

MISCATEGORISATION OF THE OLD BRIDGE OF MOSTAR IN THE *PRLIĆ ET AL* CASE

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Abstract

The 1993 destruction of the Old Bridge in Mostar, Bosnia and Herzegovina, has attracted more publicity than the destruction of any other bridge in the history of humankind. The purpose of this article is to provide insight into the visibility of the Old Bridge as an object of cultural property in the *Prlić et al* Trial Judgment before the International Criminal Tribunal for the former Yugoslavia (ICTY) and to determine whether it was treated adequately by the Trial Chamber. The question of the prominence of the Old Bridge of Mostar before the ICTY warrants particular attention in light of an ever-growing recognition of the importance of preservation of cultural property for future generations. Given the extent of the destruction of cultural property in the ongoing Syrian and Iraqi conflicts and the possible prosecution of cultural property-related crimes, observations in this article of lessons-learned are timely and instructive. .

After a brief historic overview of the Old Bridge case, the article focuses on the treatment of the Old Bridge before the ICTY. It starts with outlining cultural property-related crimes in the *ICTY Statute* and then considers the standing of the Bridge first in the *Prlić* Indictment and then in the *Prlić* Trial Judgment. The article concludes that the Old Bridge was not adequately contextualised within the paradigm of ‘cultural property’ by the ICTY in the *Prlić* trial phase. The failure to properly categorise the nature of the Old Bridge immensely undermines its significance as an object of cultural property and impacts upon a conviction of those found responsible for its destruction.

INTRODUCTION

The 1993 destruction of the Old Bridge in Mostar, Bosnia and Herzegovina, has attracted more publicity than the destruction of any other bridge in the history of humankind.¹ Equally, the destruction of no other bridge has drawn closer attention under international criminal law than the deliberate

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This article partly draws on some of the arguments made in the author’s book, *The Old Bridge of Mostar and Increasing Respect for Cultural Property in Armed Conflict* (Brill, Martinus Nijhoff Publishers, 2013).

¹ For a brief discussion about various other bridges destroyed in armed conflicts see eg, *The Prosecutor v Prlić et al (Judgment, Separate and Partially Dissenting Opinion of Presiding Judge Jean-Claude Antonetti)* (ICTY Trial Chamber III, Case No.: IT-04-74-T, 29 May 2013, Vol 6) 305 [*Judge Antonetti’s Separate Opinion*].

targeting and destruction of the Old Bridge. The destruction of the Old Bridge was dealt with by the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Prosecutor v Prlić et al* case (*Prlić*).² *Prlić* (involving six accused: Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćoric and Berislav Pušić) was one of the largest and most complex cases before the ICTY. So expansive was the case that it is often referred to as a 'mega case'.

The Prosecution charged the accused persons in *Prlić* with having participated in a joint criminal enterprise between 18 November 1991 and April 1994. The Prosecution alleged that, *inter alia*, the joint criminal enterprise was designed to subject the Muslims and other non-Croats living the regions of the territory of Bosnia and Herzegovina, which were claimed as territories of the Croatian Community (and later Republic) of Herzeg-Bosna, in order to remove them permanently and to create a Croatian territory with the borders of the Croatian Banovina.³ The Prosecution charged the Accused with a number of crimes under the ICTY's jurisdiction which were committed in various municipalities in Bosnia and Herzegovina.⁴ The destruction of the Old Bridge, in the municipality of Mostar, constituted one of these charges.

A substantial body of literature has been produced on the subject of the destruction of cultural property in the territory of the former Yugoslavia following its dissolution in the 1990s.⁵ Although the Old Bridge is frequently mentioned in this literature little consideration has been given to the issue of the Old Bridge's value as an object of cultural property before the ICTY. In particular, scholarly writing on *Prlić* deals fleetingly with the destruction of the Old Bridge and, save for a few exceptions, tangentially concentrates on the Old Bridge in the context of individual issues such as dual-use objects, military

² *The Prosecutor v Prlić et al* (ICTY Trial Chamber III, Case No.: IT-04-74-T [*Prlić*]).

³ See, eg, Trial Chamber, Judgment Summary for Jadranko Prlić and Others, The Hague, 29 May 2013 [3], <www.icty.org> [*Prlić Judgment Summary*].

⁴ For a brief overview of the case see, *The Prosecutor v Prlić et al (Judgment)* (ICTY Trial Chamber III, Case No.: IT-04-74-T, 29 May 2013, Vol 1 of 6 [1-29] [*Prlić Trial Judgment*]; *Prlić Judgment Summary*).

⁵ For an overview of the international legal protection of cultural property in armed conflict and the survey of cultural destruction in the former Yugoslavia, with an emphasis on the examination of the Old Bridge case before the ICTY, prior to the *Prlić Trial Judgment*, see generally, Jadranka Petrovic, *The Old Bridge of Mostar and Increasing Respect for Cultural Property in Armed Conflict* (Brill, Martinus Nijhoff Publishers, 2013) [*The Old Bridge of Mostar*]. See also, Jadranka Petrovic, 'A Monument, Identity and Nationhood: The Case of the Old Bridge of Mostar' in Duncan French (ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (Cambridge University Press, 2013); Jadranka Petrovic, 'The Cultural Dimension of Peace Operations' in Andrew Campbell (ed), *Global Leadership Initiatives in Conflict Resolution and Peacebuilding* (IGI Global) [forthcoming]; Helen Walasek, *Bosnia and the Destruction of Cultural Heritage* (Routledge, 2015); Serge Brammertz, Kevin C Hughes, Alison Kipp and William B Tomljanovich, 'Attacks against Cultural Heritage as a Weapon of War: Prosecutions at the ICTY' (2016) 14(5) *Journal of International Criminal Justice* 1143; Mark S Ellis, 'The ICC's Role in Combating the Destruction of Cultural Heritage' (2017) 49(1) *Case Western Reserve Journal of International Law* 23; Hiram Abtahi, 'The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the former Yugoslavia' (2001) 14 *Harvard Human Rights Journal* 1.

