, especially the Old Town.
3. There was no capitulation by the Croatian defenders. The close fighting at Srdj was desperate. [...] At a time after 1400 hours, the JNA troops were permitted to withdraw from Srdj. Withdrawal was also a difficult process and it was not until after 1500 hours that this was completed.
4. The JNA plan to take Srdj had failed. Casualties had been suffered, with five men killed and seven wounded among the [Serbian] troops. JNA artillery continued to fire on Dubrovnik until after 1630 hours, although with noticeably reduced intensity after 1500 hours. [...]
5. At around 0600 hours, the troops advancing on Srdj observed that JNA ZIS cannons opened fire at the lower fortifications around Srdj where Croatian snipers had dug in, and in addition, a mortar barrage was directed at Srdj. [...] Lieutenant Pesic and his soldiers came under fire. This was from two 82mm mortars which he describes as firing from the area of the tennis courts in Babin Kuk. The T-55 tank supporting Lieutenant Pesic's group at this point also came under lateral fire from the direction of Dubrovnik. In addition to attracting fire from positions in the wider Dubrovnik area, they were also shot at from Srdj as they continued to advance. [...] The Chamber notes that the references to fire from the direction of Dubrovnik, or the wider Dubrovnik, are not evidence of firing from the Old Town. [...] Both the Hotel Libertas and Babin Kuk are well to the northwest of the Old Town. [...]
6. [...] Once the JNA had thus seized control of the Srdj plateau, it came under fierce mortar attack from Croatian forces. Lieutenant Lemal's evidence was that the mortar fire originated in the area of Lapad, which is also well to the northwest of the Old Town. [...]
7. The truth seems to be, in the finding of the Chamber, that there was inadequate direction of the fire of the JNA mortars and other weapons against Croatian military targets. Instead, they fired extensively and without disciplined direction and targeting correction, at Dubrovnik, including the Old Town. Hence, the few Croatian artillery weapons were able to continue to fire and to concentrate their fire on Srdj, where

the few remaining Croatian defenders were underground and the JNA attackers were exposed. [...]

8. [...] [I]t is the Chamber's finding that at that meeting the Accused told [a witness] that he had responded to an attack on his troops in Bosnia and Herzegovina by firing on the city of Dubrovnik. For reasons it explains later, the Chamber finds this to be an admission of the Accused that he ordered the attack on the Srdj feature at Dubrovnik. [...]

F. How did the Old Town come to be shelled?

[...]

3. Did JNA forces fire only at Croatian military positions?

1. Yet a further Defence submission [...] is that any damage to the Old Town on 6 December 1991 was a regrettable but unavoidable consequence of artillery fire of the JNA targeted at Croatian military positions in and in the immediate vicinity of the Old Town. The Defence submits that the attack on the Old Town by the JNA was merely in response to Croatian fire from its positions. [...]
2. By way of general observation, to which the Chamber attaches significant weight, the Chamber notes that by 6 December 1991 there were quite compelling circumstances against the proposition that the Croatian defenders had defensive military positions in the Old Town. To do so was a clear violation of the World Heritage protected status of the Old Town. The Chamber accepts there was a prevailing concern by the citizens of the Old Town not to violate the military free status of the Old Town. That is the view of the Chamber, notwithstanding suggestions in the evidence that at times in earlier stages of the conflict there were violations of this by Croatian defending forces. [...]
3. The Chamber concludes that the evidence of Croatian firing positions or heavy weapons within the Old Town on 6 December 1991 is inconsistent, improbable, and not credible. It further observes that the witnesses who claimed to have seen weapons located at those positions were at the material time JNA commanders or staff officers, or officers having responsibility for JNA artillery firing on the day. [...] When all factors are weighed, including the directly contradicting evidence, the Chamber is entirely persuaded and finds that there were no Croatian firing positions or heavy weapons in the Old Town or on its walls on 6 December 1991.
4. The further question arises whether, even though there were in truth no Croatian firing positions or heavy weapons in the Old Town, it was believed by those responsible for the JNA shelling of the Old Town that there were. In this regard the primary finding of the Chamber is that the evidence of the existence of such firing positions or heavy weapons is in each case false, not that it is merely mistaken. Even if it were to be assumed for present purposes, however, that one, some or all of the firing positions or heavy weapons referred to in the evidence we have considered was believed to exist in the Old Town or on its walls, the evidence discloses that they were not treated as posing any significant threat to the JNA forces on the day. [...]
5. The Chamber further notes that the evidence of the alleged Croatian firing positions, even were it to be assumed to be true or that it was believed to be true, and if it were accepted in the version which is most favourable to the Defence, would not provide any possible explanation for, or justification of, the nature, extent and duration of the shelling of the Old Town that day, and the variety of positions shelled. In the Chamber's finding the evidence [...] would preclude a finding that the JNA artillery was merely firing at

Croatian military targets in the Old Town. There would be simply no relationship in scale between the evidence offered as the reason for the attack, and the JNA artillery response. [...]

6. The [Croatian] firing positions described in the preceding paragraphs are located various distances from the Old Town. All are outside the Old Town. Some of them are so remote from the Old Town that any attempt to neutralise them by the JNA forces, even using the most imprecise weapons, could not affect the Old Town. As regards the positions which are closer to the Old Town, the Chamber heard expert evidence as to which positions in the vicinity of the Old Town, if targeted by the JNA, would give rise to a risk of incidental shelling of the Old Town. [...]
7. In the Chamber's finding, the most that can be made of the evidence of the experts [regarding e.g. weather conditions and weapons] is that if Croatian military positions, outside, but in close proximity to, the Old Town, had in fact been targeted by JNA mortars on 6 December 1991, it is possible that some of the shells fired might have fallen within the Old Town. For reasons already given, few of the possible Croatian military targets considered by the experts were the subject of JNA targeting by mortars, and none of them were the subject of intensive or prolonged firing. In view of the [...] shortcomings of the expert reports and the differences between them, the Chamber is unable to rely exclusively on one or the other in determining which targets in close proximity to the Old Town could give rise to a risk of incidental shelling of the Old Town. [...]
8. In view of the foregoing, the Chamber finds that the shelling of the Old Town on 6 December 1991 was not a JNA response at Croatian firing or other military positions, actual or believed, in the Old Town, nor was it caused by firing errors by the Croatian artillery or by deliberate targeting of the Old Town by Croatian forces. In part the JNA forces did target Croatian firing and other military positions, actual or believed, in Dubrovnik, but none of them were in the Old Town. These Croatian positions were also too distant from the Old Town to put it in danger of unintended incidental fall of JNA shells targeted at those Croatian positions. It is the finding of the Chamber that the cause of the established extensive and large-scale damage to the Old Town was deliberate shelling of the Old Town on 6 December 1991 [...].

Paras 215 to 233

V. JURISDICTION UNDER ARTICLE 3 OF THE STATUTE

A. Existence of an armed conflict and nexus between the acts of the Accused and the armed conflict

1. All the crimes contained in the Indictment are charged under Article 3 of the Statute of this Tribunal. For the applicability of Article 3 of the Statute two preliminary requirements must be satisfied. First, there must have been an armed conflict at the time the offences were allegedly committed. Secondly, there must be a close nexus between the armed conflict and the alleged offence, meaning that the acts of the accused must be "closely related" to the hostilities. The Appeals Chamber considered that the armed conflict "need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed".
2. With regard to the issue of the nature of the conflict, it has been established in the jurisprudence of the Tribunal that Article 3 of the Statute is applicable regardless of the nature of the conflict. [746] In the present case, while the Prosecution alleged in the Indictment that an international armed conflict and partial occupation existed in Croatia at the time of the offences, both parties concur in saying that the

nature of the conflict does not constitute an element of any of the crimes with which the Accused is charged. The Chamber will therefore forbear from pronouncing on the matter [...].

3. As will be apparent from what has been said already in this decision, the evidence establishes that there was an armed conflict between the JNA and the Croatian armed forces throughout the period of the Indictment. These were each forces of governmental authorities, whether of different States or within the one State need not be determined. The offences alleged in the Indictment all relate to the shelling of the Old Town of Dubrovnik, which was a significant part of this armed conflict. It follows that the acts with which the Accused is charged were committed during an armed conflict and were closely related to that conflict.

B. The four Tadic conditions

[**See** ICTY, The Prosecutor v. Tadic [Part A., para. 94]]

1. The Appeals Chamber in the Tadic case observed that Article 3 functions as a “residual clause” designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the Tribunal. In the Appeals Chamber’s view, this provision confers on the Tribunal jurisdiction over any serious offence against international humanitarian law not covered by Articles 2, 4 or 5 of the Statute, on the condition that the following requirements are fulfilled: (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule. It is the view of the Chamber that these conditions must be fulfilled whether the crime is expressly listed in Article 3 of the Statute or not. Accordingly, the Chamber will discuss whether the offences with which the Accused is charged meet the four *Tadic* conditions.

1. Murder and cruel treatment

1. In the present case, the charges of cruel treatment and murder are brought under common Article 3 (1) (a) of the Geneva Conventions. At the outset, the Chamber notes that the jurisprudence of the Tribunal in relation to common Article 3 is now settled. [...] First, it is well established that Article 3 of the Statute covers violations of common Article 3. [752] The crimes of murder and cruel treatment undoubtedly breach a rule protecting important values and involving grave consequences for the victims. Further, it is also undisputed that common Article 3 forms part of customary international law applicable to both internal and international armed conflicts and that it entails individual criminal responsibility. Thus, the Chamber finds that the four Tadic conditions are met in respect of these offences.

2. Attacks on civilians and civilian objects

(a) Attacks on civilians

1. The Chamber notes that Article 51 of Additional Protocol I and Article 13 of Additional Protocol II, on which Count 3 is based, clearly set out a rule of international humanitarian law. Therefore, the first *Tadic*

condition is fulfilled. [755] As regards the second condition, the Chamber recalls the ruling given in the present case and upheld by the Appeals Chamber, according to which the prohibition of attacks on civilians stated in the Additional Protocols attained the status of customary international law and the Additional Protocols' provisions at issue constitute a reaffirmation and reformulation of the existing customary norms. [...] [T]he prohibition of attacks on civilians is included in both Additional Protocols, of which Protocol I deals with international armed conflicts and Protocol II with non-international armed conflicts. Therefore, the nature of the conflict is of no relevance to the applicability of Article 3 of the Statute. The Chamber thus finds that the second *Tadic* requirement is met.

