



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of
Former Yugoslavia since 1991

Case No. IT-01-47-AR73.3

Date: 11 March 2005

Original: English

IN THE APPEALS CHAMBER

Before: Judge Theodor Meron, Presiding
Judge Fausto Pocar
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Inés Weinberg de Roca

Registrar: Mr. Hans Holthuis

Decision: 11 March 2005

PROSECUTOR

v.

ENVER HADŽIHASANOVIC and AMIR KUBURA

**DECISION ON JOINT DEFENCE INTERLOCUTORY APPEAL
OF TRIAL CHAMBER DECISION ON RULE 98BIS MOTIONS
FOR ACQUITTAL**

The Office of the Prosecutor:

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1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991 (“Appeals Chamber” and “International Tribunal” respectively) is seised of an Interlocutory Appeal of Trial Chamber Decision on Enver Hadžihasanović and Amir Kubura’s Rule 98*bis* Motions for Acquittal (“Defence Appeal”).

I. BACKGROUND

2. On 27 September 2004, the Trial Chamber in the case against Enver Hadžihasanović and Amir Kubura (“Appellants”) rendered its Decision on the Defence Motions for Acquittal Pursuant to Rule 98*bis* of the Rules of Procedure and Evidence (“Impugned Decision”).¹ Following a request for certification by the Appellants, the Trial Chamber certified three grounds for appeal before the Appeals Chamber.²

3. The three grounds certified by the Trial Chamber are as follows:

- a) the Chamber erred in law in ruling that it had jurisdiction to adjudicate on Count 5 of the Third Amended Indictment (the “Indictment”);
- b) the Chamber erred in law in ruling that it had jurisdiction to adjudicate on Count 6 of the Indictment; and
- c) the Chamber erred in law in ruling that it had jurisdiction to adjudicate on Count 7 of the Indictment.³

4. In certifying these grounds, the Trial Chamber considered that the questions were relevant for interlocutory appeal because (1) the Trial Chamber at this stage could not rule whether the nature of the armed conflict was international or non-international; (2) the “Prosecution made it known that it was not intending to define the nature of the armed conflict”⁴; and (3) if the conflict were determined to be non-international then the Appellants’ question of competence would be material.

¹ Decision on Motions for Acquittal Pursuant to Rule 98*bis* of the Rules, 27 September 2004 (“Impugned Decision”).

² Decision on the Request for Certification to Appeal the Decision Rendered Pursuant to Rule 98*bis* of the Rules, 26 October 2004 (“Decision on Certification”).

³ Joint Defence Interlocutory Appeal of Trial Chamber Decision on Enver Hadžihasanović and Amir Kubura’s Rule 98*bis* Motions for Acquittal, 2 November 2004 (“Defence Appeal”), para. 1.

⁴ Decision on Certification, page 7.

II. SUBMISSIONS OF THE PARTIES

5. In filing this Appeal, the Appellants do not identify any error in the reasoning of the Trial Chamber but instead reassert in full the arguments that were apparently put before the Trial Chamber and rejected by it. This is not the purpose of an appeal. An appeal is not a hearing *de novo* of arguments considered and rejected by a Trial Chamber. In filing an Appeal, the Appellants are expected to identify precisely the error in the reasoning of the Trial Chamber.⁵

6. While the Appellants fail to identify any actual error in the reasoning of the Trial Chamber, the Appellant's basic assertion is that the Trial Chamber erred in holding that it had jurisdiction over Counts 5, 6 and 7 of the Indictment because the Article 3 offences charged in those counts are derived from the law of occupation, which only applies in international armed conflict. The Appellants claim that the Prosecution did not plead or prove an international armed conflict.⁶ Coupled with this complaint is the complaint that the Prosecution was required to identify precisely the conventional law or customary norm underpinning the Article 3 offence pleaded because without doing so it impossible for the Appellants to know the case they have to meet. In this regard, the Appellants claim that the *Tadić* Jurisdiction Decision specifies four conditions that must be met for Article 3 of the Statute of the International Tribunal ("Article 3") to become applicable and for an offence to be subject to prosecution pursuant to that Article:

- i) the violation must constitute an infringement of a rule of international 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; and
- iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.⁷

The Appellants claim that the Prosecution's failure to identify clearly the conventional law or customary norm alleged to be breached makes it impossible to ascertain whether the required

⁵ *Prosecutor v. Milorad Krnojelac*, IT-97-25-A, Judgement, 17 September 2003, paras. 10-18.

⁶ Article 3, under the heading "Violations of the laws or customs of war", states,
 "The International Tribunal shall have the power to prosecute persons violating the laws or customs of war.
 Such violations shall include, but not be limited to:
 (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
 (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
 (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
 (d) seizure of, 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;
 (e) plunder of public or private property."

⁷ Defence Appeal, para. 5 citing *Prosecutor v. Dusko Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 ("*Tadić* Jurisdiction Decision"), para. 94.

conditions of that rule of international law have been met.⁸ The Appellants argue further that, while the Prosecution could have charged stand alone norms of customary international law, their reference to Article 3 provisions of the Statute excluded this possibility.⁹

7. In essence, the Appellants are complaining about the pleading practice of the Prosecution. The Appellants say they did not challenge the form of the Indictment before trial, as they are entitled to do pursuant to Rule 72 of the Rules, because the *Tadić* Jurisdiction Decision confirmed that Article 3 of the Statute was applicable to both situations of international and non-international armed conflict.¹⁰ However, the Appellants now argue that the *Tadić* Jurisdiction Decision did not hold that all Article 3 offences are applicable to both types of conflict because Dusko Tadić was not indicted for Article 3 offences against civilian property. The Appellants say that it is appropriate for them to bring this challenge now because the charges contained in Counts 5, 6 and 7 of the Indictment are only applicable to international armed conflicts, and the Prosecution has failed to establish the existence of an international armed conflict at trial.¹¹

8. In response, the Prosecution contends that the complaints made by the Appellants are matters that should have been addressed in preliminary motions challenging the form of the indictment and the jurisdiction of the Tribunal pursuant to Rule 72 of the Rules.¹² In the alternative, the Prosecution argues that it is not required to identify the conventional law or customary norm underpinning the Article 3 offences charged in Counts 5, 6 and 7. It claims that by pleading the subparagraphs of Article 3, the Prosecution provided sufficient notice to the Appellants of the case it has to meet.¹³ The Prosecution further argues that, early in the proceedings, it made clear its view that the Article 3 offences charged in Counts 5, 6 and 7 were prohibited in both international and non-international armed conflicts.¹⁴ In any event, the Prosecution submits that it introduced evidence at trial indicating that the conflict was international and that this is a matter that will be determined by the Trial Chamber in its Judgment.¹⁵

⁸ Defence Appeal, paras. 18-19.