necessity and proportionality.⁶ The existing literature summarises the *Prlić* Trial Judgment, repeats portions of it verbatim, and/or comments on parts of the Summary of the Judgment read by the Presiding Judge Antonetti at the 29 May 2013 hearing when the Trial Judgment was handed down. Few of the articles analyse or critique the Trial Judgment in the context of cultural

⁶ See, eg, David Luban, 'Demystifying Political Violence: Some Bequests of ICTY and ICTR' (2016) 110 *American Journal of International Law Unbound* 251, 257 (agreeing with the *Prlić* Trial Chamber that the Old Bridge was a military objective); David Ohlin, 'Targeting and the Concept of Intent' (2013) 35(1) *Michigan Journal of International Law* 79 (identifying a two-track system for proportionality at the ICTY and distinguishing *Prlić* from other cases: 'Under the first track, an attack violates IHL if it is intentionally directed at civilians. Under the second track, an attack violates IHL, even in the absence of intent, if it produces disproportionate civilian casualties', and arguing that most prosecutions occur under the first-track system because it removes the 'fraught legal complications of proportionality' and asserting that '[t]he one exception remains *Prlić*, where an ICTY Trial Chamber held that the defendant's attack against a bridge was disproportionate to its military value' — but see Berenika Drazewska, 'The Human Dimension of the Protection of Cultural Heritage from Destruction during Armed Conflicts' (2015) 22 *International Journal of Cultural Property* 205, 215 (contending that the *Prlić* Trial Judgment is not 'atypical' but that it rather represents an evolutionary trend in the ICTY jurisprudence vis-à-vis the immunity of the cultural objects as a function of their location on the battlefield); Sebastián A Green Martinez, 'Destruction of Cultural Heritage in Northern Mali: A Crime against Humanity?' (2015) 13(5) *Journal of International Criminal Justice* 1073, 1081, 1086 (discussing a crime against humanity — persecution and stating that the Trial Judgment in *Prlić* 'concluded that the destruction of a bridge of cultural importance to the Bosnian civilian population amounted to a deprivation of the fundamental right of human dignity'. Martinez's statements do not critique the *Prlić* Trial Judgment, however. Instead, they reaffirm the destruction of cultural property as a deprivation of the fundamental right of human dignity, whilst citing with approval the persecution aspect of Antonetti's Separate and Partially Dissenting Opinion); Paige Casaly, 'Al Mahdi before the ICC: Cultural Property and World Heritage in International Criminal Law' (2016) 14 *Journal of International Criminal Justice* 1199, 1216 (observing that World Heritage status influences gravity in international criminal law for the crime of intentionally directing attacks against cultural heritage, including the *Prlić* case); Rogier Bartels, '*Prlić et al*: The destruction of the Old Bridge of Mostar and Proportionality' 31 July 2013, <<https://www.ejiltalk.org/prlic-et-al-the-destruction-of-the-old-bridge-of-mostar-and-prop...>> (discussing the principle of proportionality with reference to the Judgment Summary in *Prlić*, and arguing that the Trial Chamber did not make an explicit legal finding on the proportionality of an attack on the Old Bridge, and concluding that 'based on the Majority's own findings — would have been that the strike on the Old Bridge was proportionate at the time it was being launched'). See also, Sterling M Paulson, 'Deterring Destroyers: International Prohibitions and Punishments against the Destruction of Cultural Property' (2017) *Gonzaga University Journal of International Law*, <<https://www.law.gonzaga.edu/gjil/2017/05/deterring-destroyers-international-prohibition...>> (making reference to Article 3(d) of the *ICTY Statute* in relation to the destruction of cultural property, including the Old Bridge, and noting that *Prlić*, together with *Strugar* and *Jokić*, demonstrates that destruction of cultural property as part of a military campaign is often one aspect of a series of other war crimes and human rights violations, and that in the Balkan conflicts, destruction of cultural property was part of greater ethnic cleansing efforts: 'Indeed, when crimes against people are involved, they often become the centrepiece of the post-conflict proceedings, with charged crimes against property mainly serving to inform and weigh on the gravity of the crimes and sentencing.')

property and none discuss whether the destruction of the Old Bridge was treated adequately in the Trial Judgment.

The purpose of this Article is to provide insight into the visibility of the Old Bridge as an object of cultural property in the *Prlić et al* Trial Judgment and to determine whether it was treated adequately by the Trial Chamber. The question of the prominence of the Old Bridge of Mostar before the ICTY warrants particular attention in light of an ever-growing recognition of the importance of preserving cultural property for future generations.⁷ Given the extent of the destruction of cultural property in the ongoing Syrian and Iraqi conflicts⁸ and the possible prosecution of cultural property-related crimes, observations in this article of lessons-learned are timely and instructive. This article is useful to identify the Old Bridge's treatment before the Tribunal in the trial phase to better understand the attention given to the Old Bridge in the anticipated Appeal Judgment in the *Prlić* case (which is expected to be rendered on 29 November 2017).⁹

The Article commences with a brief historic overview of the Old Bridge case. It then focuses on the treatment of the Old Bridge before the ICTY, where it first outlines cultural property-related crimes in the *ICTY Statute*, then considers the degree of importance given to the Bridge by the *Prlić* Indictment and finally examines the prominence of the Bridge in the *Prlić et al* Trial Judgment. The article concludes that despite the number of paragraphs of the *Judgment* that are dedicated to the Old Bridge, this bridge has not been treated adequately as an object of cultural property by the ICTY in the trial phase. The