2. As regards the third Tadic requirement, the prohibition of attacks on civilians is one of the elementary rules governing the conduct of war and undoubtedly protects "important values". [757] The Chamber considers that any breach of this prohibition encroaches upon the fundamental principle of the distinction between combatants and non-combatants. This principle has developed throughout the history of armed conflict with the purpose of keeping civilians from the danger arising from hostilities. The Chamber points out that attacks on civilians jeopardise the lives or health of persons who do not take active part in combat. [...] Accordingly, the third requirement for the applicability of Article 3 of the Statute is fulfilled.
3. With regard to the fourth Tadic condition, the Chamber reiterates the Appeals Chamber's statement that "a violation of (the rule prohibiting attacks on civilians) entails individual criminal responsibility". [760] In addition, the Chamber observes that at the material time there existed "Regulations concerning the Application of the International Law of War to the Armed Forces of SFRY", which provided for criminal responsibility for "war crimes or other serious violations of the law of war" and contained a list of laws binding upon the armed forces of the SFRY, including Additional Protocols I and II.77

(b) Attacks on civilian objects

1. The offence of attacking civilian objects is a breach of a rule of international humanitarian law. As already ruled by the Chamber in the present case and upheld by the Appeals Chamber, Article 52, referred to in respect of the count of attacking civilian objects, is a reaffirmation and reformulation of a rule that had previously attained the status of customary international law. [762]
2. The Chamber observes that the prohibition of attacks on civilian objects is set out only in Article 52 of Additional Protocol I, referred to in relation to Count 5. Additional Protocol II does not contain provisions on attacking civilian objects. Nonetheless, as the Appeals Chamber found, the rule prohibiting attacks on civilian objects has evolved to become applicable also to conflicts of an internal nature. [...] The Chamber therefore concludes that despite the lack of a provision similar to Article 52 in Additional Protocol II, the general rule prohibiting attacks on civilian objects also applies to internal conflicts. Accordingly, the first and second jurisdictional requirements are met.
3. As regards the third *Tadic* condition, the Chamber notes that the prohibition of attacks on civilian objects is aimed at protecting those objects from the danger of being damaged during an attack. It further reiterates that a prohibition against attacking civilian objects is a necessary complement to the protection of civilian populations. The Chamber observes that in the [...] 1970 resolution of the General Assembly [on the protection of civilians in "armed conflicts of all types"] the prohibition of making civilian dwellings and installations the object of military operations was listed among the "basic principles for the protection of civilian populations in armed conflicts". Those principles were reaffirmed because of the

"need for measures to ensure the better protection of human rights in armed conflicts". The General Assembly also emphasised that civilian populations were in "special need of increased protection in time of armed conflicts". The principle of distinction, which obliges the parties to the conflict to distinguish between civilian objects and military objectives, was considered "basic" by the drafters of Additional Protocol I. [...] All the same, the Chamber recalls that the requirement of seriousness contains also the element of gravity of consequences for the victim. The Chamber is of the view that, unlike in the case of attacks on civilians, the offence at hand may not necessarily meet the threshold of "grave consequences" if no damage occurred. Therefore, the assessment of whether those consequences were grave enough to bring the offence into the scope of the Tribunal's jurisdiction under Article 3 of the Statute should be carried out on the basis of the facts of the case. The Chamber observes that in the present case it is alleged that the attacks against civilian objects, with which the Accused is charged, did incur damage to those objects. It will thus pursue the examination of the case on the assumption that the attacks as charged in the Indictment did bring about grave consequences for their victims and the third Tadic condition is met. The Chamber would only need to return to the analysis of applicability of Article 3 of the Statute if the evidence on the alleged damage were to fail to demonstrate the validity of the Prosecution allegations to such an extent as to render it questionable whether the consequences of the attack were grave for its victims. As will be seen later in this decision, that is not the case.

4. As recalled above, the fourth *Tadic* condition concerns individual criminal responsibility. The Appeals Chamber has found that under customary international law a violation of the rule prohibiting attacks on civilian objects entails individual criminal responsibility. [772] Furthermore, the Chamber recalls its above findings as to the SFRY regulations establishing criminal responsibility for violations of Additional Protocol I.

3. Destruction and devastation of property, including cultural property

1. As to the first and the second *Tadic* conditions, the Chamber observes that Article 3(b) is based on Article 23 of the Hague Convention (IV) of 1907 and the annexed Regulations. Both The Hague Convention (IV) of 1907 and The Hague Regulations are rules of international humanitarian law and they have become part of customary international law.
2. Recognising that the Hague Regulations were made to apply only to international armed conflicts, the Chamber will now examine whether the prohibition contained in Article 3(b) of the Statute covers also non-international armed conflicts. The rule at issue is closely related to the one prohibiting attacks on civilian objects, even though certain elements of those two rules remain distinct. Both rules serve the aim of protecting property from damage caused by military operations. In addition, the offence of devastation charged against the Accused is alleged to have occurred in the context of an attack against civilian objects. Therefore, and having regard to its conclusion that the rule prohibiting attacks on civilian objects applies to non-international armed conflicts, the Chamber finds no reason to hold otherwise than that the prohibition contained in Article 3 (b) of the Statute applies also to non-international armed conflicts.
3. Turning now to the crime charged under Article 3(d), the Chamber notes that this provision is based on Article 27 of the Hague Regulations. Moreover, protection of cultural property had developed already in earlier codes. The relevant provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 confirm the earlier codes. The Appeals Chamber in the *Tadic* case explicitly referred to Article 19 of the Hague Convention of 1954, as a treaty rule which formed part of

customary international law binding on parties to non-international armed conflicts. More generally, it found that the customary rules relating to the protection of cultural property had developed to govern internal strife. The Chamber additionally notes that it is prohibited "to commit any act of hostility directed against [cultural property]" both in Article 53 of Additional Protocol I relating to international armed conflicts and Article 16 of Additional Protocol II governing non-international armed conflicts.

4. In view of the foregoing, the Chamber is satisfied that Article 3(d) of the Statute is a rule of international humanitarian law which not only reflects customary international law but is applicable to both international and non-international armed conflicts. Accordingly, the first and second *Tadic* conditions with regard to Article s 3(b) and 3(d) are met.
5. As to the third *Tadic* condition, the Chamber recalls its conclusion that the offence of attacking civilian objects fulfils this condition when it results in damage severe enough to involve "grave consequences" for its victims. It is of the view that, similarly to the attacks on civilian objects, the crime of devastation will fall within the scope of the Tribunal's jurisdiction under Article 3 of the Statute if the damage to property is such as to "gravely" affect the victims of the crime. Noting that one of the requirements of the crime is that the damage be on a large scale, the Chamber has no doubt that the crime at hand is serious.
6. As regards the seriousness of the offence of damage to cultural property (Article 3 (d)), the Chamber observes that such property is, by definition, of "great importance to the cultural heritage of every people". [1954 Hague Convention Art 1(a)] It therefore considers that, even though the victim of the offence at issue is to be understood broadly as a "people", rather than any particular individual, the offence can be said to involve grave consequences for the victim. In the Jokic case, for instance, the Trial Chamber [...] found that "since it is a serious violation of international humanitarian law to attack civilian buildings, it is a crime of even greater seriousness to direct an attack on an especially protected site, such as the Old Town [of Dubrovnik]." In view of the foregoing, the Chamber finds that the offences under Articles 3(b) and 3(d) of the Statute are serious violations of international humanitarian law. Hence, the third *Tadic* condition is satisfied.
7. As to the fourth *Tadic* condition, the Chamber notes that Article 6 of the Charter of the Nuremberg International Military Tribunal already provided for individual criminal responsibility for war crimes, including devastation not justified by military necessity, which is listed in Article 3(b) of the Statute. Concerning Article 3(d) of the Statute, the Chamber recalls that Article 28 of the Hague Convention of 1954 stipulates that "the high contracting parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the Convention." [...] Accordingly, the Chamber finds that Articles 3(b) and 3(d) of the Statute entail individual criminal responsibility. Thus, the fourth *Tadic* condition is fulfilled.

Footnotes

- 746: Tadic Jurisdiction para. 94. **See** ICTY, The Prosecutor v. Tadic ↑
- 752: Tadic Jurisdiction decision para. 89. **See** ICTY, The Prosecutor v. Tadic ↑
- 755: Galic Trial Judgement, para. 16. **See** ICTY, The Prosecutor v. Galic ↑
- 757: Galic Trial Judgement, para. 27. **See** ICTY, The Prosecutor v. Galic ↑
- 760: Strugar Appeals Chamber Decision on Jurisdiction, para. 10. **See** Part A. of this Case ↑

- 762: Strugar Appeals Chamber Decision on Jurisdiction para. 9. **See** Part A. of this Case ↑
- 772: Strugar Appeals Chamber Decision on Jurisdiction para. 9. **See** Part A. of this Case ↑

Paras 234 to 288

VI. THE CHARGES

A. Crimes against persons (Count 1 and 2)

1. Murder (Count 1)

1. The Indictment charges the Accused with criminal liability for murder as a violation of the laws or customs of war under Article 3 of the Statute. The alleged victims of this crime are Tonci Skocko and Pavo Urban. [...]
2. On the basis of the foregoing analysis, it would seem that the jurisprudence of the Tribunal may have accepted that where a civilian population is subject to an attack such as an artillery attack, which results in civilian deaths, such deaths may appropriately be characterised as murder, when the perpetrators had knowledge of the probability that the attack would cause death. Whether or not that is so, given the acceptance of an indirect intent as sufficient to establish the necessary *mens rea* for murder and wilful killing, there appears to be no reason in principle why proof of a deliberate artillery attack on a town occupied by a civilian population would not be capable of demonstrating that the perpetrators had knowledge of the probability that death would result. The Chamber will proceed on this basis. [...]
3. [...] In the Chamber's finding, Tonci Skocko died from haemorrhaging caused by shrapnel wound from a shell explosion in the course of the JNA artillery attack on the Old Town on 6 December 1991.
4. With respect to the *mens rea* required for murder, the Chamber reiterates its findings that the JNA attack on the Old Town was deliberate and that the perpetrators knew it to be populated. The Chamber finds that the perpetrators of the attack can only have acted in the knowledge that the death of one or more of the civilian population of the Old Town was a probable consequence of the attack.
5. On the basis of the foregoing, and leaving aside for the present the question of the Accused's criminal responsibility, the Chamber finds that the elements of the offence of murder are established in relation to Tonci Skocko.

B. Attacks on civilians and civilian objects (Counts 3 and 5)

1. Law

[...]

1. The offence of attacks on civilians and civilian objects was defined in earlier jurisprudence as an attack that caused deaths and/or serious bodily injury within the civilian population or damage to civilian objects, and that was "conducted intentionally in the knowledge, or when it was impossible not to know, that civilians or civilian property were being targeted not through military necessity". The Appeals Chamber recently clarified some of the jurisprudence relating to the various elements of the crime. First, the Appeals Chamber rejected any exemption on the grounds of military necessity and underscored that there is an absolute prohibition on the targeting of civilians and civilian objects in customary international

law. [895] In this respect, the Chamber would observe that on the established facts in the present case, there was no possible military necessity for the attack on the Old Town on 6 December 1991. Further, the Appeals Chamber confirmed that criminal responsibility for unlawful attacks requires the proof of a result, namely of the death of or injury to civilians, or damage to civilian objects. With respect to the scale of the damage required, the Appeals Chamber, while not discussing the issue in detail, appeared to endorse previous jurisprudence that damage to civilian objects be extensive. In the present case however, in light of the extensiveness of the damage found to have been caused, the Chamber finds no need to elaborate further on the issue and will proceed on the basis that if extensive damage is required, it has been established in fact in this case.