⁹ *Ibid.*, para. 55.

¹⁰ *Ibid.*, para. 56.

¹¹ *Ibid.*, para. 14.

¹² Prosecution Response to Joint Defence Interlocutory Appeal of Trial Chamber Decision on Enver Hadžihasanović and Amir Kubura's Rule 98 *Bis* Motions for Acquittal, 15 November 2004 ("Prosecution Response"), para. 4.

¹³ *Ibid.*, para. 29.

¹⁴ *Ibid.*, para. 30.

¹⁵ *Ibid.*, para. 5.

III. ANALYSIS

A. Pleading Practices of the Prosecution

9. The interlocutory appeal of the Appellants does relate to issues that should have been raised in a preliminary motion filed pursuant to Rule 72 of the Rules. The first complaint is directed to the pleading practices of the Prosecution. In relation to each of the Counts challenged on this Appeal, the Appellants argue that the Prosecution failed to satisfy the first requirement of the *Tadić* Jurisdiction Decision by not identifying the rule of international humanitarian law alleged to have been breached, or indicating whether the legal basis for that count was the laws of war (conventional) or customary international law (customs of war).¹⁶

10. While the Appeals Chamber agrees that an accused is entitled to know the jurisdictional basis for the charge against him, the Appellants in this case did not complain of the Prosecution's pleading prior to the commencement of this trial pursuant to Rule 72 of the Rules.¹⁷ Given that it was clear at that time that the Prosecution was not expressly pleading the nature of the armed conflict, and that the Prosecution was proceeding on the basis that Article 3 applied to both international and non-international conflicts, it might be inferred that the Appellants saw a tactical advantage in waiting until this time. While the Appellants say that, during the pre-trial stage, they made no challenge to the pleading because of the holding of the *Tadić* Jurisdiction Decision regarding the application of Article 3 offences to both types of conflict, they also say that the *Tadić* Jurisdiction Decision did not establish the applicability of all Article 3 offences to non-international armed conflicts, because *Tadić* was not charged with any property offences under Article 3.¹⁸ Hence, the Appellants' reliance on the *Tadić* Jurisdiction Decision as a reason for not bringing a pre-trial motion challenging the Prosecution's pleading is not persuasive. The Appellants knew at the time of the issuing of the Indictment that their argument would be that the *Tadić* Jurisdiction Decision did not establish the application of the Article 3 offences subject of Counts 5, 6 and 7 to non-international armed conflicts, and that complaint should have been made pre-trial.

11. The Appellants further complain that the Prosecution did not identify the legal basis for the Counts charged because it did not want to commit itself to proving that the armed conflict was either international or non-international.¹⁹ This is also a complaint about the pleading practice of the Prosecution that should have been brought by the Appellants during the pre-trial stage. By not pleading the nature of the armed conflict in the Indictment, the Prosecution left the issue to the Trial Chamber to determine. The Prosecution also made it clear to the Appellants that it did not consider

¹⁶ Defence Appeal, para. 45.

¹⁷ *Prosecutor v Pavle Strugar, et al.*, IT-01-42-AR72, 22 November 2002, para. 13.

¹⁸ Defence Appeal, para. 56.

the Tribunal's jurisdiction over Counts 5, 6, and 7 to be dependent on a finding that an international armed conflict occurred. If the Appellants required greater clarification than this, they should have filed a pre-trial motion pursuant to Rule 72.

B. Jurisdiction of the Tribunal over Article 3 Offences

12. The second complaint of the Appellants relates to the jurisdiction of the Tribunal over Counts 5, 6 and 7 in non-international armed conflicts. This is also a complaint that should have been made by the Appellants pre-trial pursuant to Rule 72. However, because the resolution of this issue will assist both the Appellants and the Prosecution in the further conduct of the trial proceedings, and the Trial Chamber in the rendering of its judgment, the Appeals Chamber resolves to determine this issue.

1. Scope of Article 3

13. The Appellants' challenge to the Tribunal's jurisdiction over Counts 5, 6 and 7 of the Indictment stems from the Appellants' interpretation of the *Tadić* Jurisdiction Decision regarding the scope of jurisdiction under Article 3 of the Statute. In the *Tadić* Jurisdiction Decision, the Appeals Chamber held that Article 3 confers jurisdiction over any serious offence against international humanitarian law committed in non-international or international armed conflict not covered by Articles 2, 4, or 5.²⁰ The Appeals Chamber prescribed a four-prong test to ensure that offences charged under Article 3 lie within the International Tribunal's jurisdiction.²¹ On appeal the Appellants argue that the jurisdictional grant embodied in the enumerated provisions of Article 3 only refers to the conventional law from which that text is derived. The Appellants claim that as that conventional law underpinning Articles 3(b), (d) and (e), charged in Counts 5, 6 and 7 of the Indictment respectively, relates to international armed conflicts and situations in occupied territory, the Tribunal does not have jurisdiction over these offences in non-international armed conflicts.²²

14. The Appellants' position is an unnecessarily narrow reading of the Appeals Chamber's jurisprudence with respect to the scope of the enumerated provisions in Article 3. In the *Tadić* Jurisdiction Decision, the Appeals Chamber stated, with respect to the list of enumerated violations, that "*this list* may be construed to include other infringements of international humanitarian law",²³ demonstrating that the enumerated crimes of the list itself should be considered to encompass rules

¹⁹ *Ibid.*, paras. 50, 66, 72, 78.