⁷ See eg, John Henry Merryman, 'Cultural Property Internationalism' (2005) 12(1) *International Journal of Cultural Property* 11; John Henry Merryman, 'The Public Interest in Cultural Property' (1989) 77(2) *California Law Review*; Maja Göpel, 'Guarding our Future: How to Protect Future Generations' (2010) 1(6) *Solutions* 62; 'Alternative Approaches to Intergenerational Equity', <<http://archive.unu.edu/unupress/unupbooks/uu25ee/uu25eeoz.htm>>; Raechel Aglin, 'The World Heritage List: Bridging the Cultural Property Nationalism-Internationalism Divide' (2013) 20(2) *Yale Journal of Law and the Humanities* 241; Catherine Grant, 'Speaking of Future Generations...Let's Not Forget Culture' *The Conversation* 16 March 2015, <<https://theconversation.com/speaking-of-future-generations-lets-not-forget-culture-38707>>; The Getty Conservation Institute, Los Angeles Research Report, *Assessing the Value of Cultural Heritage* (2002); Petrovic, *The Old Bridge of Mostar*, above n 5, 34.

⁸ See, eg, Jadranka Petrovic and Rebecca Hughes, 'The Syrian Conflict and the Use of Cultural Property for Military Purposes' in Jadranka Petrovic (ed), *Accountability for Violations of International Humanitarian Law: Essays in Honour of Tim McCormack* (Routledge, 2016) 136. See also, Helga Turku, *The Destruction of Cultural Property as a Weapon of War: ISIS in Syria and Iraq* (Springer, 2017); Marina Lostal, *International Cultural Heritage Law in Armed Conflict: Case-Studies of Syria, Libya, Mali, the Invasion of Iraq, and the Buddhas of Bamiyan* (Cambridge University Press, 2017); Patty Gerstenblith, 'The Destruction of Cultural Heritage: A Crime against Property or a Crime against People?' (2016) 15 *John Marshall Review of Intellectual Property* 336; Emma Cunliffe, Nibal Muhesen and Marina Lostal, 'The Destruction of Cultural Property in the Syrian Conflict: Legal Implications and Obligations' (2016) 23(1) *International Journal of Cultural Property* 1.

⁹ See, ICTY Press Release, 'The ICTY's Final Appeal Judgment to be Rendered on 29 November 2017', <<http://www.icty.org/en/the-icty's-final-appeal-judgment-to-be-rendered-on-29-november-2017?platform=hootsuite>>.

failure to properly categorise the nature of the Bridge immensely undermines its significance as an object of cultural property and impacts upon conviction of those found responsible for its destruction.

THE OLD BRIDGE: A BRIEF HISTORIC OVERVIEW

The Old Bridge of Mostar (or *Stari Most* as it is referred to locally in Bosnia and Herzegovina) was built in 1566 during Ottoman rule. It was a single arched, delicate stone construction with a span of 28.70 metres, with the supporting vault of only 77 centimetres deep, 3.97 metres wide, and 20.34 metres in height (above the Neretva River level measured during the summer) – which was considered to be a very ‘brave’ construction at the time.¹⁰ As acknowledged by the United Nations Educational, Scientific and Cultural Organisation (UNESCO), perfection in construction, logic and the elegance of a splendid stone structure made the Old Bridge a monument of exceptional value from an artistic, scientific and historical point of view.¹¹

It has been observed that although Mostar (the city’s name means ‘a bridge keeper’) continued to grow and to catch up with modernity, it was ‘an incredible [B]ridge’, with an early ensemble collected around it, that introduced the city, gave it ‘personality’ and took up the noblest role of being the city’s interpreter.¹² Over time, the Old Bridge grew into a symbol of tolerance for ethnic and cultural diversity, where the Bridge and the city of Mostar became connected as an indivisible semantic pair. This ‘painfully beautiful’,¹³ delicate footbridge withstood centuries of wear and tear, natural disasters, as well as human-made disasters, the latter of which included the two world wars. Yet it was the people who were supposed to protect the Old Bridge that betrayed it and sentenced it to death.

On 9 November 1993, at 10:16am, during the Croat-Muslim conflict in Bosnia and Herzegovina, the Old Bridge (the greatest cultural treasure of the city of Mostar, and of Bosnia and Herzegovina, which also represented a significant part of the cultural heritage of all humankind) was destroyed and reduced to a pile of stone blocks and fragments after being shelled by Croat tanks. The recorded images of ‘a tragic splash, as if the Neretva [River] was shedding tears for the millions of people who had now lost a cherished piece of memory’¹⁴ were televised throughout the world. What took years of artistic and engineering work to construct, and centuries of love and admiration to make

¹⁰ Amir Pašić, *The Old Bridge (Stari Most) in Mostar* (1995).

¹¹ UNESCO, ‘Mostar and its Historic Monuments’, <http://www.unesco.org/culture/heritage/tangible/mostar/html_eng/monument.shtml>.

¹² Bogdan Bogdanović, ‘Može li grad bez svog mosta, može li most bez svog grada?’ (‘Can the City be without its Bridge; Can the Bridge be without its City?’), *Most*, No. 139, June 2001, <<http://wl.500.telia.com/~u5000875/50/010.htm>>.

¹³ *Prosecutor v Mladen Naletilić, aka ‘Tuta’ and Vinko Martinović, aka ‘Štela’ (Sentencing Judgment Statement)* (ICTY Trial Chamber I, 31 March 2003, Case No. IT-98-34-T) [16] (Judge Clark, describing the Old Bridge of Mostar as ‘[t]he *painfully beautiful* old arched footbridge which stood over the Neretva River for four centuries’) (emphasis added) [*Naletilić Sentencing Judgment Statement*].