2. [...] [T]he issue whether the attack charged against the Accused was directed at military objectives and only incidentally caused damage does not arise in the present case. Therefore, the Chamber does not find it necessary to determine whether attacks incidentally causing excessive damage qualify as attacks directed against civilians or civilian objects.
3. Pursuant to Article 49(1) of Additional Protocol I to the Geneva Conventions “attacks” are acts of violence against the adversary, whether in offence or in defence. According to the ICRC Commentary an attack is understood as a “combat action” and refers to the use of armed force to carry out a military operation at the beginning or during the course of armed conflict. As regards the notion of civilians, the Chamber notes that members of the civilian population are people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed *hors de combat* by sickness, wounds, detention or any other cause. The presence of certain non-civilians among the targeted population does not change the character of that population. It must be of a “predominantly civilian nature”. Further, Article 50 (1) of Additional Protocol I provides for the assumption that in case of doubt whether a person is a civilian, that person shall be considered to be a civilian. The Chamber reiterates that “civilian property covers any property that could not be legitimately considered a military objective”.
4. The Chamber therefore concludes that the crime of attacks on civilians or civilian objects, as a crime falling within the scope of Article 3 of the Statute, is, as to *actus reus*, an attack directed against a civilian population or individual civilians, or civilian objects, causing death and/or serious injury within the civilian population, or damage to the civilian objects. As regards *mens rea*, such an attack must have been conducted with the intent of making the civilian population or individual civilians, or civilian objects, the object of the attack. [...] [T]he issue whether a standard lower than that of a direct intent may also be sufficient does not arise in the present case.

2. Findings

1. The Chamber has already found that on 6 December 1991 there was an attack launched by the JNA forces against the Old Town of Dubrovnik. It is also the finding of the Chamber, as recorded earlier, that there were no military objectives within the Old Town and the attack was not launched or maintained in the belief that there were. It is possible that there may have been individuals in the Old Town on 6 December 1991 who were connected with the Croatian defending forces, however, any such persons did not fire on JNA forces or undertake any overt military activity. Their presence could not change the character of the population. It was properly characterised as a civilian population, and the objects located there were civilian objects. As regards the Defence submission concerning alleged military activities of the Crisis Staff, the headquarters of which was located in the Old Town, the Chamber notes

that no persuasive evidence has been supplied to the effect that the Crisis Staff was conducting military operations from the Old Town. On the contrary, […] the Crisis Staff did not deal with issues of defence. [...] [I]ts members did not fight and did not wear uniforms. It was his testimony that the headquarters of the Territorial Defence was in Lapad [an island north-west of Dubrovnik]. There is nothing in the evidence to suggest that the building of the Crisis Staff made "an effective contribution to military action" or that its destruction would offer "a definite military advantage". Accordingly, the Chamber finds on the evidence in this case that the presence of the Crisis Staff in a building located in the Old Town did not render the building a legitimate military objective. The Chamber would also note that the building in question was not proved to have been damaged during the shelling so that this Defence submission apparently lacks factual foundation.

2. 6 December 1991, the evidence is unequivocal that the Old Town was, as it still is, a living town. Though a protected World Heritage site, it had a substantial resident population of between 7,000 and 8,000, many of whom were also employed in the Old Town, as were very many others who came to the Old Town from the wider Dubrovnik to work. The Old Town was also a centre of commercial and local government activity and religious communities lived within its walls. Because of, and under the terms of, the JNA blockade, some women and children had temporarily left the Old Town, but many remained. In addition, families and individuals displaced by the JNA advance on Dubrovnik had found shelter in the Old Town. Some people from the wider Dubrovnik had also been able to take up temporary residence in the Old Town during the blockade in the belief that its World Heritage listing would give them protection from military attack. The existence of the Old Town as a living town was a renowned state of affairs which had existed for centuries. [...]
3. In addition to this long established and renowned state of affairs, it is clear from the evidence that the JNA forces had both the wider Dubrovnik and the Old Town under direct observation from many positions since its forces had closed in on Dubrovnik in November. The presence and movements of a large civil population, in both the Old Town and the wider Dubrovnik, of necessity would have been obvious to this close military observation. Of course, JNA leaders, including the Accused and Admiral Jokic were directly concerned with negotiations with inter alia representatives of the civilian population. Further, one apparent objective of the JNA blockade of Dubrovnik was to force capitulation of the Croatian defending forces by the extreme hardship the civilian population was being compelled to endure by virtue of the blockade. In the Chamber's finding it is particularly obvious that the presence of a large civilian population in the Old Town, as well as in the wider Dubrovnik, was known to the JNA attackers, in particular the Accused and his subordinates, who variously ordered, planned and directed the forces during the attack.
4. One or two particular aspects of the evidence related to the issue of a civilian population in the Old Town, and in the wider Dubrovnik, warrants particular note. On 6 December 1991 the attacking JNA soldiers could hear that a defence or air-raid alarm was sounded at about 0700 hours on 6 December 1991 in Dubrovnik. In his report concerning that day Lieutenant-Colonel Jovanovic, commanding the 3/5 mtbr, purported to assume that after the alarm the city dwellers had hidden in shelters. Hence, as he asserted in evidence, he ordered firing on the basis that anyone who was still moving around in the Dubrovnik residential area was participating in combat activities. This view assumes, of course, the presence of civilians but seeks to justify the targeting of persons and vehicles moving about on the basis suggested. The view which Lieutenant-Colonel Jovanovic purported to hold on that day does not hold up to scrutiny. Common sense and the evidence of many witnesses in this case, confirms that the

population of Dubrovnik was substantially civilian and that many civilian inhabitants had sound reasons for movement about Dubrovnik during the 10 ½ hours of the attack. An obvious example is those trying to reach the wounded or to get them to hospital. Others sought better shelter as buildings were damaged or destroyed. Others sought to reach their homes or places of work. There are many more examples. [...] The presence of civilians within the Old Town was also directly communicated to the JNA at command level by the protests they received on that day from the Crisis Staff. [...]

5. The Chamber has found that the Old Town was extensively targeted by JNA artillery and other weapons on 6 December 1991 and that no military firing points or other objectives, real or believed, in the Old Town were targeted by the JNA. Hence, in the Chamber's finding, the intent of the perpetrators was to target civilians and civilian objects in the Old Town. The Chamber has, in addition, found that a relatively few military objectives (actual or believed) in the wider city of Dubrovnik, but outside the Old Town, were targeted by JNA forces on 6 December 1991. These were, in most cases, widely separated and in positions distant from the Old Town. Shelling targeted at the Croatian military positions in the wider Dubrovnik, including those closer to the Old Town, and whether actual or believed positions, would not cause damage to the Old Town, for reasons given in this decision. That is so for all JNA weapons in use on 6 December 1991, including mortars. In addition to this, however, the Chamber has found there was also extensive targeting of non-military objectives outside the Old Town in the wider city of Dubrovnik. [...]

Footnotes

- 895: Blaskic Appeals Judgement, para. 109 [...] **See** ICTY, The Prosecutor v. Blaskic ↑

Paras 292 to 329

C. Crimes against property, including cultural property (Counts 4 and 6)

1. Law on devastation not justified by military necessity (Count 4)

[...]

1. While the crime of "devastation not justified by military necessity" has scarcely been dealt with in the Tribunal's jurisprudence, the elements of the crime of "wanton destruction not justified by military necessity" were identified by the Trial Chamber in the *Kordic* case, and recently endorsed by the Appeals Chamber in that same case, as follows:
    i. the destruction of property occurs on a large scale;
    ii. the destruction is not justified by military necessity; and
    iii. the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction.
2. At least in the context of the present trial this definition appears equally applicable to devastation. The Chamber will adopt this definition, with appropriate adaptions to reflect "devastation", for the crime of "devastation not justified by military necessity." Both the Prosecution and the Defence submit that this should be done.
3. Turning to the first element, that is, that the devastation occurred on a "large scale", the Chamber is of

the view that while this element requires a showing that a considerable number of objects were damaged or destroyed, it does not require destruction in its entirety of a city, town or village. [...]

4. The second requirement is that the act is "not justified by military necessity". The Chamber is of the view that military necessity may be usefully defined for present purposes with reference to the widely acknowledged definition of military objectives in Article 52 of Additional Protocol I as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage". Whether a military advantage can be achieved must be decided, as the Trial Chamber in the Galic case held, from the perspective of the "person contemplating the attack, including the information available to the latter, that the object is being used to make an effective contribution to military action." [940] [...] Recalling its earlier finding that there were no military objectives in the Old Town on 6 December 1991, the Chamber is of the view that the question of proportionality in determining military necessity does not arise on the facts of this case.
5. According to the consistent case-law of the Tribunal the mens rea requirement for a crime under Article 3(b) is met when the perpetrator acted with either direct or indirect intent, the latter requiring knowledge that devastation was a probable consequence of his acts.
6. In sum, the elements of the crime of "devastation not justified by military necessity", at least in the present context, may be stated as: (a) destruction or damage of property on a large scale; (b) the destruction or damage was not justified by military necessity; and (c) the perpetrator acted with the intent to destroy or damage the property or in the knowledge that such destruction or damage was a probable consequence of his acts.

2. Law on destruction or wilful damage of cultural property (Count 6)

1. Count 6 of the Indictment charges the Accused with destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science, punishable under Article 3(d) of the Statute. [...]
2. This provision has been interpreted in several cases before the Tribunal to date. The *Blaskic* Trial Chamber adopted the following definition:

The damage or destruction must have been committed intentionally to institutions which may clearly be identified as dedicated to religion or education and which were not being used for military purposes at the time of the acts. In addition, the institutions must not have been in the immediate vicinity of military objectives. [943]

1. The Naletilic Trial Judgement, while rejecting the *Blaskic* holding that, in order to be protected, the institutions must not have been located in the immediate vicinity of military objectives, held that the elements of this crime with respect to destruction of institutions dedicated to religion would be satisfied if: "(i) the general requirements of Article 3 of the Statute are fulfilled; (ii) the destruction regards an institution dedicated to religion; (iii) the property was not used for military purposes; (iv) the perpetrator acted with the intent to destroy the property."
2. Further, [...] when the acts in question are directed against cultural heritage, the provision of Article 3(d) is *lex specialis*.

3. In order to define the elements of the offence under Article 3(d) it may be useful to consider its sources in international customary and treaty law. Acts against cultural property are proscribed by Article 27 of the Hague Regulations of 1907, by the Hague Convention of 1954, by Article 53 of Additional Protocol I and by Article 16 of Additional Protocol II.
4. Article 27 of the Hague Regulations of 1907 reads [**See** The Hague Regulations]
5. Article 4 of The Hague Convention of 1954 requires the States Parties to the Convention to: [**See** Conventions on the Protection of Cultural Property [Part A.]]
6. Article 53 of Additional Protocol I reads: [**See** The First Protocol Additional to the Geneva Conventions]

This text is almost identical in content to the analogous provision in Additional Protocol II (Article 16) the only differences being the absence in the latter of a reference to “other relevant international instruments” and the prohibition on making cultural property the object of reprisals.