²⁰ *Tadić* Jurisdiction Decision, paras. 89-91 (and noting the Secretary-General's Report, which stated that "Article 3 is taken to cover all violations of international humanitarian law other than [those covered by other provisions of the Statute]").

²¹ *See supra*, para. 5.

²² Defence Appeal, paras. 25-29.

²³ *Tadić* Jurisdiction Decision, para. 87 (emphasis added).

in addition to the conventional law from which their text originates.²⁴ Accordingly, properly understood, Article 3 confers jurisdiction over violations of rules that are expressed by the provisions of the Article, but which are not limited to the conditions of the rule's origin in conventional instruments applicable to international armed conflicts only.²⁵

15. The arguments made by the Appellants in challenging the Trial Chamber's jurisdiction over Articles 3(b), (d) and (e) in non-international armed conflicts were considered by the Trial Chamber in its Impugned Decision. Because the Appellants fail to identify how the Trial Chamber erred, as they are required to do when bringing an Appeal, the Appeals Chamber will not consider the argument of the Appellants *de novo*. Rather, the Appeals Chamber will focus upon the reasoning of the Trial Chamber to determine whether the Trial Chamber erred in finding that it has jurisdiction over Articles 3(b), (d) and (e) as charged in Counts 5, 6 and 7 respectively, in non-international armed conflict.

2. Count 5

16. In Count 5 of the Indictment the Prosecution charges the Appellants with "[w]anton destruction of cities, towns or villages not justified by military necessity" in the municipalities of Zenica, Travnik and Vareš pursuant to Article 3(b) of the Statute of the Tribunal.²⁶

(a) Trial Chamber's findings

17. In determining that it did have jurisdiction over Count 5 of the Indictment in a situation of non-international armed conflict, the Trial Chamber referred to provisions of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts ("Additional Protocol II").²⁷ Article 4 of Additional Protocol II prohibits pillage, Article 16 prohibits the damaging of places dedicated to religion or other specific purposes, and Article 13 provides general protection from military operations to the civilian population and individual civilians. In relation to the general protection provided by Article 13, the Trial Chamber referred to the Commentary of the International Committee of the Red Cross ("ICRC"), which states that Article 13 is "based on the general principles relating to the protection of the civilian population which apply irrespective of whether the conflict is an international or a non-international one", and that the principle of distinction and proportionality are among these

²⁴ Regulations annexed to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 ("Hague Regulations").

²⁵ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Annex containing the Charter of the International Military Tribunal, art. 6, Aug. 8, 1945, 59 Stat. 154, 82 U.N.T.S. 279 ("Nuremberg Charter").

²⁶ *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-PT, Third Amended Indictment, 26 September 2003 ("Third Amended Indictment"), para. 45.

²⁷ U.N.T.S. No. 17513, vol. 1125, p. 609.

principles. The Trial Chamber considered that these principles denote “that attacks against dwellings, schools and other buildings occupied by civilians are prohibited unless the buildings have become legitimate military objectives” and that “[t]he protection of civilian property may therefore be the necessary corollary to the protection of the civilian population in certain cases”.²⁸ The Trial Chamber also referred to the Preamble to Additional Protocol II reference to the Martens Clause and the basic principle that “in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience”.²⁹

18. Following consideration of these provisions of Additional Protocol II, the Trial Chamber turned to relevant resolutions of the United Nations General Assembly. In resolution 2444 (XXIII) of 19 December 1968 on the respect for human rights in armed conflict and resolution 2675 (XXV) of 9 December 1970 on the basic principles for the protection of civilian populations in armed conflict, the United Nations General Assembly affirmed that the principle of distinction applied to all armed conflicts, whether international or non-international. In particular, the Trial Chamber noted that paragraph 2 of resolution 2675 (XXV) acknowledges that “in the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in the hostilities and the civilian populations,” and paragraph 5 sets out the principle that “dwellings or other installations that are used only by civilian populations should not be the object of military operations”.³⁰

19. The Trial Chamber also considered the adoption by the former Yugoslavia in 1988 of rules on the application of the international laws of war by the armed forces of the SFRY.³¹ It noted that Article 7 of those rules was explicit that war operations must be directed solely towards armed enemy forces and military installations, and that Articles 4 and 6 made that principle applicable to both international and non-international armed conflicts. Likewise, Article 142 of the Penal Code of the former Yugoslavia, in enumerating war crimes against the civilian population, made no distinction between international and non-international armed conflicts and encompassed the prohibition against the “seizure and plunder of private property and the widespread destruction of property not justified by military necessity”.³²

20. The Trial Chamber also took notice of the position taken by the ICRC on the applicability of international humanitarian law in a non-international armed conflict by its request to the parties

²⁸ Impugned Decision, para. 98.

²⁹ *Ibid.*

³⁰ *Ibid.*, para. 99.

³¹ *Ibid.*, para. 100.

³² *Ibid.*, para. 100.

to the armed conflict in Angola in June 1994 to respect this body of law and its prohibition against attacks on civilian property.³³

21. On the basis of these authorities, the Trial Chamber found that the principles proclaimed by the General Assembly in the resolutions referred to above were established rules of customary international law at the time and that those principles are more generally considered as declaratory of customary law.³⁴ The Trial Chamber also noted that the International Court of Justice (“ICJ”), in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* of 8 July 1996, confirmed that “the existence of cardinal principles in the texts constituting the fabric of humanitarian law, the first of which in respect of the distinction between combatants and non-combatants, seeks to protect the civilian population and civilian property” and also confirmed the application of those principles to both international and non-international armed conflicts.³⁵ The Trial Chamber found that the ICJ’s opinion also confirmed that the prohibition of wanton destruction of cities, towns or villages during a non-international armed conflict was prohibited by customary international law during the period relevant to the Indictment against the Appellants.³⁶

22. Having found that Article 3(b) of the Tribunal’s Statute reflected customary international law that is applicable in non-international armed conflicts, the Trial Chamber went on to consider whether a breach of the Article 3(b) prohibition entailed the individual criminal responsibility of a person in the period relevant to the Indictment in the context of a non-international armed conflict. Referring to previous jurisprudence of the Appeals Chamber, the Trial Chamber concluded that it did so.³⁷

23. Finally, the Trial Chamber considered the previous jurisprudence of the Tribunal and identified the elements of the Article 3(b) prohibition in international armed conflicts as: the destruction of property on a large scale; the destruction is not justified by military necessity; and the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction. Having identified those elements, the Trial Chamber “provisionally” viewed them as applicable in both international and non-international armed conflicts.³⁸

(b) Argument of Appellants

³³ *Ibid.*, para. 102.