¹⁴ Suha Özkan, ‘The Destruction of Stari Most’ (1994) 14 *Development Network* 5.

this gigantic mass of stones more special than others, it took mere minutes to bring it down on 9 November 1993. Combined with the physical destruction of the Old Bridge, its historic and symbolic significance were destroyed, too.

While watching in disbelief a puff of smoke and the Bridge collapsing into the Neretva River 'like a dead beast'¹⁵ millions of people have asked how it was possible that so much love for the Bridge turned suddenly into so much animosity resulting in the Bridge's demise. Colin Kaiser correctly notes that it was the resurgence of nationalism and the subsequent armed conflicts that destroyed a common civic identity between people of various ethnicities in the region (Croats, Muslims and others).¹⁶ The Old Bridge became 'ethnicised' in armed conflict.¹⁷ Before the conflict, no one in Mostar would have said that the Old Bridge was a 'Muslim' monument. The Old Bridge became a 'Muslim' monument following initial shelling by the Serb forces, and later by the Croat forces which led to its deliberate destruction.¹⁸ The consequences of this change have been intense and lasting: the city of Mostar was divided along ethnic lines both physically and psychologically. While the physical division was eventually removed, the psychological division is still ingrained in many hearts.¹⁹

The destruction of the Old Bridge greatly impacted the citizens of Mostar, who described the Old Bridge, which spanned the East and West bank of the Neretva River, as 'our heart'.²⁰ This sentiment was echoed both throughout Bosnia and Herzegovina and beyond its borders.²¹ Although we know the destruction of the Old Bridge had an impact on the citizens of Mostar and the world, how is this obliteration of memory seen in the eyes of international law?

THE OLD BRIDGE BEFORE THE ICTY

ICTY Statute — Crimes

Under international law the deliberate destruction of cultural property may amount to a war crime²² and incur individual criminal responsibility. Cultural property is predominantly civilian in nature. As such it can be prosecuted under a number of articles of the *ICTY Statute*.²³ Several provisions

¹⁵ Michael Ignatieff, *Empire Lite: Nation-Building in Bosnia, Kosovo and Afghanistan* (London: Vintage, 2003) 2.

¹⁶ Colin Kaiser, 'Crimes against Culture' *UNESCO Courier* Sept 2000, 41, <<http://web1.infotrack.galegroup.com/itw/infomark/109/511>> ['Crimes against Culture'].

¹⁷ *Ibid.*

¹⁸ *Ibid* 3.

¹⁹ See eg, Petrovic, 'A Monument, Identity and Nationhood: The Case of the Old Bridge of Mostar', above n 5, 447.

²⁰ John Pomfret, 'A Bridge Becomes a Wedge as Span Crumbles, Unity Dreams Die' *The Seattle Times*, Monday, 30 August 1993, A3 1993 WL 6014999, <<http://web2westlaw.com>>, 1.

²¹ See, Petrovic, *The Old Bridge of Mostar*, above n5, 84-87.

²² The term 'war crime' here is used in its generic sense and means any war crime and not only a 'war crime' in its specific meaning.

²³ *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, adopted by the UN Security Council, Resolution 827 (1993) of 25 May 1993, UN SCOR, 48th Session, 3217th Meeting, UN Doc. S/RES827 (1993) [*ICTY Statute*].

of Article 3 of the *Statute* deal with civilian property generally, under the rubric of violations of the laws or customs of war, namely: Article 3(b) – wanton destruction of cities, towns or villages, or devastation not justified by military necessity; Article 3(c) – attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; and Article 3(e) – plunder of public or private property. Cultural property may also be protected by Article 2(d) – extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly (a grave breach of the 1949 *Geneva Conventions*). Furthermore, cultural property enjoys protection under Article 5(h) – persecution on political, racial and religious grounds (a crime against humanity).²⁴

However, the articles of the *ICTY Statute* outlined above do not recognize the special status of cultural property. The protection given is the same as that provided for any other (‘ordinary’) civilian object. Moreover, in case of persecution it is the civilian population to which cultural property is attached that enjoys primary protection and not cultural property itself (i.e., due to its intrinsic value) – cultural property plays only an auxiliary role here. It should be noted that Article 4 of the *Statute*, which covers genocide, does not include any direct reference to any property whatsoever. In fact, according to the jurisprudence of the ICTY, as well as of the International Court of Justice (ICJ), unlike crimes against humanity (the crime of persecution), acts directed against cultural property cannot amount to a crime of genocide.²⁵

The only article of the *ICTY Statute* that covers cultural property directly is Article 3(d).²⁶ Under this article the destruction of cultural property is deemed to be a violation of the laws or customs of war. However, neither this article nor the rest of the *Statute* uses the term ‘cultural property’. The absence of the term ‘cultural property’ in the *Statute* is due to its reliance on the *Regulations concerning the Laws and Customs of War on Land (1907 Hague Regulations)*, annexed to the *1907 Hague Convention concerning the Laws and Customs of War on Land (1907 Convention IV)*²⁷ because they form part of customary international law.²⁸ The *Regulations* do not utilize the term ‘cultural property’. The first international instrument to espouse the term ‘cultural

²⁴ *ICTY Statute* arts 2, 3 and 5.

²⁵ See, eg, *Prosecutor v Radislav Krstić (Judgment)* (ICTY Trial Chamber I, 2 August 2001, Case No. IT-98-33-T [580] [*Krstić Trial Judgment*]; ICJ, *Application of the Genocide Convention* [344], <http://www.icj-cij.org/cijwww/cdoocket/cbhyudgements/cbhy_cjudgment_20070226/>.