1. The Hague Convention of 1954 protects property “of great importance to the cultural heritage of every people.” The Additional Protocols refer to “historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples.” [...] [T]the basic idea [underlying the two provisions] is the same. [...] The Chamber will limit its discussion to property protected by the above instruments (hereinafter “cultural property”).
2. While the aforementioned provisions prohibit acts of hostility “directed” against cultural property, Article 3(d) of the Statute explicitly criminalises only those acts which result in damage to, or destruction of, such property. Therefore, a requisite element of the crime charged in the Indictment is actual damage or destruction occurring as a result of an act directed against this property.
3. The Hague Regulations of 1907 make the protection of cultural property dependent on whether such property was used for military purposes. The Hague Convention of 1954 provides for an obligation to respect cultural property. This obligation has two explicit limbs, viz. to refrain “from any use of the property and its immediate surroundings for purposes which are likely to expose it to destruction or damage in the event or armed conflict”, and, to refrain “from any act of hostility directed against such property.” [Art. 4(1) Hague Convention] The Convention provides for a waiver of these obligations, however, but only when “military necessity imperatively requires such a waiver.” [*ibid*. Art. 4(2)] The Additional Protocols prohibit the use of cultural property in support of military efforts, but make no explicit provision for the consequence of such a use, i.e. whether it affords a justification for acts of hostility against such property. Further, the Additional Protocols prohibit acts of hostility against cultural property, without any explicit reference to military necessity. However, the relevant provisions of both Additional Protocols are expressed to be “[w]ithout prejudice to” the provisions of the Hague Convention of 1954. This suggests that in these respects, the Additional Protocols may not have affected the operation of the waiver provision of the Hague Convention of 1954 in cases where military necessity imperatively requires waiver. In this present case, no military necessity arises on the facts in respect of the shelling of the Old Town, so that this question need not be further considered. For the same reason, no consideration is necessary to the question of what distinction is intended (if any) by the word “imperatively” in the context of military necessity in Article 4, paragraph 2 of the Hague Convention of 1954.
4. Nevertheless, the established jurisprudence of the Tribunal confirming the “military purposes” exception [956] which is consistent with the exceptions recognised by the Hague Regulations of 1907 and the

Additional Protocols, persuades the Chamber that the protection accorded to cultural property is lost where such property is used for military purposes. Further, with regard to the differences between the *Blaskic* and *Naletilic* Trial Judgements noted above (regarding the use of the immediate surroundings of cultural property for military purposes), [...] the preferable view appears to be that it is the use of cultural property and not its location that determines whether and when the cultural property would lose its protection. Therefore, contrary to the Defence submission, the Chamber considers that the special protection awarded to cultural property itself may not be lost simply because of military activities or military installations in the immediate vicinity of the cultural property. In such a case, however, the practical result may be that it cannot be established that the acts which caused destruction of or damage to cultural property were "directed against" that cultural property, rather than the military installation or use in its immediate vicinity.

5. As for the *mens rea* element for this crime, the Chamber is guided by the previous jurisprudence of the Tribunal that a perpetrator must act with a direct intent to damage or destroy the property in question. There is reason to question whether indirect intent ought also to be an acceptable form of *mens rea* for this crime [...].
6. In view of the above, the definition established by the jurisprudence of the Tribunal appears to reflect the position under customary international law. For the purposes of this case, an act will fulfil the elements of the crime of destruction or wilful damage of cultural property, within the meaning of Article 3(d) of the Statute and in so far as that provision relates to cultural property, if: (i) it has caused damage or destruction to property which constitutes the cultural or spiritual heritage of peoples; (ii) the damaged or destroyed property was not used for military purposes at the time when the acts of hostility directed against these objects took place; and (iii) the act was carried out with the intent to damage or destroy the property in question.

3. Findings on Counts 4 and 6

[...]

1. The Chamber finds that of the 116 buildings and structures it listed in the Annex to its Rule 98bis Decision, 52 were destroyed or damaged during the 6 December shelling of the Old Town by the JNA. [...]
2. The nature and extent of the damage to the 52 buildings and structures from the 6 December 1991 attack varied considerably [...].
3. The Chamber also observes that among those buildings which were damaged in the attack, were monasteries, churches, a mosque, a synagogue and palaces. Among the other buildings affected were residential blocks, public places and shops; damage to these would have entailed grave consequences for the residents or the owners, i.e. their homes and businesses suffered substantial damage. [...]
4. In relation to Count 4 specifically, the Chamber finds that the Old Town sustained damage on a large scale as a result of the 6 December 1991 JNA attack. In this regard, the Chamber has considered the following factors: that 52 individually identifiable buildings and structures were destroyed or damaged; that the damaged or destroyed buildings and structures were located throughout the Old Town and included the ramparts surrounding it; that a large number of damaged houses bordered the main central axis of the Old Town, the Stradun, which itself was damaged, or were in the immediate vicinity thereof; and finally, that overall the damage varied from totally destroyed, i.e. burned out, buildings to more

minor damage to parts of buildings and structures.

5. In relation to Count 6 specifically, the Chamber observes that the Old Town of Dubrovnik in its entirety was entered onto the World Heritage List in 1979 upon the nomination of the SFRY. The properties inscribed on the World Heritage List include those which, “because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science.” The Chamber is of the view that all the property within the Old Town, i.e. each structure or building, is within the scope of Article 3(d) of the Statute. The Chamber therefore concludes that the attack launched by the JNA forces against the Old Town on 6 December 1991 was an attack directed against cultural property within the meaning of Article 3(d) of the Statute, in so far as that provision relates to cultural property.
6. In relation to Count 6, there is no evidence to suggest that any of the 52 buildings and structures in the Old Town which the Chamber has found to have been destroyed or damaged on 6 December 1991, were being used for military purposes at that time. [...] As discussed earlier, military necessity can, in certain cases, be a justification for damaging or destroying property. In this respect, the Chamber affirms that in its finding there were no military objectives in the immediate vicinity of the 52 buildings and structures which the Chamber has found to have been damaged on 6 December 1991, or in the Old Town or in its immediate vicinity. In the Chamber’s finding, the destruction or damage of property in the Old Town on 6 December 1991 was not justified by military necessity.
7. As to the *mens rea* element for both crimes the Chamber makes the following observations. In relation to Count 4, the Chamber infers the direct perpetrators’ intent to destroy or damage property from the findings that the attack on the Old Town was deliberate, and that the direct perpetrators were aware of the civilian character of the Old Town. Similarly, for Count 6, the direct perpetrators’ intent to deliberately destroy cultural property is inferred by the Chamber from the evidence of the deliberate attack on the Old Town, the unique cultural and historical character of which was a matter of renown, as was the Old Town’s status as a UNESCO World Heritage site. As a further evidentiary issue regarding this last factor, the Chamber accepts the evidence that protective UNESCO emblems were visible, from the JNA positions at Zarkovica and elsewhere, above the Old Town on 6 December 1991. [...]

Footnotes

- 940: Galic Trial Judgement para. 51. **See** ICTY, The Prosecutor v. Galic ↑
- 943: Blaskic Trial Judgement, para. 185. **See** ICTY, The Prosecutor v. Blaskic ↑
- 956: Blaskic Trial Judgement, para. 185 [...]. **See** ICTY, The Prosecutor v. Blaskic ↑

Paras 334 to 418

VII. INDIVIDUAL CRIMINAL RESPONSIBILITY OF THE ACCUSED

A. Ordering

[...]

2. Findings

1. The Indictment alleges that on 6 December 1991, the Accused ordered the unlawful artillery and mortar shelling of the Old Town of Dubrovnik conducted by forces under his command, including the forces under the command of Captain Kovacevic, which were directly subordinated to the 9 VPS commanded by Admiral Jokic.
2. The Prosecution submits that “[a]lthough there is no direct evidence of ordering, circumstantial evidence exists such that the conclusion must be drawn that the Accused gave an express or implied order to attack Srdj prior to the attack which was launched on 6 December 1991.” It further argues that “an express or implied order by the Accused to attack Srdj on 6 December 1991 had to be an order given with the awareness of the substantial likelihood that the Old Town would also be unlawfully attacked during the course of the attack on Srdj.” [...]
3. In the finding of the Chamber the evidence does not, however, establish that there was an express order of the Accused to attack or to fire on the Old Town, or the greater city of Dubrovnik. The relevant order was directed against Srdj. [...]
4. While very substantial provision was made for artillery support, the plans that were developed are not shown to be inappropriate for the objective of attacking and taking Srdj. There is nothing to suggest that they were outside the scope of what was or ought to have been contemplated by the Accused in respect of the troops and artillery to be employed in the assault. So far as the evidence indicates the plan was one which, if well executed, should have enabled the successful taking of Srdj well before 1200 hours on 6 December 1991.
5. While the attack ordered by the Accused was directed at Srdj, it is apparent from the evidence, as noted elsewhere in this decision, that any such attack necessarily contemplated that JNA artillery fire would be necessary against any Croatian forces which threatened the JNA forces attacking Srdj and jeopardised the success of the attack on Srdj. As has been indicated the reality was obvious that, apart from the limited Croatian forces on Srdj itself, any such defensive action by the Croatian forces could only come from the very limited artillery and other weapons in the wider city of Dubrovnik.
6. Given these circumstances, in the finding of the Chamber, the Accused with his very considerable military knowledge and experience, was well aware that his order to attack Srdj necessarily also involved the prospect that his forces might well have need to shell any Croatian artillery and other military positions in the wider Dubrovnik which, by their defensive action, threatened the attacking JNA troops on Srdj and the success of their attack to capture Srdj. That is the inference the Chamber draws.
7. As the Chamber has found earlier, the JNA forces attacking Srdj did come under limited but determined Croatian mortar, heavy machine gun (anti-aircraft gun) and other fire directed from the wider Dubrovnik. This fire caused JNA fatalities and other casualties on Srdj. It is clear that it threatened the success of the attack. JNA artillery fire [...] was, in part, directed against a number of these Croatian defensive positions in the wider Dubrovnik. [...] On 6 December 1991, no Croatian defensive fire was directed to Srdj or to other JNA positions from the Old Town, and the JNA forces did not act under any other belief.
8. What did occur is that the JNA artillery did not confine its fire to targeting Croatian military positions, let alone Croatian positions actually firing on the JNA forces on Srdj or other JNA positions. The JNA artillery which was active that day came to fire on Dubrovnik, including the Old Town, without regard to military targets, and did so deliberately, indiscriminately and extensively over a prolonged time. In respect of the shelling of the Old Town by the JNA, it caused substantial damage to civilian property and loss of life and other casualties to civilians. It is not proved that the Accused ordered this general artillery attack on Dubrovnik, or the Old Town. The evidence indicates otherwise. His order was confined to an

attack on Srdj. The implications with regard to the use of JNA artillery against Dubrovnik, of the Accused's ordered attack on Srdj, has not been shown to extend to such a general artillery attack on Dubrovnik, or the Old Town.

9. For the purposes of the Accused's individual criminal responsibility, so far as it is alleged that he ordered the attack on the Old Town on 6 December 1991, the further issue arises whether the Accused was aware of the substantial likelihood that in the course of executing his order to attack Srdj, there would be a deliberate artillery attack by his forces on the Old Town. Previous JNA shelling of Dubrovnik, during which there was unauthorised shelling of the Old Town, in the course of JNA military action in October and November 1991 in the vicinity of the city of Dubrovnik, including Srdj, would certainly have alerted the Accused that this could occur, especially as the 3/472 mtbr had been identified to him as a likely participant in the November shelling.
10. There were, however, relevant differences. The JNA operations in October and November 1991 each involved a general widespread attack and advance over several days by many JNA units over a wide front, with naval and air support. The attack on Srdj in December 1991 was a much more limited operation both in terms of the forces engaged in the attack, the ground to be gained and the time allocated to the troops in which to do so. While the Accused's order to attack Srdj necessarily had the implication of JNA artillery support against Croatian forces threatening the attacking JNA troops and the success of the attack on Srdj including, if necessary, artillery fire against specific Croatian defensive positions in Dubrovnik, that implication was of limited, specifically targeted and controlled responsive fire by the Accused's forces. The escalation of JNA artillery fire on Dubrovnik into the deliberate, indiscriminate and extensive shelling which occurred, although not dissimilar to the previous episodes, was a marked step further than was implied by the Accused's order, and occurred in circumstances sufficiently different from the previous episodes as to reduce to some degree the apparent likelihood of a repetition of the previous conduct of his forces. While the circumstances known to the Accused, at the time of his order to attack Srdj, can only have alerted him to the possibility that his forces would once again ignore orders and resort to deliberate and indiscriminate shelling, it must be established by the Prosecution that it was known to the Accused that there was a substantial likelihood of this occurring. The risk as known to the Accused was not slight or remote; it was clearly much more real and obvious. Nevertheless, the evidence falls short, in the Chamber's view, of establishing that there was a "substantial likelihood" that this would occur known to the Accused when he ordered the attack on Srdj. [...]