³⁴ *Ibid.*, para. 103.

³⁵ *Ibid.*, para. 104 (quoting Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, International Court of Justice, 8 July 1996, para. 78).

³⁶ *Ibid.*, para. 104.

³⁷ *Ibid.*, para. 105.

³⁸ *Ibid.*, para. 107.

24. The Appellants complain that the legal basis for Article 3(b) of the Statute is the 1907 Hague Convention (IV), which applies only to situations of international armed conflict. The Appellants add that Article 3(b) is drawn from Article 6(b) of the Nuremberg Charter and as such refers to a violation which takes place in occupied territories. The Appellants claim that, because the notion of occupied territory does not exist in the context of a non-international armed conflict, the prohibition of Article 3(b) of the Statute cannot be a norm of customary international law applicable in situations of non-international armed conflict and the Tribunal does not have jurisdiction over Count 5 of the Indictment.³⁹

25. The Appellants argue further that it appears from paragraph 44 of the Indictment that the Prosecution's theory for Count 5 was an attack-based crime as evidenced by the words "in the course of their combat activities."⁴⁰ The Appellants claim that there is no conventional rule of international humanitarian law prohibiting such conduct in the context of a non-international armed conflict and that this conclusion is supported by the ICRC commentary on Article 14 of Additional Protocol II, which states that "specific legal protection for objects indispensable to the survival of the civilian population is all the more important as Protocol II, unlike Protocol I, does not protect civilian objects in general".⁴¹

(c) Analysis

26. The text of Article 3(b) of the Statute has its origin in Article 23 of the Hague Convention (IV) of 1907 and the annexed Regulations, and there is no dispute that both the Hague Convention (IV) of 1907 and The Hague Regulations have become part of customary international law.⁴² The footnote references in the relevant part of the Impugned Decision show that the Trial Chamber recognized that these Conventions formed the basis of the customary evolution of the prohibition against wanton destruction of cities, towns and villages not justified by military necessity in international armed conflicts.⁴³ Although this prohibition originated in conventional international law that applies to international armed conflict, its development in conventional and customary international law demonstrates that it applied in customary international law at the time relevant to this case.

27. In finding that the prohibition of Article 3(b) had evolved as customary international law in non-international armed conflicts, the Trial Chamber referred to provisions of Additional Protocol II and resolutions of the General Assembly prohibiting attacks against civilian objects during non-

³⁹ Impugned Decision, paras. 46-49.

⁴⁰ *Ibid.*, paras. 26, 54.

⁴¹ *Ibid.*, para. 53.

⁴² See *Tadić* Jurisdiction Decision, para. 86.

⁴³ Impugned Decision, para. 96, see footnotes 179, 180.

international armed conflicts.⁴⁴ The Trial Chamber's analysis is consistent with the jurisprudence of the International Tribunal, which has determined that jurisdiction pursuant to Article 3 of the Statute includes the customary international law as embodied in the Hague Regulations, the Geneva Conventions, and those aspects of the Additional Protocols which have been determined to apply in situations of international and non-international armed conflict.⁴⁵ The Trial Chamber's analysis reflects the International Tribunal's jurisprudence that the protection of civilians and civilian objects from the effects of armed conflict are not contingent on where the civilian and civilian objects are located, or whether it is in occupied territory.⁴⁶ Rather, the Appeals Chamber finds that the relevant question is whether the civilian objects in question are entitled to protected status under the customary law of armed conflict at the time of the offence.

28. Civilian property is subject to general protections that require the distinction between military and civilian objects, and the prohibition on attacks directed against civilian objects. These are fundamental principles of humanitarian law that apply in international and non-international armed conflict. These rules are codified in Articles 48 and 52(2) of Additional Protocol I, which apply in international armed conflict and were adopted by consensus.⁴⁷ According to the ICJ, these are "cardinal principles" of international humanitarian law and are "intransgressible principles" of customary international humanitarian law.⁴⁸ The International Tribunal has previously examined that application of some articles of the Additional Protocols as customary international law. The Trial Chamber in *Prosecutor v. Kordić and Čerkez* held that Articles 51 and 52 of Additional Protocol I and Article 13(2) of Additional Protocol II were customary law at the time of the conduct in that case.⁴⁹ The Trial Chamber in *Prosecutor v. Strugar* upheld the

⁴⁴ *Ibid.*, para. 98.

⁴⁵ *Prosecutor v. Dario Kordić and Mario Čerkez*, IT-95-14/2-PT, Decision on the Joint Defense Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3, 2 March 1999; *Prosecutor v. Pavle Strugar, Miodrag Jokić*, IT-01-42-PT, Trial Chamber Decision on Defense Preliminary Motion Challenging Jurisdiction, 7 June 2002, paras. 17-22; *Prosecutor v. Dragoljub Kunarac*, IT-96-23, IT-96-23/1, Trial Judgment, 22 February 2001; and *Prosecutor v. Pavle Strugar, Miodrag Jokić*, IT-01-42-PT, Appeals Chamber Decision on Interlocutory Appeal, 22 November 2002.

⁴⁶ *Prosecutor v. Dusko Tadić*, IT-94-1-T, Judgement, 7 May 1997, para. 615.