²⁶ Since cultural property is predominantly civilian property, in addition to the protection afforded by Article 3(d) of the *ICTY Statute*, it also enjoys the protection granted to civilian property. See, eg, *The Prosecutor v Jokić (Sentencing Judgment)* (ICTY Trial Chamber I, 18 March 2004, Case No. IT-01-42/1-S [50] [*Jokić Sentencing Judgment*]).

²⁷ *Convention (IV) respecting the Laws and Customs of War on Land, The Hague*, 18 October 1907, 36 Stat 2277 (entered into force 26 January 1920) [*1907 Convention (IV)*]; *Regulations concerning the Laws and Customs of War on Land, annexed to Convention (IV) respecting the Laws and Customs of War on Land, The Hague*, 18 October 1907 (entered into force 26 January 1910) [*1907 Regulations*].

²⁸ *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (ICJ), 14 July 2004 [*Wall Opinion*] [89].

property' is the *1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954 Hague Convention)*.²⁹ However, the *Convention* was not used as a legal basis for Article 3(d) of the *ICTY Statute*. It was rather Article 56 of the *1907 Hague Regulations*, together with Article 27 thereof, that was used as a basis for Article 3(d) of the *ICTY Statute* due to the mentioned customary nature of this legal instrument. Despite the absence of the term 'cultural property' in the *ICTY Statute*, its definition under Article 1 of the *1954 Hague Convention* is accepted by the ICTY as customary international law.³⁰ Article 1 of the *1954 Hague Convention* can aid determining whether an object constitutes cultural property and thus fall within the purview of Article 3(d) of the *ICTY Statute*. Article 3(d) of the *ICTY Statute* prohibits:

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.³¹

Article 3(d) thus accords protection to a limited number of categories of property, only a few of which fall under the rubric of 'cultural property'. Notwithstanding this, Article 3(d) protects cultural property in its own right and does not require any link to a particular group of people. Given its direct reference to at least some of the objects of cultural property, only this article of the *ICTY Statute* recognizes the special status of cultural property, which presupposes the immunity in armed conflict additional to that accorded to 'ordinary' civilian objects. As held in the *Kordić and Čerkez* case, the charge of destruction or wilful damage done to cultural property within the meaning of Article 3(d) of the *ICTY Statute* is the *lex specialis* relative to the charge of unlawful attacks on civilian objectives within the meaning of other property-related provisions of Article 3 of the *Statute*.³² A look at the relevant provisions of the *Protocol I Additional to the Geneva Conventions of 1949*,³³ which in its Article 52 provides protection for all civilian property and Article 53 of this protocol which grants protection to specific objects, namely, objects of cultural property, illustrates the distinction between the two types of protection accorded to property. This raises the question of whether the Old Bridge of Mostar constituted an object of 'cultural property' qualifying for protection under Article 3(d) of the *ICTY Statute*.

²⁹ *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, opened for signature 14 May 1954, 249 UNTS 215 (entered into force 7 August 1956).

³⁰ *The Prosecutor v Prlić et al (Judgment)* (ICTY Trial Chamber III, Case No.: IT-04-74-T, 29 May 2013, Vol 1 of 6 [174] [*Prlić Trial Judgment*]).

³¹ *ICTY Statute* art 3(d) (emphasis added).

³² *The Prosecutor v Kordić and Čerkez (Judgment)* (ICTY Trial Chamber, 17 December 2004, Case No.: IT-95-14/2-A) [167] [*Kordić*].

³³ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict*, Geneva, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) [*Additional Protocol I*]. Cultural property is also protected in non-international armed conflicts by Article 16 of *Additional Protocol II. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict*, Geneva, 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) [*Additional Protocol II*].

Was the Old Bridge an Object of Cultural Property under International Law?

The determination of the Old Bridge as an object of cultural property relies on its compliance with the relevant provisions of the 1954 *Hague Convention*. The *Convention* deals with the protection of cultural property in armed conflict exclusively.³⁴ It grants immunity in armed conflict to a broad spectrum of objects. The *Convention* distinguishes between the so-called ‘general protection’ of cultural property for a comprehensive range of objects deemed to be ‘of great importance to the cultural heritage of every people’ and the so-called ‘special protection’ of cultural property envisaged only for a limited number of select categories of cultural property. The *Second Protocol to the 1954 Hague Convention of 1999 (1999 Protocol)*³⁵ adds the third category of cultural property protection – the so-called ‘enhanced protection’ which is aimed at replacing the ‘special protection’.

In accordance with Article 1 of the *1954 Hague Convention*, the ‘general protection’ is accorded to both movable and immovable property that is ‘of great importance to the cultural heritage of every people’ irrespective of its origin or ownership and regardless of whether it is religious or secular in character. Given the nature of the Old Bridge, that is, being a monument, which is a static structure, it is obvious that it is immovable property. Under Article 1 of the *Convention*, monuments are the leading example of protected objects enumerated in its paragraph (a). To qualify for the protection, a monument needs to be of architectural, artistic or historic significance. These requirements need not to be met cumulatively. It is worth reiterating that to qualify for immunity in armed conflict it is irrelevant whether a monument is of religious or secular character or what its origin or ownership is. It is its importance from the point of view of architecture, art or history that matters.³⁶ Objects that qualify as ‘cultural’ within the meaning of Article 1 of the *Convention* enjoy immunity in armed conflict provided that they are not used for military purposes. Pursuant to Article 4 of the *Convention*, an attack on such objects can only be justified on the ground of ‘imperative military necessity’.³⁷

³⁴ The *Convention* obligates State Parties to safeguard cultural property in times of peace and to respect cultural property during armed conflicts.

³⁵ *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, opened for signature 26 March 1993, 38 ILM 769 (entered into force 9 March 2004) [1999 Protocol].