C. Command Responsibility

1. Law [...]

(a) Superior-subordinate relationship

1. In the present case, the issue is raised whether a commander may be found responsible for the crime committed by a subordinate two levels down in the chain of command.
2. It appears from the jurisprudence that the concepts of command and subordination are relatively broad. Command does not arise solely from the superior's formal or de jure status, but can also be "based on the existence of *de facto* powers of control". In this respect, the necessity to establish the existence of a superior-subordinate relationship does "not [...] import a requirement of direct or formal subordination".

Likewise, there is no requirement that the relationship between the superior and the subordinate be permanent in nature. The temporary nature of a military unit is not, in itself, sufficient to exclude a relationship of subordination.

3. Consistently with the above reasoning, other persuasive sources seem to indicate that there is no requirement that the superior-subordinate relationship be immediate in nature for a commander to be found liable for the acts of his subordinate. What is required is the establishment of the superior's effective control over the subordinate, whether that subordinate be immediately answerable to that superior or more remotely under his command. [...]
4. [...] As to whether the superior has the requisite level of control, the Chamber considers that this is a matter which must be determined on the basis of the evidence presented in each case.

(b) Mental element: the superior knew or had reason to know

1. A superior may be held responsible under Article 7(3) of the Statue for crimes committed by a subordinate if, *inter alia*, he knew or had reason to know that the subordinate was about to commit or had committed such crimes. [...]

(c) Necessary and reasonable measures

1. What the duty to prevent will encompass will depend on the superior's material power to intervene in a specific situation. [...]

2. Findings

(a) Superior-subordinate relationship

(i) Command structure

[...]

[...] [T]he Chamber is satisfied that on 6 December 1991 the [units carrying out the attack], were directly subordinated to the 9 VPS, which was subordinated to the 2 OG. The [units] were at the second level of subordination to the 2 OG. The Chamber is satisfied, therefore, and finds that the Accused, as the commander of the 2 OG, had *de jure* authority over the JNA forces involved in the attack on Srdj and the shelling of Dubrovnik, including the Old Town.

(ii) Effective control

1. As discussed above, the indicators of effective control depend on the specific circumstances of the case. The Chamber turns now to consider whether the evidence in the case establishes that the Accused had the power to prevent the unlawful shelling of the Old Town of Dubrovnik on 6 December 1991, and punish or initiate disciplinary or other adverse administrative proceedings against the perpetrators.

a. Did the Accused have the material ability to prevent the attack on the Old Town of 6 December 1991?

[...]

1. The Chamber is satisfied that the Accused, as the commander of the 2 OG, had the material ability to prevent the unlawful shelling of the Old Town on 6 December 1991 and to interrupt and stop that shelling at any time during which it continued.

b. Did the Accused have the material ability to punish the perpetrators?

[...]

1. [...] [T]he Chamber is satisfied that as the commander of the 2 OG the Accused had effective control over the perpetrators of the unlawful attack on the Old Town of Dubrovnik of 6 December 1991. The Accused had the legal authority and the material ability to issue orders to the 3/472 mtbr, and all the other JNA forces involved in the attack on Srdj and the shelling of Dubrovnik, including the Old Town, explicitly prohibiting an attack on the Old Town, as well as to take other measures to ensure compliance with such orders and to secure that the Old Town would not be attacked by shelling, or that an existing attack be immediately terminated. Further, the Chamber is satisfied that following the attack of 6 December 1991 the Accused had the legal authority and the material ability to initiate an effective investigation and to initiate or take administrative and disciplinary action against the officers responsible for the shelling of the Old Town.

(b) Mental element: did the Accused know or have reason to know that his subordinates were about to or had committed crimes?

415. The factual circumstances relevant to the mental element, as established by the evidence in this case, have been reviewed in this decision. Against that factual background Article 7(3) of the Statute gives rise to a significant issue. This is whether, by virtue of the JNA artillery fire on Dubrovnik to be expected in support of the attack the Accused ordered on Srdj, he knew or had reason to know that in the course of the attack the JNA artillery would commit offences such as the acts charged. By way of general analysis the Accused knew of the recent shelling of the Old Town in October and November by his forces. Indeed, the forces in the attack on 6 December 1991 were among the forces involved at the time of the November shelling [...]. Existing orders in December precluded shelling of the Old Town, however that had also been the position with the October and November shelling, so that general orders had not proved effective as a means of preventing his troops from shelling Dubrovnik, especially the Old Town. The Accused well knew that no adverse action had been taken against anyone by virtue of the previous acts of shelling the Old Town, so that there had been no example of adverse disciplinary or other consequences shown to those who breached the existing orders, or international law, on previous occasions.
416. In the view of the Chamber, as discussed earlier in this decision, what was known to the Accused when he ordered the attack on Srdj on 5 December 1991, and at the time of the commencement of the attack on 6 December 1991, gave the Accused reason to know that criminal acts such as those charged *might*

be committed by his forces in the execution of his order to attack Srdj. Relevantly, however, the issue posed by Article 7(3) of the Statute is whether the Accused then had reason to know that offences were about to be committed by his forces. [...]

417. In the Chamber's assessment of what was known to the Accused at or before the commencement of the attack on Srdj, there has been shown to be a real and obvious prospect, a clear possibility, that in the heat and emotion of the attack on Srdj, the artillery under his command *might well* get out of hand once again and commit offences of the type charged. It has not been established, however, that the Accused had reason to know that this would occur. This is not shown to be a case, for example, where the Accused had information that before the attack his forces planned or intended to shell the Old Town unlawfully, or the like. It is not apparent that additional investigation before the attack could have put the Accused in any better position. Hence, the factual circumstances known to the Accused at the time are such that the issue of "reason to know" calls for a finely balanced assessment by the Chamber. In the final analysis, and giving due weight to the standard of proof required, the Chamber is not persuaded that it has been established that the Accused had reasonable grounds to suspect, before the attack on Srdj, that his forces were about to commit offences such as those charged. Rather, he knew only of a risk of them getting out of hand and offending in this way, a risk that was not slight or remote, but nevertheless, in the Chamber's assessment, is not shown to have been so strong as to give rise, in the circumstances, to knowledge that his forces were about to commit an offence, as that notion is understood in the jurisprudence. It has not been established, therefore, that, before the commencement of the attack on Srdj, the Accused knew or had reason to know that during the attack his forces would shell the Old Town in a manner constituting an offence.

418. That being so, the Chamber will therefore consider whether, in the course of the attack on Srdj on 6 December 1991, what was known to the Accused changed so as to attract the operation of Article 7(3). In the very early stages of the attack, well before the attacking JNA infantry had actually reached the Srdj feature and the fort, at a time around 0700 hours as the Chamber has found, the Accused was informed by the Federal Secretary of National Defence General Kadijevic of a protest by the ECMM against the shelling of Dubrovnik. For reasons given earlier, the order of the Accused to attack Srdj necessarily involved knowledge by him that JNA artillery might need to act against Croatian defensive positions in Dubrovnik which were threatening the lives of the attacking soldiers and the success of the attack on Srdj. His knowledge, in the Chamber's finding, was that only a limited number of such Croatian defensive positions could exist and that, as the attack progressed, these positions could be subjected to controlled and limited JNA shelling targeted on these positions, or on what were believed by his forces to be such positions. While a protest such as had been made to General Kadijevic could perhaps have arisen from shelling targeted at such Croatian defensive positions, the description that Dubrovnik was being shelled, the extremely early stage in the attack of the protest (before sunrise), and the circumstance that the seriousness of the situation had been thought by the ECMM to warrant a protest in Belgrade at effectively the highest level, would have put the Accused on notice, in the Chamber's finding, at the least that shelling of Dubrovnik beyond what he had anticipated at that stage by virtue of his order to attack Srdj, was then occurring. This knowledge was of a nature, in the Chamber's view, that, when taken together with his earlier knowledge, he was on notice of the clear and strong risk that already his artillery was repeating its previous conduct and committing offences such as those charged. In the Chamber's assessment the risk that this was occurring was so real, and the implications were so serious, that the events concerning General Kadijevic ought to have sounded alarm bells to the Accused, such that at the least he saw the urgent need for reliable additional

information, i.e. for investigation, to better assess the situation to determine whether the JNA artillery were in fact shelling Dubrovnik, especially the Old Town, and doing so without justification, i.e. so as to constitute criminal conduct. [...]

Paras 420 to 455 and Disposition

(c) Measures to prevent and to punish

(i) Measures to prevent

1. [...] [T]here was, in the Accused's knowledge at the time of his decision to order the attack on Srdj and when the attack commenced, a real risk that in the heat of the attack the JNA artillery would once again repeat its then recent and already repeated conduct of unlawful shelling of Dubrovnik, in particular of the Old Town. [...] [T]he known risk was sufficiently real and the consequences of further undisciplined and illegal shelling were so potentially serious, that a cautious commander may well have thought it desirable to make it explicitly clear that the order to attack Srdj did not include authority to the supporting artillery to shell, at the least, the Old Town. Depending on the attitude of such a commander to the status of the Old Town, any such explicit clarification may have been qualified, for example, by words such as "except in the case of lethal fire from the Old Town", words which reflect the terms of one of the earlier orders. [T]he Chamber is not persuaded that a failure to make any such clarification before the attack commenced gives rise to criminal liability of the Accused, pursuant to Article 7(3) of the Statute, for what followed. Any such clarification would have been merely by way of wise precaution. It remains relevant, however, when evaluating the events that followed, that no such precaution was taken.
2. There were of course existing orders. As described elsewhere in this decision, in some cases, their effect was to preclude shelling of Dubrovnik, others forbade the shelling of the Old Town itself. [...] The existence of such orders had not been effective to prevent the previous shellings. Further, no action had been taken to deal with those who were responsible for the previous breaches of existing orders. In these circumstances, in the Chamber's finding, the mere existence of such orders could not on 6 December 1991 be seen to be effective to prevent repetition of the past shelling of Dubrovnik, and especially the Old Town. In the Chamber's view, however, there is a relevant distinction between such existing orders which, with apparent impunity, had not been faithfully observed by the forces to whom they were given, and a further clear and specific order to the same effect, if given at the time of, and specifically for the purposes of, a fresh new attack. A new express order prohibiting the shelling of the Old Town (had that been intended by the Accused) given at the time of his order to attack Srdj, would both have served to remind his forces of the existing prohibition, and to reinforce it. Further, and importantly, it would have made it clear to those planning and commanding the attack, and those leading the various units (had it been intended by the Accused) that the order to attack Srdj was not an order which authorised shelling of the Old Town. In the absence of such an order there was a very clear prospect that those planning, commanding and leading the attack would understand the new and specific order to attack Srdj as implying at least that shelling necessary to support the attack on Srdj was authorised, notwithstanding existing orders. [...] There is nothing to support the view that the Accused took any measures to guard against this. Indeed, as the Chamber has found, the intended implication of the Accused's order to attack Srdj was that shelling, even of the Old Town, which was necessary to support the attacking infantry on Srdj, could occur. As has been made clear in this

decision, however, in the Chamber's finding what did occur on 6 December was deliberate, prolonged and indiscriminate shelling of the Old Town, shelling quite outside the scope of anything impliedly ordered by the Accused. It remains relevant, however, that nothing had been done by the Accused before the attack on Srdj commenced to ensure that those planning, commanding and leading the attack, and especially those commanding and leading the supporting artillery, were reminded of the restraints on the shelling of the Old Town, or to reinforce existing prohibition orders.