⁴⁷ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 161 (Article 48 provides that "in order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between . . . civilian objects and military objectives").

⁴⁸ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, International Court of Justice, 8 July 1996, para. 78.

⁴⁹ *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-PT, ICTY Decision on the Joint Defense Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3, 2 March 1999, para. 31 (stating, "[i]t is sufficient here only to address . . . Articles 51(2) and 52(1) of Additional Protocol I, and Article 13(2) of Additional Protocol II. These provisions concern unlawful attacks on civilians or civilian objects and are based on Hague law relating to the conduct of warfare, which is considered as part of customary law. To the extent that these provisions of the Additional Protocols echo the Hague Regulations, they can be considered as reflecting customary law. It is indisputable that the general prohibition of attacks against the civilian population and the prohibition of indiscriminate attacks or attacks on civilian objects are generally accepted obligations. As a consequence, there is no possible doubt as to the customary status of these specific provisions as they reflect core principles of humanitarian law that can be considered as applying to all armed conflicts, whether intended to apply to international or non-international conflicts." (emphasis added)).

customary law status of the principles prohibiting attacks on civilians and unlawful attacks on civilian objects that are articulated in Articles 51 and 52 of Additional Protocol I. The *Strugar* Appeals Chamber also noted the principles articulated in Article 13 of Additional Protocol II that apply to non-international armed conflict, and stated that these articles of the Additional Protocols are a “reaffirmation and reformulation” of the “norms of customary international law designed to prohibit attacks on civilians and civilian objects.”⁵⁰ As such, these articles do not contain new principles, but instead codify principles found in earlier law.⁵¹ The Appeals Chamber in *Strugar* upheld the customary law status of the underlying principles prohibiting attacks on civilians and unlawful attacks on civilian objects articulated in the above mentioned articles, and held that those principles gave the Tribunal jurisdiction under Article 3 of the Statute.⁵²

29. The wanton destruction of cities, towns or villages, an offence articulated in Article 3(b) of the Statute, reflects the customary international law prohibition on unlawful attacks against civilian objects which is found in conventional and customary international law applying to situations of international and non-international armed conflicts. Because this conduct is prohibited in customary international law that applies in international and non-international armed conflict, the proof of occupied territory is not required. The elements of this offence have been enunciated in several cases before the Trial Chambers, but none has considered the international nature of the armed conflict to be an element.⁵³ Devastation not justified by military necessity, an offence articulated in Article 3(b) of the Statute, includes the customary international law prohibition that destruction of the property of an adversary is prohibited, unless required by imperative military necessity. This rule applies in international and non-international armed conflict.⁵⁴

⁵⁰ *Prosecutor v. Pavle Strugar, et al.*, IT-01-42-PT, Decision on Defence Preliminary Motion Challenging Jurisdiction, 7 July 2002, paras. 17-22 (“*Strugar* Trial Decision on Jurisdiction”).

⁵¹ *Strugar* Trial Decision on Jurisdiction, paras. 17-19. The prohibition on directing attacks against civilian objects is included in other instruments pertaining also to non-international armed conflict. See, e.g., Memorandum of Understanding on the Application of IHL between Croatia and the SRFY (27 November 1991) (requiring hostilities be conducted in accordance with Articles 48 and 52 of Additional Protocol I); and Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina (22 May 1992) (same).

⁵² *Prosecutor v. Pavle Strugar, et al.*, IT-01-42-AR72, Decision on Interlocutory Appeal, 22 November 2002, paras. 9, 13 (“*Strugar* Interlocutory Appeal Decision”).

⁵³ See, e.g., *Prosecutor v. Kordić and Čerkez*, IT-95-14-T, Judgement, 26 February 2001 (“*Kordić* Trial Judgement”), para. 346 (holding the elements to be: (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); affirmed, *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Judgement, 17 December 2004, (“*Kordić* Appeals Judgement”), paras. 74-76.

⁵⁴ This is a long-standing rule of international armed conflict. See Hague Regulations Article 23(g) (“In addition to the prohibitions provided by special Conventions, it is especially forbidden . . . [t]o destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war”). The ICRC study on customary international humanitarian law notes that “[t]his rule is included in military manuals which are applicable in or have been applied in non-international armed conflicts.” Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *ICRC CUSTOMARY INTERNATIONAL HUMANITARIAN LAW*, (Cambridge, 2005) (“*ICRC CUSTOMARY INTERNATIONAL HUMANITARIAN LAW*”), vol. 1, page 28. There is an absolute prohibition on directing attacks against civilian objects, which may not be derogated from because of military necessity. See, e.g., *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, Corrigendum to Judgement of 17 December 2004, page 2.

30. The Appeals Chamber is satisfied that the conventional prohibition on attacks on civilian objects in non-international armed conflicts has attained the status of customary international law and that this covers “wanton destruction of cities, towns or villages not justified by military necessity” in international and non-international armed conflict. The Appeals Chamber is further satisfied that violations of this provision entail, in customary international law, the individual criminal responsibility of the person breaching the rule. The ICRC notes that this prohibition is contained in numerous military manuals that are applicable in or have been applied in international and non-international armed conflict,⁵⁵ and numerous states have adopted legislation making it an offence to attack civilian objects during any armed conflict.⁵⁶

3. Count 6

31. In Count 6 of the Indictment, the Prosecutor charges the Appellants with “plunder of public or private property, a violation of the laws or customs of war,” pursuant to Article 3(e) of the Statute.⁵⁷

(a) Trial Chamber’s findings

32. The Trial Chamber’s analysis of the customary nature of Article 3(e) in non-international armed conflicts rested upon past jurisprudence of this Tribunal, which has already established that it applies as customary international law to situations of non-international armed conflict. The Trial Chamber referred to the authority of the *Tadić* Jurisdiction Decision as establishing the general principle that rules of customary international law govern non-international strife and the protection of civilian objects. The Trial Chamber also referred to earlier jurisprudence of the Tribunal holding that the act of plunder contravened several norms of international humanitarian law, including those applicable to non-international conflicts under Additional Protocol II, and that these norms are customary international law. Following these authorities, the Trial Chamber concluded that the offence of plunder of public and private property was a violation of customary international law at the time the facts alleged in the Indictment occurred.⁵⁸

33. The Trial Chamber then considered whether the prohibition entailed the individual criminal responsibility of an accused in the context of a non-international armed conflict under customary

⁵⁵ ICRC CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, vol. 1, pages 26 nn. 6-8, 28 nn. 21-22, 176 nn. 25-26, 177 nn. 30-31.