³⁶ See, eg, Jiří Toman, *The Protection of Cultural Property in the Event of Armed Conflict: Commentary on the Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocol, signed on 14 May 1954 in The Hague, and on other instruments of international law concerning such protection* (1996) 50-51; UNESCO Docs 5C/PRG/6, Annex I, [XV] and 7C/PRG/7, Annex I, 7.

³⁷ Cultural property enjoying the so-called ‘special protection’ can only be attacked in instances of ‘unavoidable military necessity’. Article 53 of *Additional Protocol I* and almost identical Article 16 of *Additional Protocol II* do not envisage a waiver of immunity on the grounds of military necessity. However, both Articles prohibit the use of cultural property for military purposes.

Cultural property is also granted immunity in armed conflict under Article 53 of the *1977 Protocol I Additional to the 1949 Geneva Conventions* and Article 16 of the *1977 Protocol II Additional to the 1949 Geneva Conventions*.³⁸ These articles apply ‘without prejudice to the provisions of the [1954] *Hague Convention*’,³⁹ meaning that in case of contradiction it is the *1954 Hague Convention* that takes primacy (where both instruments are applicable). With respect to the Old Bridge and the applicable legal instruments it needs to be noted that the former Yugoslavia was a party to the *1954 Hague Convention* from 1956 and that the Republic of Bosnia and Herzegovina, by way of succession, from the day it gained independence, was also party to this convention, which therefore points to the conclusion that the Bridge was protected under the *1954 Hague Convention*, and that this convention thus takes primacy over the *Additional Protocols*.⁴⁰

Notwithstanding this, like the *1907 Hague Regulations*, even though it includes monuments in the list of protected objects, the *1954 Hague Convention* does not prescribe criteria on the basis of which a monument is to be categorised as historic, architectural, or artistic, or a combination of these factors. It is helpful to consider other legal instruments in this regard. UNESCO documents offer some guidance, defining monuments as ‘construction[s] of a certain age and design, whatever their purpose, as well as monuments, in the more limited sense, erected to commemorate some event or person’.⁴¹ The definition of monuments provided by the *Venice Charter*⁴² is also informative. The *Charter* specifies that the concept of a historic monument embraces not only the single architectural work but also the urban or rural setting in which the evidence of a particular civilization, significant development or historic event is found, and stresses that this applies not only to great works of art but also to more modest works of the past which have acquired cultural significance with the passing of time.⁴³ Equally useful is the *1972 World Heritage Convention* which specifies the following items under this category of cultural property: ‘architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science’.⁴⁴ The *Dayton Accords* (peace agreement signed on 14 December 1995 by the Presidents of Bosnia and Herzegovina, Croatia and Serbia ending the armed conflict in Bosnia and Herzegovina and

³⁸ Article 53 *Additional Protocol I* and Article 16 of *Additional Protocol II* granting protection to cultural property in international armed conflict and non-international armed conflict respectively are almost identical.

³⁹ See, *Additional Protocol I*, art 53(a) and *Additional Protocol II*, art 16.

⁴⁰ See eg, Petrovic, *The Old Bridge of Mostar*, above n5, Chapter 4.

⁴¹ See, UNESCO Docs 5C/PRG/6, Annex I, [XV] and 7C/PRG/7, Annex I, 7.

⁴² *International Charter for the Conservation and Restoration of Monuments and Sites*, adopted at the 2nd International Congress of Architects and Technicians of Historic Monuments, which met in Venice from 25 to 31 May 1964 [*Venice Charter*], <http://www.icomos.org/docs/venice_charter.html>.

⁴³ *Ibid* art 1.

⁴⁴ *Convention concerning the Protection of the World Cultural and Natural Heritage*, 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975) [*World Heritage Convention*], art 1.

outlining a *General Framework Agreement for Peace in Bosnia and Herzegovina*), in its annex concerning national monuments, seem to encompass elements of both the definition of cultural property in Article 1 of the *1954 Hague Convention* and the definition of national monuments: ‘The following shall be eligible for designation as National Monuments: movable or immovable property of great importance to a group of people with common cultural, historic, religious or ethnic heritage, such as monuments of architecture, art or history; archaeological sites; groups of buildings; as well as cemeteries’.⁴⁵ Bosnia and Herzegovina was bound by the *1954 Hague Convention* and *Additional Protocols*, as well as by *1907 Convention (IV)* and its annexed *Regulations*, at the time of the destruction of the Old Bridge.⁴⁶ What all these instruments have in common vis-à-vis categories of cultural property covered therein is that each of them makes reference to ‘historic monuments’.

Was the Old Bridge a ‘historic monument’? The Bridge was a fixed architectural structure, a permanent crossing from the East to the West of the Neretva. Thus, it obviously belonged to the category of immovable property. The Bridge was considered to be a monument of exceptional artistic and scientific value. It also illustrated a significant stage in the history and development of the city of Mostar and of the wider region. Because of its age — that is, its 427-year lifespan — the Old Bridge fell into the category of ‘historic monuments’. The sixteenth and seventeenth century documents retrieved in the archives in Turkey for the purpose of the reconstruction of the Old Bridge,⁴⁷ point to the Ottoman architect who designed the Bridge and the year 1566 as the year of construction of the Bridge.⁴⁸

Importantly, the Bridge not only served as evidence of a significant four-centuries-long phase in the development of the city of Mostar, but it was also considered to be ‘of great importance’ to the cultural heritage of the people concerned within the meaning of Article 1 of the *1954 Hague Convention* as it was the landmark of Mostar. It stood as a symbol of unity and harmony of Mostar’s multicultural milieu and was one of the most famous monuments in the entire former Yugoslavia. It was a public, secular monument admired by people of all ethnicities. In the words of the then Director-General of UNESCO, ‘[t]he [B]ridge was exceptional both artistically and structurally, and was considered the most outstanding monument in Bosnia and Herzegovina. It also came to represent the relations of mutual understanding between the various communities of the region’.⁴⁹

⁴⁵ *General Framework for Peace in Bosnia and Herzegovina*, initialled in Dayton, 21 November 1995, signed in Paris, 14 December 1995, Annex 8 on Commission to Preserve National Monuments, art VI.