3. Hence, when the Accused was informed by General Kadijevic around 0700 hours of the ECMM protest, that put the Accused directly on notice of the clear likelihood that his artillery was then already repeating its earlier illegal shelling of the Old Town. The extent of the Accused's existing knowledge of the October and November shelling of the Old Town, of the disciplinary problems of the 3/472 mtbr and of its apparent role, at least as revealed by Admiral Jokic's November investigation, in the November shelling of Dubrovnik, especially the Old Town, and of his failure to clarify the intention of his order to attack Srdj in regard to the shelling of Dubrovnik or the Old Town are each very relevant. In combination they give rise, in the Chamber's finding to a strong need to make very expressly clear, by an immediate and direct order to those commanding and leading the attacking forces, especially the artillery, the special status of the Old Town and the existing prohibitions on shelling it, and of the limitations or prohibition, if any, on shelling the Old Town intended by the Accused on 6 December 1991. This should have been starkly obvious. The evidence contains no suggestion whatever that any such order was issued by the Accused, or anyone else that day [...].
4. There was also the obvious immediate need to learn reliably what JNA shelling was in truth occurring, and why. [...]
5. Just as the Accused had the ready and immediate means to be informed of the circumstances in Dubrovnik, and the Old Town, regarding JNA shelling, and to readily send his own staff to further investigate and report, he also had the ready and immediate means throughout 6 December 1991 to communicate orders to the commander of the attacking forces, Captain Kovacevic, and to the other senior 9 VPS officers at Zarkovica, including Warship-Captain Zec. [...]
6. [...] [T]he Accused had the legal authority and the material means to have stopped the shelling of the Old Town throughout the ten and a half hours it continued, as he also had the means and authority to stop the shelling of the wider Dubrovnik. No steps that may have been taken by the Accused were effective to do so. While the forces responsible for the shelling were under the immediate command of the 9 VPS, they were under his superior command and were engaged in an offensive military operation that day pursuant to the order of the Accused to capture Srdj.
7. While the finding of the Chamber is that the Accused did not order that the attack on Srdj be stopped when he spoke to Admiral Jokic around 0700 hours on 6 December 1991, the Chamber would further observe that had he in truth given that order, the effect of what followed is to demonstrate that the Accused failed entirely to take reasonable measures within his material ability and legal authority to ensure that his order was communicated to all JNA units active in the attack, and to ensure that his order was complied with. This failure, alone, would have been sufficient for the Accused to incur liability for the acts of his subordinates pursuant to Article 7(3), even if he had ordered at about 0700 hours that the attack on Srdj be stopped.

(ii) Measures to punish

[...]

1. The evidence establishes, in the Chamber's finding, that the Accused at all material times had full material and legal authority to act himself to investigate, or take disciplinary or other adverse action, against the officers of the 9 VPS who directly participated in, or who failed to prevent or stop, the unlawful artillery attack on the Old Town on 6 December 1991. Despite this the Accused chose to take no action of any type. Given that one line of the Defence case is to submit that Admiral Jokic, and his staff at 9 VPS, planned, authorised and oversaw the attack on Dubrovnik on 6 December 1991, and deliberately kept word of the attack from the Accused and 2 OG, until the attack had failed, it must also be recorded, in the Chamber's finding, that at no time did the Accused institute any investigation of the conduct of Admiral Jokic or his staff, or take any disciplinary or other adverse action against them in respect of the events of 6 December 1991. [...]

3. Conclusion

1. In view of the findings made earlier in this section, the Chamber is satisfied that the Accused had effective control over the perpetrators of the unlawful shelling of the Old Town of Dubrovnik of 6 December 1991. The Accused had the legal authority and the material ability to stop the unlawful shelling of the Old Town and to punish the perpetrators. The Chamber is further satisfied that as of around 0700 hours on 6 December 1991 the Accused was put on notice at the least of the clear prospect, that his artillery was then repeating its previous conduct and committing offences such as those charged. Despite being so aware, the Accused did not ensure that he obtained reliable information whether there was in truth JNA shelling of Dubrovnik occurring, especially of the Old Town, and if so the reasons for it. Further, the Accused did not take necessary and reasonable measures to ensure at least that the unlawful shelling of the Old Town be stopped. The Chamber is further satisfied that at no time did the Accused institute any investigation of the conduct of his subordinates responsible for the shelling of the Old Town, nor did he take any disciplinary or other adverse action against them, in respect of the events of 6 December 1991. The Chamber is therefore satisfied that the elements required for establishing the Accused's superior responsibility under Article 7(3) of the Statute for the unlawful shelling of the Old Town by the JNA on 6 December 1991 have been established.

VIII. CUMULATIVE CONVICTIONS

A. Should there be cumulative convictions?

1. The question of cumulative convictions arises where more than one charge arises out of what is essentially the same criminal conduct. In this case the artillery attack against the Old Town by the JNA on 6 December 1991 underlies all the offences charged in the Indictment. The Appeals Chamber has held that it is only permissible to enter cumulative convictions under different statutory provisions to punish the same criminal conduct if "each statutory provision involved has a materially distinct element not contained in the other". Where, in relation to two offences, this test is not met, the Chamber should enter a conviction on the more specific provision. [...]
2. The issue of cumulation arises first in relation to the offences of murder (Count 1), cruel treatment (Count 2) and attacks on civilians (Count 3). [...] [S]ince murder and cruel treatment do not contain an element in addition to the elements of attacks on civilians and because the offence of attacks on

civilians contains an additional element (i.e. an attack) it is, theoretically, the more specific provision.

3. In the present case, the essential criminal conduct was an artillery attack against the Old Town inhabited by a civilian population. In the course of that attack civilians were killed and injured. The essential criminal conduct of the perpetrators is directly and comprehensively reflected in Count 3. The offence of attacks on civilians, involved an attack directed against a civilian population, causing death, and also serious injury, with the intent of making the civilian population the object of the attack. Given these circumstances, in the present case, the offence of murder adds no materially distinct element, nor does the offence of cruel treatment the gravamen of which is fully absorbed by the circumstances in which this attack on civilians occurred. [...]
4. The issue of cumulation also arises in relation to the remaining offences charged in the Indictment. These are devastation not justified by military necessity (Count 4), unlawful attacks on civilian objects (Count 5), and destruction or wilful damage of cultural property (Count 6). The statutory basis and the elements of each of these offences have been set out earlier in this decision. The elements of each of these three offences are such that they each, on a theoretical basis, contain “materially” distinct elements from each other.
5. The offence of attacks on civilian objects requires proof of an attack, which is not required by any element of either the offence of devastation not justified by military necessity or the offence of destruction of or wilful damage to cultural property. The offence of destruction of or wilful damage to cultural property requires proof of destruction or wilful damage directed against property which constitutes the cultural or spiritual heritage of peoples, which is not required by any element of the offence of attacks on civilian objects or the offence of devastation not justified by military necessity. The offence of devastation not justified by military necessity requires proof that the destruction or damage of property (a) occurred on a large scale and that (b) was not justified by military necessity. What is required by one offence, but not required by the other offence, renders them distinct in a material fashion.
6. In the present case, however, the offences each concern damage to property caused by the JNA artillery attack against the Old Town of Dubrovnik on 6 December 1991. The entire Old Town is civilian and cultural property. There was large scale damage to it. There was no military justification for the attack. In the view of the Chamber, given these particular circumstances, the essential criminal conduct is directly and comprehensively reflected in Count 6, destruction or wilful damage to cultural property. Counts 4 and 5 really add no materially distinct element, given the particular circumstances in which these offences were committed. The criminal conduct of the Accused in respect of these three Counts, is fully, and most appropriately reflected in Count 6 [...].
7. For these reasons, in the particular circumstances in which these offences were committed, the Chamber will enter convictions against the Accused only in respect of Count 3, attacks on civilians, and Count 6, destruction and willful damage of cultural property.

[...]

DISPOSITION

1. For the foregoing reasons, having considered all of the evidence and the submissions of the parties, the Chamber decides as follows:
2. The Chamber finds the Accused **guilty** pursuant to Article 7(3) of the Statute of the following two

counts:

Count 3: Attacks on civilians, a Violation of the Laws or Customs of war, under Article 3 of the Statute;

Count 6: Destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works or art and science, a Violation of the Laws or Customs of war, under Article 3 of the Statute.

1. While the Chamber is satisfied that the elements of the following four counts have been established pursuant to Article 7(3) of the Statute, for reasons given earlier the Chamber does **not** record a finding of guilty against the Accused in respect of:

Count 1: Murder, a Violation of the Laws or Customs of war, under Article 3 of the Statute;

Count 2: Cruel Treatment, a Violation of the Laws or Customs of war, under Article 3 of the Statute;

Count 4: Devastation not justified by military necessity, a Violation of the Laws or Customs of war, under Article 3 of the Statute;

Count 5: Unlawful Attacks on Civilian Objects, a Violation of the Laws or Customs of war, under Article 3 of the Statute.

1. The Chamber does not find the Accused guilty pursuant to Article 7(1) of the Statute in respect of any of the six Counts.
2. The Chamber hereby sentences the Accused to a single sentence of eight years of imprisonment.
3. The Accused has been in custody for 457 days. Pursuant to Rule 101(c) of the Rules, he is entitled to credit for time spent in detention so far.
4. Pursuant to Rule 103 of the Rules, the Accused shall remain in the custody of the Tribunal pending the finalisation of arrangements for his transfer to the State where he shall serve his sentence.

C. Appeals Chamber, Judgement

[**Source**: Prosecutor v. Pavle Strugar, IT-01-42-A (Appeals Chamber Judgement) 17 July 2008; footnotes omitted.]

IN THE APPEALS CHAMBER JUDGEMENT 17 July 2008 PROSECUTOR v. PAVLE STRUGAR

[…]

IV. ALLEGED ERRORS OF FACT (STRUGAR'S FIRST AND THIRD GROUNDS OF APPEAL

[…]

D. Alleged Errors Regarding the Events of 6 December 1991 […]

9. Alleged Errors Regarding the Status of Valjalo and Ivo Vlašica

1. The Trial Chamber found that Valjalo was injured while on his way to work and that there was nothing in the evidence to suggest that, in his capacity as a driver for the Dubrovnik Municipal Crisis Staff, he was taking an active part in the hostilities. It therefore held that Valjalo was the victim of cruel treatment as a violation of the laws or customs of war under Article 3 of the Statute. Strugar submits that the Trial Chamber erred in so holding.