⁵⁶ *Ibid.*, page 28.

⁵⁷ Third Amended Indictment, para. 45.

⁵⁸ Impugned Decision, para. 125.

international law at the time of the facts alleged in the Indictment. It concluded that it did so in light of the Appeals Chamber's general observations on this subject.⁵⁹

34. Finally, the Trial Chamber considered the previous jurisprudence of the Tribunal, which holds that in international armed conflicts the crime of plunder includes all forms of unlawful appropriation of property. Since Article 3(e) prohibits acts of looting committed by individual soldiers for their private gain and the organised seizure of property undertaken within the framework of a systematic exploitation of occupied territory, the Trial Chamber "provisionally" decided that the prohibition on those acts is applicable in both international and non-international armed conflicts.⁶⁰

(b) Argument of Appellants

35. The Appellants argue that the clear legal basis for Article 3(e) of the Statute is the 1907 Hague Convention (IV) and that this only applies in international armed conflict.⁶¹ They argue further that Article 3(e) of the Statute is drawn from Article 6(b) of the Charter of the IMT Nuremberg and as such refers to a violation which takes place in occupied territories. The Appellants argue that as the notion of occupied territory does not exist in the context of a non-international armed conflict, the "plunder of public and private property" referred to in Article 3(e) of the Statute cannot be a norm of customary international law applicable in situations of non-international armed conflict. Thus, the Appellants argue, the Tribunal does not have jurisdiction over this violation in the context of a non-international armed conflict.⁶²

36. The Appellants argue further that it appears from paragraph 44 of the Indictment that the Prosecution conceives of Count 6 as an attack based crime, based on the wording "in the course of their combat activities".⁶³ The Appellants contend that the only conventional rule of international humanitarian law which prohibits this type of conduct in non-international armed conflicts is Article 4(2)(g) of Additional Protocol II, which prohibits pillage.⁶⁴

(c) Analysis

37. The Appeals Chamber affirms that the jurisprudence of the International Tribunal shows that the offence of plunder in Article 3(e) is applicable in international and non-international armed conflict. As the Appeals Chamber has noted previously, the prohibition on plunder in Article 3(e)

⁵⁹ *Ibid.*, para. 126.

⁶⁰ *Ibid.*, para. 128.

⁶¹ Defence Appeal, para. 28.

⁶² *Ibid.*, para. 62.

⁶³ *Ibid.*, para. 67.

⁶⁴ *Ibid.*

includes “all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international criminal law, including those acts traditionally described as žpillage”.”⁶⁵ The sources of the prohibition against the unlawful appropriation of property include conventional law applicable in international armed conflict⁶⁶ and non-international armed conflict.⁶⁷ Several conventional law provisions that are considered to be customary international law prohibit the appropriation of property. Articles 28 and 47 of the Hague Regulations prohibit pillage under all circumstances in international armed conflict.⁶⁸ Article 4 of Additional Protocol II prohibits pillage under all circumstances against persons who take no part in the hostilities in non-international armed conflict.⁶⁹ Article 4 of Additional Protocol II reflects the fundamental guarantees embodied in common Article 3 of the Geneva Conventions.⁷⁰ These fundamental guarantees are customary international law⁷¹ and apply to both situations of armed conflict.⁷² The Appeals Chamber therefore finds that the customary international law rule embodied in Article 3(e) is applicable in all situations of armed conflict, and is not limited to occupied territory.⁷³

38. The Appeals Chamber is satisfied that violations of the prohibition against “plunder of public or private property” under Rule 3(e) entail, under customary law, the individual criminal responsibility of the person breaching the rule. The ICRC notes that the prohibition against pillage is found in numerous military manuals, and constitutes an offence under the legislation of a large number of States.⁷⁴ The ICTY’s jurisprudence has made clear that violation of the prohibition against plunder can entail individual criminal responsibility. The *Jelisić* Trial Chamber convicted

⁶⁵ *Kordić Appeals Judgement*, para. 79 (footnote omitted) (referring to *Kordić Trial Judgement*, para. 352); *See also ibid.*, para. 77 (stating that “[a]cts of plunder, which have been deemed by the International Tribunal to include pillage, infringe various norms of international humanitarian law”) (citing *Blaškić Appeal Judgement*, para. 147, referring to *Čelebići Trial Judgement*, para. 591).

⁶⁶ *See Kordić Appeals Judgement*, para 77.

⁶⁷ *See Article 4(2)(g) Additional Protocol II.*

⁶⁸ Article 28 states “[t]he pillage of a town or place, even when taken by assault, is prohibited”; Article 47 states “[p]illage is formally forbidden” in occupied territory.

⁶⁹ Article 4 states “[a]ll persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted . . . (2) Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph I are and shall remain prohibited at any time and in any place whatsoever: . . . (g) [p]illage”.

⁷⁰ *Tadić*, Jurisdiction Decision, para. 98.

⁷¹ *Prosecutor v. Kunarac, et al.*, IT-96-23/1-A, Judgement, 12 June 2002, para. 187 (stating that “Article 3 of the Statute incorporates customary international law, particularly Common article 3 of the Geneva Conventions, is clear from the discussions on the Statute in the Security Council . . . [and] the consistent jurisprudence of the Tribunal”) (citations omitted).

⁷² *Prosecutor v. Delalić, et al.*, IT-96-21-A, Judgement, 20 February 2001, para. 420 fn 651 (quoting Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*) (Merits), 1986 I.C.J. Reports 14, at para. 218 (27 June) stating, “Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court’s opinion, reflect what the Court in 1949 called elementary considerations of humanity”).