⁴⁶ See, eg, Petrovic, *The Old Bridge of Mostar*, above n5, Chapter 4.

⁴⁷ The Old Bridge was rebuilt in 2004 and together with the Old City of Mostar precinct inscribed on the UNESCO World Heritage List in 2005.

⁴⁸ See, eg, Mirjana Belanov, ‘The Mostar Bridge Conservation Issues’ December 1995, 3.2.1, <http://www.gen-eng.florence.it/starimost/10_contr/belanov/belanov.htm>.

⁴⁹ UNESCO, ‘Director-General Appeal for Reconstruction of Mostar’s Bridge’, Paris, 10 March 1994, <<http://www.unesco.org>>. For a discussion about the symbolic value of the Bridge see Walasek, above n 5 (examining the symbolic value on many fronts to many constituencies: multiculturalism, cultural diversity, reconciliation, peaceful co-existence and religious tolerance

In accordance with the *Law of Bosnia and Herzegovina on the Protection and Utilization of Cultural-Historic and Natural Heritage*, the Old Bridge was designated a monument of invaluable significance for the city of Mostar and was added to a list of national monuments of Bosnia and Herzegovina.⁵⁰ Together with 136 other monuments that represented the cultural heritage of Bosnia and Herzegovina, the Old Bridge was also added to the list of national monuments of the former Yugoslavia where it was categorised as ‘zero monument’, which was the top level in terms of classification of cultural heritage. As cultural expert Colin Kaiser explains,

[t]he zero monument was a monument of world class importance and in Bosnia and Herzegovina there was only one. It was the *Old Bridge of Mostar*...Monument value (1) was a national monument; (2) was a regional monument and (3) was a local monument.⁵¹

That the Old Bridge was ‘the zero monument’, that is, a monument of exceptional value for the entire international community, was demonstrated, *inter alia*, by the fact that before its destruction it was recommended, together with the Old City of Mostar precinct, for inscription on the World Heritage in Danger List.⁵² Therefore, in the eyes of the law and the international community, the Old Bridge of Mostar was considered a historic monument, as well as an architectural and secular monument which was ‘of great importance’ to the cultural heritage of Mostar and the rest of Bosnia and Herzegovina. Simultaneously, and importantly, the Old Bridge was also part of cultural heritage of all humankind. This is consistent with the underlining philosophy of the *1954 Hague Convention*, which avers that ‘damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all [hu]mankind, since each people makes its contribution to the culture of the world’.⁵³ As such the Old Bridge was eligible for protection under the rubric of ‘cultural property’ within the meaning of the *1954 Hague Convention*. At the

among them, all actualized through the highly visible and concrete process of bridge-building. The rebuilding of the Old Bridge was where an idea of reconstruction of cultural heritage playing an active role in the process of reconciliation between the formerly warring ethno-national groups came actively into play – the most conspicuous example of such a linkage by external actors in Bosnia and Herzegovina. The Old Bridge was characterized as a symbol of peace and reconciliation.).

⁵⁰ *Law on the Protection and Use of Cultural-Historic and Natural Heritage*, Official Gazette of SR BH, Nos 20/85 and 12/87. See also UNESCO, DRG Operational Unit, Mostar/Stari Most, ‘Rebuilding of Stari Most (Old Bridge) and the Rehabilitation of the Old Town of Mostar’, <<http://www.unesco.org/opi2/starimost.htm>>.

⁵¹ Testimony of Dr Colin Kaiser, the Prosecution witness, Public hearing in *The Prosecutor of the Tribunal v Radovan Karadžić and Ratko Mladić*, Tuesday, 2 July 1996, Case No. IT-95-18-R61 and IT-95-5-R61, Tuesday, Transcript 433 [Kaiser Testimony] (emphasis added).

⁵² See, Committee on Culture and Education of Parliamentary Assembly of Council of Europe (COE), *First Information Report*, Doc 6756, 2 February 1993, 42 [*First COE Report*] and *COE Third Information Report*, Doc 6904, 20 September 1993 [*Third COE Report*]. However, before the inscription on the List could happen, the Bridge and much of the Old City of Mostar were destroyed.

⁵³ *1954 Hague Convention*, preamble.

same time, the Old Bridge was a historic monument protected under the *1907 Regulations* which are reflected in the *Convention*, and which are together further reflected in the *1977 Additional Protocols*. But was the Old Bridge considered a ‘monument’ in the eyes of the ICTY Prosecutor?

Where Does the Old Bridge Feature in the Prlić et al Indictment?