[…]

(i) Applicable Legal Standard

1. In order to prove cruel treatment as a violation of Common Article 3 under Article 3 of the Statute, the Prosecution must prove beyond a reasonable doubt that the victim of the alleged offence was a person taking no active part in the hostilities.
2. In *Kordić* and *Čerkez*, the Appeals Chamber defined the notion of direct participation in hostilities set out in Article 51(3) of Additional Protocol I as encompassing acts of war, which by their nature or purpose are likely to cause actual harm to the personnel or equipment of the enemy's armed forces. The Appeals Chamber considers the concepts of "active participation" under Common Article 3 and "direct participation" under Additional Protocol I to be synonymous for the present purposes. Nevertheless, as the present case requires that the definition of this concept be addressed in more detail and in different circumstances, which was not necessary in the *Kordić* and *Čerkez* case, the Appeals Chamber will expand below upon its previous reasoning.
3. The notion of participation in hostilities is of fundamental importance to international humanitarian law and is closely related to the principle of distinction between combatants and civilians. [**See** ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities] Pursuant to Additional Protocol I, combatants have the right to participate directly in hostilities and civilians enjoy general protection against dangers arising from military operations unless and for such time as they take a direct part in hostilities. As a result, a number of provisions of international humanitarian law conventions refer to the concept of participation in hostilities.
4. While neither treaty law, nor customary law expressly define the notion of active or direct participation in hostilities beyond what has been stated above, references to this notion in international humanitarian law conventions do provide guidance as to its meaning. Common Article 3 itself provides examples of persons other than civilians taking no active part in the hostilities, namely "members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause". Article 41(2) of *Additional Protocol I* states that a person will be *hors de combat* if he "is in the power of an adverse Party", "clearly expresses an intention to surrender" or "has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself" provided that "he abstains from any hostile act and does not attempt to escape". *A contrario*, the notion of active participation in hostilities encompasses armed participation in combat activities.
5. Conduct amounting to direct or active participation in hostilities is not, however, limited to combat

activities as such. Indeed, Article 67(1)(e) of Additional Protocol I draws a distinction between direct participation in hostilities and the commission of "acts harmful to the adverse party" while Article 3(1) of the *Mercenaries Convention* distinguishes between direct participation in hostilities and participation "in a concerted act of violence". The notion of direct participation in hostilities must therefore refer to something different than involvement in violent or harmful acts against the adverse party. At the same time, direct participation in hostilities cannot be held to embrace all activities in support of one party's military operations or war effort. This is made clear by Article 15 of Geneva Convention IV, which draws a distinction between taking part in hostilities and performing "work of a military character". Moreover, to hold all activities in support of military operations as amounting to direct participation in hostilities would in practice render the principle of distinction meaningless.

6. The Appeals Chamber also takes note of examples of direct and indirect forms of participation in hostilities included in military manuals, soft law, decisions of international bodies and the commentaries to the Geneva Conventions and the Additional Protocols. Examples of active or direct participation in hostilities include: bearing, using or taking up arms, taking part in military or hostile acts, activities, conduct or operations, armed fighting or combat, participating in attacks against enemy personnel, property or equipment, transmitting military information for the immediate use of a belligerent, transporting weapons in proximity to combat operations, and serving as guards, intelligence agents, lookouts, or observers on behalf of military forces. Examples of indirect participation in hostilities include: participating in activities in support of the war or military effort of one of the parties to the conflict, selling goods to one of the parties to the conflict, expressing sympathy for the cause of one of the parties to the conflict, failing to act to prevent an incursion by one of the parties to the conflict, accompanying and supplying food to one of the parties to the conflict, gathering and transmitting military information, transporting arms and munitions, and providing supplies, and providing specialist advice regarding the selection of military personnel, their training or the correct maintenance of the weapons.
7. On the basis of the foregoing, the Appeals Chamber holds that in order to establish the existence of a violation of Common Article 3 under Article 3 of the Statute, a Trial Chamber must be satisfied beyond a reasonable doubt that the victim of the alleged offence was not participating in acts of war which by their nature or purpose are intended to cause actual harm to the personnel or equipment of the enemy's armed forces. Such an enquiry must be undertaken on a case-by-case basis, having regard to the individual circumstances of the victim at the time of the alleged offence. As the temporal scope of an individual's participation in hostilities can be intermittent and discontinuous, whether a victim was actively participating in the hostilities at the time of the offence depends on the nexus between the victim's activities at the time of the offence and any acts of war which by their nature or purpose are intended to cause actual harm to the personnel or equipment of the adverse party. If a reasonable doubt subsists as to the existence of such a nexus, then a Trial Chamber cannot convict an accused for an offence committed against such a victim under Article 3 of the Statute.
8. When dealing with crimes pursuant to Common Article 3, it may be necessary for a Trial Chamber to be satisfied beyond a reasonable doubt that the alleged offence committed against the victim was not otherwise lawful under international humanitarian law. The need for such an additional enquiry will depend on the applicability of other rules of international humanitarian law, which is assessed on the basis of the scope of application of these rules as well as the circumstances of the case. Indeed, if the victim of an offence was a combatant or if the injury or death of such a victim was the incidental result of an attack which was proportionate in relation to the anticipated concrete and direct military advantage, his injury or death would not amount to a violation of international humanitarian law even if he was not

actively participating in hostilities at the time of the alleged offence.

[…]

1. The Appeals Chamber will now address Strugar's challenges to the Trial Chamber's finding that Valjalo was not actively participating in the hostilities at the time of the offence.
2. At the outset, the Appeals Chamber notes that the evidence indicates that Valjalo was a driver for the Dubrovnik Municipal Crisis Staff and that he drove local and foreign officials in Dubrovnik in this capacity. The Appeals Chamber also notes that Valjalo testified that during the events of December 1991, he drove the President of the Executive Council of Dubrovnik, who also served as the President of the Dubrovnik Municipal Crisis Staff. Valjalo specified that the latter did not wear a military uniform. In addition, Valjalo stated that he was a civilian, wore civilian clothes and was unarmed. He indicated that while he was a reserve in the Croatian army, he was not mobilised during the war.

[…]

1. Exhibit D24, a Certificate of the Dubrovnik-Neretva County Prefect delivered pursuant to the Law on Disabled Military and Civilian War Veterans Welfare, provides as follows: "During the worst attacks on Dubrovnik, Mato VALJALO drove members of the Crisis Staff and officials of the municipality and the Republic of Croatia to their war tasks". The Appeals Chamber observes that the Trial Chamber did not refer to this exhibit in the Trial Judgement. However, the Appeals Chamber finds that there is no reasonable doubt that the required nexus is lacking between Valjalo's activities at the time of the offence (he was injured near his home while on his way to work) and any possible participation of the Dubrovnik Municipal Crisis Staff, municipal officials and officials of the Republic of Croatia in acts of war which by their nature or purpose were intended to cause actual harm to the personnel or equipment of the JNA forces in the Dubrovnik region.
2. In light of the foregoing, the Appeals Chamber finds that a reasonable trier of fact could have concluded beyond a reasonable doubt that at the time of the alleged offence, Valjalo was not actively participating in the hostilities.
3. Accordingly, this sub-ground of appeal is dismissed.

V. ALLEGED ERRORS OF LAW (STRUGAR'S SECOND GROUND OF APPEAL)

[…]

B. Alleged Error in Characterization of the Mens Rea of the Criminal Offence

[…]

(a) Attacks on Civilians (Count 3)

1. The Appeals Chamber has previously ruled that the perpetrator of the crime of attack on civilians must undertake the attack "wilfully" and that the latter incorporates "wrongful intent, or recklessness, [but] not 'mere negligence' ". In other words, the *mens rea* requirement is met if it has been shown that the acts

of violence which constitute this crime were wilfully directed against civilians, that is, either deliberately against them or through recklessness. The Appeals Chamber considers that this definition encompasses both the notions of “direct intent” and “indirect intent” mentioned by the Trial Chamber, and referred to by Strugar, as the *mens rea* element of an attack against civilians.

2. As specified by the Trial Chamber in the Galić case,

For the *mens rea* recognized by Additional Protocol I to be proven, the Prosecution must show that the perpetrator was aware or should have been aware of the civilian status of the persons attacked. In case of doubt as to the status of a person, that person shall be considered to be a civilian. However, in such cases, the Prosecution must show that in the given circumstances a reasonable person could not have believed that the individual he or she attacked was a combatant. [**See** ICTY, The Prosecutor v. Galic [Part A., para. 55]]

The intent to target civilians can be proved through inferences from direct or circumstantial evidence. There is no requirement of the intent to attack particular civilians; rather it is prohibited to make the civilian population as such, as well as individual civilians, the object of an attack. The determination of whether civilians were targeted is a case-by-case analysis, based on a variety of factors, including the means and method used in the course of the attack, the distance between the victims and the source of fire, the ongoing combat activity at the time and location of the incident, the presence of military activities or facilities in the vicinity of the incident, the status of the victims as well as their appearance, and the nature of the crimes committed in the course of the attack.

1. In the present case, the Trial Chamber found that the cause of the extensive and large-scale damage to the Old Town of Dubrovnik was the deliberate shelling of the Old Town on 6 December 1991, not only by JNA mortars, but also by other JNA weapons such as ZIS and recoilless cannons and Maljutka rockets. The Trial Chamber further concluded that the intent of the perpetrators of this attack was “to target civilians and civilian objects in the Old Town”. The Appeals Chamber is of the view that Strugar has failed to demonstrate that no reasonable trier of fact could have reached such conclusions.

[…]

VI. ALLEGED ERROR OF LAW REGARDING THE SCOPE OF STRUGAR’S DUTY TO PREVENT (PROSECUTION’S FIRST GROUND OF APPEAL)

[…]

1. Pursuant to Article 7(3) of the Statute, the knowledge required to trigger a superior’s duty to prevent is established when the superior “knew or had reason to know that [his] subordinate was about to commit [crimes]”. The Trial Chamber in Celebici interpreted this requirement in light of the language used in Article 86(2) of Additional Protocol I and held that, under the “had reason to know” standard, it is required to establish that the superior had “information of a nature, which at the least, would put him on notice of the risk of […] offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates”.

[…]

1. Taking into consideration the relevant factual findings of the Trial Chamber, the Appeals Chamber finds that the Trial Chamber committed an error of law by not applying the correct legal standard regarding the *mens rea* element under Article 7(3) of the Statute. The Trial Chamber erred in finding that Strugar's knowledge of the risk that his forces might unlawfully shell the Old Town was not sufficient to meet the *mens rea* element under Article 7(3) and that only knowledge of the "substantial likelihood" or the "clear and strong risk" that his forces would do so fulfilled this requirement. In so finding, the Trial Chamber erroneously read into the *mens rea* element of Article 7(3) the requirement that the superior be on notice of a strong risk that his subordinates would commit offences. In this respect, the Appeals Chamber recalls that under the correct legal standard, sufficiently alarming information putting a superior on notice of the risk that crimes might subsequently be carried out by his subordinates and justifying further inquiry is sufficient to hold a superior liable under Article 7(3) of the Statute.