⁷³ *Kordić Appeals Judgement*, para. 78 (“[t]he prohibition of plunder is general in its application and not limited to occupied territories only”).

the defendant, pursuant to charges brought under Article 3(e), for “participat[ing] in the plunder of money, watches and other valuable property belonging to persons detained at Luka camp” and held that “individual acts of plunder perpetrated by people motivated by greed might entail individual criminal responsibility on the part of their perpetrators.”⁷⁵ The Trial Chamber found in the Čelebići camp case that the “prohibition against the unjustified appropriation of public and private enemy property is general in scope, and extends both to acts of looting committed by individual soldiers for their private gain, and to the organized seizure of property . . . within . . . occupied territory.”⁷⁶ The *Delalić* Trial Chamber found that acts of plunder, charged under Article 3(e), could entail individual criminal responsibility on the part of the perpetrator.⁷⁷ In the *Blaškić* and *Kordić and Čerkez* cases the defendants were indicted for violations of the prohibition against plunder pursuant to Article 3(e).⁷⁸ The *Blaškić* Appeals Judgement dismissed several convictions for plunder for failure to prove the charges, but not on the grounds that a violation if proven would not have entailed individual criminal responsibility.⁷⁹ The *Kordić* Appeals Judgement sustained convictions for charges of “plunder of public or private property, a violation of the laws or customs of war” pursuant to Article 3(e).⁸⁰ The Appeals Chamber also notes that rules on the application of international laws of war by the armed forces of the SFRY adopted by the former Yugoslavia in 1988 stated that “every individual . . . is personally responsible for any violation of the law of war whether he actually commits it or orders someone to commit it.”⁸¹ Under these rules, the applicable conventional international law included the prohibitions against pillage and plunder contained in the Hague Regulations, Geneva Conventions, and Additional Protocol II.⁸²

4. Count 7

39. In Count 7 of the Indictment the Prosecution charges the Appellants with “destruction or wilful damage done to institutions dedicated to religion, a violation of the laws of war or customs or war” pursuant to Article 3(d) of the Statute.⁸³

(a) Trial Chamber’s findings

⁷⁴ ICRC CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, vol. 1, page 182,

⁷⁵ *Prosecutor v. Jelisić*, IT-95-10-T, Judgement, 14 December 1999, paras. 48-49.

⁷⁶ *Ibid.*, para. 590.

⁷⁷ *Ibid.*, paras. 590-594; *see also* Article 44, Instructions for the Government of Armies of the United States in the Field, prepared by Francis Lieber, LL.D., originally issued as General Orders No. 100 Adjutant General’s Office, 1863 (“all robbery, all pillage or sacking, . . . are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offence”).

⁷⁸ *Prosecutor v. Blaškić*, IT-95-14-I, Second Amended Indictment, 25 April 1997; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-I, Amended Indictment, 30 September 1998.

⁷⁹ *Compare Blaškić Appeals Judgement*, para. 304 *with ibid.*, para. 573.

⁸⁰ *Kordić Appeals Judgement*, Disposition.

⁸¹ See original text and English translation in M. Cherif Bassiouni & Peter Manikas, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (Irvington- on-Hudson, New York, Transnational Publishers Inc., 1996), pp. 658-659.

40. In finding that it had jurisdiction over Count 7 of the Indictment, the Trial Chamber relied on the *Tadić* Jurisdiction Decision which recognised that customary rules had emerged to regulate non-international armed conflicts and that those rules covered the protection of private property “in particular cultural property.”⁸⁴ The Trial Chamber further referred to the *Tadić* Jurisdiction Decision, which observed – relying on Article 19 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (“1954 Hague Convention”) – that “in the event of an armed conflict not of an international character ... each party to the conflict shall be bound to apply, as a minimum, the provisions of the ... Convention which relates to respect for cultural property.”⁸⁵ The Trial Chamber considered that the Appeals Chamber in the *Tadić* Jurisdiction Decision established the customary nature of Article 19 to non-international armed conflicts.⁸⁶

41. By reference to the *Tadić* Jurisdiction Decision the Trial Chamber satisfied itself that a breach of the prohibition of Article 3(d) did entail individual criminal responsibility of a person during the period relevant to the Indictment within the framework of a non-international armed conflict.⁸⁷

42. The Trial Chamber identified the elements of Article 3(d) prohibition in international armed conflicts as a wilful act by the accused intended to cause destruction or damage to institutions dedicated to religion which are not used for a military purpose. The Trial Chamber then “provisionally” determined that those elements apply in both international and non-international armed conflicts.⁸⁸

(b) Argument of the Appellants

43. The Appellants argue that Article 3(d) is drawn from Article 56 of the Regulations annexed to the 1907 Hague Convention (IV), which refers to a violation that takes place in occupied territories in international armed conflicts.⁸⁹ The Appellants claim, therefore, that Article 3(d) of the Statute cannot be a norm of customary international law applicable to non-international armed conflicts and that the Tribunal does not have jurisdiction over this count in the context of a non-international armed conflict.⁹⁰

(c) Analysis

⁸² *Ibid.*, pp. 652-657.

⁸³ Third Amended Indictment, para. 46.

⁸⁴ Impugned Decision, para. 147.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*, para. 148.

⁸⁸ *Ibid.*, para. 149.

⁸⁹ Defence Appeal, para. 27.

⁹⁰ *Ibid.*, paras. 73-74.

44. The Appeals Chamber is satisfied that the ruling of the Trial Chamber was correct with respect to its holding that Article 3(d) jurisdiction encompasses violations of the customary international law that provides protection for cultural property in both situations of international as well as non-international armed conflict. The jurisprudence of the International Tribunal indicates that protection of cultural property in customary international law applies in all situations of armed conflict.