[…]

1. In light of the Trial Chamber's factual findings regarding Strugar's knowledge prior to the attack against Srdj, the Appeals Chamber is satisfied beyond a reasonable doubt that Strugar had notice of sufficiently alarming information such that he was alerted of the risk that similar acts of unlawful shelling of the Old Town might be committed by his subordinates as well as of the need to undertake further enquiries with respect to this risk.
2. In the opinion of the Appeals Chamber, the only reasonable conclusion available on the facts as found by the Trial Chamber was that Strugar, despite being alerted of a risk justifying further enquiries, failed to undertake such enquiries to assess whether his subordinates properly understood and were inclined to obey the order to attack Srdj and existing preventative orders precluding the shelling of the Old Town.
3. Consequently, the Appeals Chamber is satisfied beyond a reasonable doubt that as of 12:00 a.m. on 6 December 1991, Strugar possessed sufficiently alarming information to meet the "had reason to know" standard under Article 7(3) of the Statute.

[…]

IX. DISPOSITION

For the foregoing reasons, **THE APPEALS CHAMBER**,

PURSUANT TO Article 25 of the Statute and Rules 117 and 118 of the Rules;

[…]

DISMISSES all grounds of appeal submitted by Strugar (…);

ALLOWS the Prosecution's first ground of appeal regarding the scope of Strugar's duty to prevent the shelling of the Old Town;

[…]

REPLACES the sentence of eight years of imprisonment imposed by the Trial Chamber by a sentence of seven and a half years, subject to credit being given under Rule 101(C) of the Rules for the period already spent in detention;

ORDERS that, in accordance with Rules 103(C) and Rule 107 of the Rules, Strugar is to remain in the custody of the Tribunal pending the finalisation of arrangements for his transfer to the State in which his sentence will be served.

Discussion

I. Qualification of the conflict

1. Does the Trial Chamber qualify the conflict? Why/why not? How would you qualify it? On what would a correct qualification depend? Does the qualification of a conflict as international or non-international have an impact on the legal analysis of the shelling of Dubrovnik? Does the nature of the conflict have an impact on whether the shelling of civilians or civilian objects is criminalized? (GC I-IV, Art. 2; P I, Arts 51 and 52; P II, Art. 13)
2. *(Trial Chamber, paras 224-228)* Why does the Tribunal refer to the consideration whether Art. 52 of Protocol I is also covered by Protocol II? Why does it assess whether the Hague Regulations have customary law status in non-international armed conflicts as well? (P I, Arts 51 and 52; P II, Art. 13)

II. Attacks on civilians

1. a. *(Trial Chamber, para. 282)* What is the Trial Chamber's definition of a civilian? Do you agree that combatants become civilians once they lay down their arms or are sick or wounded? Does the Trial Chamber give a definition of "taking an active part in the hostilities"? (GC I-IV, Art. 3; P I, Arts 50 and 51(3))
   b. *(Appeals Chamber, paras 176-177)* Do you agree with the Appeals Chamber that "direct participation in hostilities must (…) refer to something different than involvement in violent or harmful acts against the adverse party"? Why/Why not? Does the Appeals Chamber make clear whether or not a person indirectly participating in hostilities loses the protection of civilian status? In your opinion, is that the case? (P I, Art. 51(3); P II, Art. 13(3))
   c. *(Appeals Chamber, para. 178)* What are the elements of the definition of direct participation in hostilities proposed by the Appeals Chamber? What are the differences from and similarities to the ICRC's study on direct participation in hostilities? Is the definition of the Appeals Chamber relevant? Does it create a legal reference with regard to direct participation in hostilities? [**See** ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities] (P I, Art. 51(3); P II, Art. 13(3))
   d. *(Appeals Chamber, para. 178)* Do you agree with the Appeals Chamber that "in order to establish the existence of a violation of common Article 3 under Article 3 of the Statute, a Trial Chamber must be satisfied beyond a reasonable doubt that the victim of the alleged offence was not

participating in acts of war which […] are intended to cause actual harm to […] the enemy's armed forces."? Does not this conception jeopardize the presumption of civilian status in case of doubt? Or does criminal evidence require greater certainty than IHL?

e. According to the Appeals Chamber, Valjalo was not actively participating in hostilities. Did the Appeals Chamber come to this conclusion because driving Crisis Staff officials did not constitute a direct participation in hostilities or because Valjalo was not driving Crisis Staff officials when he was attacked? Would he have been considered as directly participating in hostilities if he had been injured while driving Crisis Staff officials? (P I, Art. 51(3); P II, Art. 13(3))

f. Does the Appeals Chamber reject the idea appearing in the ICRC's Interpretive Guidance document that someone with a continuous fighting function in an armed group is not a civilian? Does it accept the revolving-door phenomenon, i.e. that a person who regularly takes direct part in hostilities regains protection against attacks each time he or she does not so participate? [**See** ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities] (P I, Art. 51(3); P II, Art. 13(3))

2. What are the differences and what are the similarities between the Appeals Chamber's approach to direct participation in hostilities and that reflected in the ICRC's Interpretative Guidance document? [**See** ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities] (P I, Art. 51(3); P II, Art. 13(3))
3. *(Trial Chamber, para. 287)* Does the Tribunal accept the claim of Lieutenant-Colonel Jovanovic that because he heard air-raid sirens, he could safely assume that all civilians were indoors and that therefore anyone in sight was a combatant? Does hearing an air-raid siren absolve attackers of the obligation to take precautions in an attack and to verify whether a person is a civilian or a combatant? (P I, Arts 57 and 58)
4. a. Does the Trial Chamber distinguish between whether the attack was indiscriminate or whether it was a deliberate attack on civilians? Does it matter under IHL whether the shelling of civilians was deliberate or indiscriminate? (P I, Art. 51; P II, Art. 13)

   b. *(Appeals Chamber, paras 270-272)* For criminal responsibility to arise, can a relevant distinction be made between whether the attack was indiscriminate or deliberate? What is the input of the Appeals Chamber in that regard? Does the notion of direct or indirect intent matter under IHL?
5. What are the elements of the offence of attacks on a civilian population and the offence of attacks on civilian objects? Is there a distinction between the two?

III. Attacks on the Old Town of Dubrovnik

1. a. How does the Trial Chamber classify the Old Town of Dubrovnik? Can an entire section of a city be a "civilian object"? Even if there are military personnel stationed there? Even if there are rockets and other weapons located there? Does the classification of the Old Town of Dubrovnik as a World Heritage Site mean that it can never be a military objective? (1954 Hague Convention on Cultural Property, Art. 4) [**See** Conventions on the Protection of Cultural Property [Part A.]]

   b. How can cultural property become a military objective? Do you agree with the Trial Chamber that the use and not the location of such property must be determinative (Trial Chamber, para. 310)? What does the 1954 Hague Convention on Cultural Property suggest? [**See** Conventions on the Protection of Cultural Property]

   c. Is "imperative military necessity", as the standard for when cultural property may be legitimately

attacked, a higher standard than the qualification as “military objective”, which is the standard for other objects? Does the Tribunal address this question? Why or why not? What is the relationship between the protection of cultural objects in Protocols I and II and in the 1954 Hague Convention? Who determines whether the military necessity is “imperative”? (P I, Art. 53; P II, Art. 16; 1954 Hague Convention on Cultural Property, Art. 4) [**See** Conventions on the Protection of Cultural Property]

   d. Why does the Tribunal discuss the nature of the Crisis Staff whose offices are situated in the Old Town *(Trial Chamber, para. 284)*? In your opinion, would the Crisis Staff headquarters have been a legitimate military objective if the staff had been providing information to Croatian forces? Would this activity correspond to the requirement of “imperative military necessity” for when cultural property may be targeted? (P I; Art. 52; 1954 Hague Convention on Cultural Property, Art. 4) [**See** Conventions on the Protection of Cultural Property]
   e. (Trial Chamber, para. 285) In this case, the Old Town of Dubrovnik is a registered World Heritage Site. Which other factors may determine whether a civilian object amounts to “cultural property”? Does the Tribunal list other factors? Why? Is there any significance to the fact that many women and children had left the Old Town due to the ongoing naval blockade?
   f. (*Trial Chamber, para. 329)* What is the significance of the fact that there were “protective UNESCO emblems” marking the Old Town? Do UNESCO emblems have the same protective function as the red cross or red crescent? (GC I, Arts 39-43; P I, Art. 18; 1954 Hague Convention on Cultural Property, Arts 4 and 17) [**See** Conventions on the Protection of Cultural Property]

2. *(Trial Chamber, paras 195 and 295)* Is the Trial Chamber correct in holding that the question of proportionality does not arise on the facts of this case? Why/why not? Does the Trial Chamber indicate what its findings might have been with a proportionality assessment, if there had been military objectives in the Old Town?
3. How does the Tribunal determine that destruction of cultural property entails individual criminal responsibility? Is a treaty provision obliging States to criminalize certain behaviour sufficient to determine that individual criminal responsibility attaches to that behaviour under international law?
4. *(Trial Chamber, para. 308)* Does every violation of IHL in terms of unlawful attacks entail criminal liability? What additional elements are required for criminal responsibility to attach to acts of hostility directed against cultural property?

IV. Strugar’s criminal responsibility

1. *(Trial Chamber, paras 347 and 415-417; Appeals Chamber, paras 297-308)* Is a superior responsible for crimes committed by subordinates as soon as he or she knows of any risk that those subordinates might commit such crimes (and does not do everything feasible to prevent or repress them? Did the Trial Chamber find that Strugar knew or should have known that Dubrovnik more generally would be attacked when he ordered the attack on Srdj? What level of certainty that troops might engage in unlawful shelling of Dubrovnik is necessary in order to hold a superior criminally responsible for ordering an attack on a legitimate military objective? Is less certainty required under the doctrine of command responsibility?
2. *(Trial Chamber, para. 343)* Why does the Tribunal note that Croatian fire was sufficiently serious to threaten the success of the JNA attack on Srdj?
3. Does the Tribunal hold that Strugar was under an obligation to order that the attack on Srdj be stopped

once he was aware that supporting fire for that attack was being directed at the city of Dubrovnik and the Old Town *(Trial Chamber, para. 433)*? In such circumstances, does IHL require a commander to stop an attack? Which rules of IHL could be used to support such a holding? (P I, Arts 51(4) and 57)

4. *(Trial Chamber, paras 433-434)* Under the doctrine of command responsibility, is the obligation to prevent and punish an obligation of result or of means? In the view of the Tribunal? In your view, which should it be?
5. *(Trial Chamber, para. 420)* Regarding the preventive measures under command responsibility, does IHL require a commander to be “cautious” in giving orders? Does the failure to issue an explicit order not to attack the Old Town give rise to criminal liability? Would issuing an order specifying that the Old Town should not be attacked during the attack on Srdj be part of the precautionary measures a commander must take? Is there a distinction between precautionary measures required by IHL and preventive measures required by command responsibility when it comes to planning attacks? (P I, Art. 57)
6. Why does the relationship between Lieutenant-General Strugar and Captain Kovacevic matter with respect to command responsibility?
7. Why could Strugar not be convicted of murder even though all the elements of the crime were established? According to the doctrine of cumulative convictions as applied by the Tribunal, can there ever be a situation in which a superior is guilty of murder for deaths caused during an unlawful attack? What distinct elements may exist?