45. The protection of cultural property embodied in Article 3(d) is derived from conventional and customary international law that applies in both international and non-international armed conflict. As the Appellants note, Article 3 reproduces the core of Articles 27 and 56 of the Hague Regulations.⁹¹ However, as noted above, the meaning of the enumerated provisions in Article 3 of the Statute is not limited to that of the convention from which their text originates. Thus, in order to determine the scope of Article 3(d) jurisdiction, we must look at the full body of protections afforded to cultural property incorporated into Article 3(d). The Appeals Chamber has noted that there are two types of protection for cultural, historical, and religious monuments embodied in Article 3(d): general and special.⁹² General protection stems from, *inter alia*, Article 52 of Additional Protocol I, and is provided to a building or monument, including schools and places of worship, such that it “cannot be destroyed unless it has turned into a military object by offering the attacking side a definite military advantage” at the time of the attack.”⁹³ The *Strugar* Appeals Chamber considered the principles embodied in Article 52 of Additional Protocol I to be beyond doubt customary international law.⁹⁴ The ICRC notes that general protection for cultural property is set forth in many military manuals, and is restated in the legislation of numerous States.⁹⁵

46. Special protections are provided to property of great importance to the cultural heritage of every people. This protection stems from Article 53 of Additional Protocol I, which provides protection to “three categories of objects: historic monuments, works of art, and places of worship, provided they constitute the cultural or spiritual heritage of peoples,” against which it is prohibited to direct any act of hostility.⁹⁶ Several developments suggest the special protections afforded to cultural property apply in all armed conflict. Significantly, the 1954 Hague Convention expressly provides protection to cultural property in both types of conflict.⁹⁷ The *Tadić* Appeals Chamber

⁹¹ *Ibid.*, para. 27.

⁹² *Kordić* Appeals Judgement, paras. 89, 90.

⁹³ *Kordić* Appeals Judgement, para. 89.

⁹⁴ *Strugar* Interlocutory Appeal Decision, para. 10 (“the principles prohibiting . . . 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”).

⁹⁵ ICRC CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, vol. 1, pages 127-128.

⁹⁶ *Ibid.*, para. 90.

⁹⁷ 1954 Hague Convention, signed May 14, 1954, 249 U.N.T.S. 240. Article 18.1 states, in relevant part, that the Convention “shall apply in the event of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties”; Article 19.1 states in relevant part “[i]n the event of an armed conflict not

noted that Article 19 of the 1954 Hague Convention, which provides protection in non-international armed conflict, is customary international law.⁹⁸ The ICRC notes that many military manuals specify the obligation to respect and protect cultural property, and numerous States have enacted legislation that makes it an offence to attack cultural property.⁹⁹ Because the customary international law protection of cultural property embodied in Article 3(d) derives from conventional law that applies in both situations of international as well as non-international armed conflict, it follows that Article 3(d) applies in both situations of armed conflict. Further, the norm embodied in Article 3(d) is not limited to occupied territory because the relevant customary international law applies in non-international armed conflict. It should also be noted that the former Yugoslavia ratified the 1954 Convention for the Protection of Cultural Property in 1956, and that the Convention continues to apply to both the Republic of Croatia and the Republic of Bosnia-Herzegovina after their declarations of independence.¹⁰⁰

47. The Appeals Chamber in the *Tadić* Jurisdiction Appeal found that the Article 3(d) prohibition against destruction or wilful damage to institutions dedicated to religion applied to both non-international and international armed conflict.¹⁰¹ This Appeals Chamber affirms that conclusion.

48. The Appeals Chamber is satisfied that violations of the prohibition against “destruction or wilful damage done to institutions dedicated to religion” under Rule 3(d) entails, under customary law, the individual criminal responsibility of the person breaching the rule. The International Tribunal has found individuals criminally responsible for offences under Rule 3(d) while emphasizing underlying conventional rules that apply in both international as well as non-international armed conflict.¹⁰² The *Strugar* Appeals Chamber found that these conventional rules represent statements of a core principle of customary international humanitarian law that protects

on an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property.”

⁹⁸ *Tadić* Jurisdiction Decision, para. 98.

⁹⁹ ICRC CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, vol. 1, page 129.

¹⁰⁰ See *Kordić* Trial Judgement, para. 359.

¹⁰¹ *Tadić* Jurisdiction Decision, para. 86 (noting “this provision is based on the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, the Regulations annexed to that Convention, and the Nuremberg Tribunal’s interpretation of those Regulations”); *ibid.*, para. 87 (stating “the Hague Convention [is] considered *qua* customary law” applicable to international armed conflict); *ibid.*, para. 98 (noting one rule of customary international law that applies to non-international armed conflict is Article 19 of the [1954] Hague Convention, which states that “[i]n the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property”, where respect for cultural property includes protection and safeguarding of “immovable property of great importance to the cultural heritage of every people, such as monuments of architecture . . . whether religious or secular”. See Articles 1, 2, 3, 4, and 19 1954 Hague Convention); *ibid.*, para. 127 (noting the protection of cultural property as one of the “customary rules [that] have developed to govern internal strife”).

¹⁰² See, e.g., *Kordić* Trial Judgement, para. 359 (emphasizing the 1954 Hague Convention); *Kordić* Appeals Judgement, paras. 89-90 (relying on Article 52 and 53 of Additional Protocol I).

cultural property during armed conflict and that provides a sufficient basis for charging individuals with criminal responsibility in situations of both international as well as non-international armed conflict.¹⁰³

C. Sufficiency of evidence

49. Finally, the Appellants claim that the Trial Chamber should have found that there was insufficient evidence in relation to each count and that the Trial Chamber should have acquitted the Appellants on this basis.¹⁰⁴ The sufficiency of the evidence adduced by the Prosecution to establish these counts is not an issue certified for this appeal.

IV. DISPOSITION

50. For the foregoing reasons, the Appeals Chamber DISMISSES the Appeal.

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



Theodor Meron, Presiding Judge

Dated this 11th day of March 2005.

At The Hague,

The Netherlands.

[Seal of the Tribunal]

¹⁰³ *Strugar* Interlocutory Appeal Decision, paras. 10, 14.

¹⁰⁴ *Kordić* Appeals Judgement, para. 29.