Initial Indictment

To be prosecutable under Article 3(d) of the *ICTY Statute*, the prerequisites common to all Article 3 offences, together with the four *Tadić* Conditions, have to be met. When all the prerequisites common to all offences under Article 3 of the *ICTY Statute* are satisfied, additional elements must be met if an offence is to be charged under paragraph (d) of this article specifically.⁵⁴ To this end, the ICTY Trial Chambers specified that the damage or destruction must have been committed ‘intentionally’ to ‘protected objects’, and that such objects were ‘not being used for military purposes at the time of the acts’.⁵⁵ While some ICTY decisions reveal the further requirement that the protected objects ‘must not have been in the immediate vicinity of military objectives’⁵⁶ other decisions reject this condition.⁵⁷

The Prosecution unsealed the *Prlić* Initial Indictment on 2 March 2004. The Initial Indictment contained 26 counts. The six Accused were charged with crimes against humanity (including persecution on political, racial and religious grounds), grave breaches of the *1949 Geneva Conventions*, and violations of the laws and customs of war. Each of the 26 counts of the Initial Indictment includes numerous allegations as specified in particular paragraphs of the Indictment relating to various municipalities of Bosnia and Herzegovina. Paragraphs 43 to 217 cover eight municipalities, four of which are located in central Bosnia and Herzegovina and four in southwest Bosnia and Herzegovina. The Old Bridge is referred to in paragraph 116 of the Initial Indictment, together with religious property. Paragraph 116 alleges that:

As part of and in the course of the East Mostar siege, the Herceg-Bosna/HVO forces deliberately destroyed or significantly damaged the following mosques or religious properties in East Mostar: Sultan Selim Javuz Mosque (also known as the Mesdid Sultan Selimov Javuz Mosque), Hadži Mehmed-Beg Karađoz Mosque, Koski Mehmed-Paša Mosque, Nesuh Aga Vučijaković Mosque, Čejvan Čehaja Mosque, Hadži Ahmed Aga Lakišić Mosque, Roznamedžija Ibrahim Efendija Mosque, Čosa Jahja Hodža Mosque (also known as the Džamija Čose Jahja Hodžina Mosque), the Hadži Kurto or Tabačića Mosque, and the Hadži Memija Cernica Mosque. *On 9 November 1993, the Herzeg-Bosna/HVO forces destroyed the Stari Most (‘Old*

⁵⁴ For a discussion about the requirements under Article 3 (including paragraph (d)) of the *ICTY Statute* see generally, Petrović, *The Old Bridge of Mostar*, above n5.

⁵⁵ See *Prosecutor v Tihomir Blaškić (Judgment)* (ICTY Trial Chamber I, 3 March 2000, Case No. IT-95-14-T) [185] [*Blaškić Trial Judgment*].

⁵⁶ *Ibid.*

⁵⁷ See *Prosecutor v Naletilić and Martinović (Trial Judgment)* (ICTY Trial Chamber, 31 March 2003, Case No.: IT-98-34-T) [604].

Bridge'), an international landmark that crossed the Neretva River between East and West Mostar.⁵⁸

This is the only explicit reference to the Old Bridge in the Initial Indictment. Despite the exceptional significance of the Old Bridge, paragraph 116 does not deal with this bridge exclusively as it also includes allegations relating to the destruction or damage to other property, notably religious property in East Mostar, more precisely, 10 mosques. The Old Bridge is mentioned at the end of paragraph 116, following the list of destroyed and damaged mosques — as the last item. It is worth noting that paragraph 229 of the Initial Indictment, which enumerates various crimes under Counts 1 to 26, does include allegations made in paragraph 116. In fact, paragraph 116 is referred to in several counts of the Initial Indictment.⁵⁹ Despite frequent references to paragraph 116 in paragraph 229 of the Initial Indictment, this paragraph containing the allegations related to the Old Bridge must still be searched for carefully as each count of the Initial Indictment, as noted, refers to a number of other paragraphs containing various other allegations.

It is essential to note that paragraph 116 of the *Prlić* Initial Indictment alleges that '[a]s part of and in the course of the East Mostar siege, the Herzeg-Bosna/HVO forces deliberately destroyed or significantly damaged *the following mosques or religious properties* in East Mostar'.⁶⁰ After specifying these properties, the Initial Indictment, in the same paragraph and under the same rubric of 'religious property', alleges the destruction of the Old Bridge. This is despite the fact that the Bridge was not a religious object but, as noted above, a public and secular monument of historic and architectural, as well as scientific significance. As argued elsewhere,⁶¹ the Initial Indictment's incorrect categorisation of the Old Bridge as a religious object rather than a secular one implies that the Old Bridge 'belonged' only to the people of one specific religion, namely, the Muslim citizens of Mostar and not also to the non-Muslim population. This religious connotation in paragraph 116 of the Initial

⁵⁸ *The Prosecutor v Prlić et al (Initial Indictment)* (ICTY 4 March 2004, kept confidential until its unsealing 2 April 2004, Case No.: IT-04074-PT) [*Prlić Initial Indictment*] [116] (emphasis added).

⁵⁹ *Prlić Initial Indictment* [229] (Counts 1 (persecutions on political, racial and religious grounds, a crime against humanity, punishable under *Statute* Articles 5(h), 7(1) and 7(3)); 21 (destruction or wilful damage done to institutions dedicated to religion or education, a violation of the laws or customs of war, punishable under *Statute* Articles 3(d), 7(1) and 7(3)); 24 (unlawful attack on civilians (Mostar), a violation of the laws or customs of war, as recognized under customary law and Article 51 of *Additional Protocol I* and Article 13 of *Additional Protocol II to the Geneva Conventions of 1949*, punishable under *Statute* Articles 3, 7(1) and 7(3)); 25 (unlawful infliction of terror on civilians (Mostar), a violation of the laws or customs of war, as recognised under customary law and Article 51 of *Additional Protocol I* and Article 13 of *Additional Protocol II to the Geneva Conventions of 1949*, punishable under *Statute* Articles 3, 7(1) and 7(3)); 26 (cruel treatment (Mostar siege), a violation of the laws or customs of war, as recognised by Article 3(1)(a) of the *Geneva Conventions*, and punishable under *Statute* Articles 3, 7(1) and 7(3)).

⁶⁰ *Prlić Indictment* [229] (emphasis added).

⁶¹ See, Petrovic, *The Old Bridge*, above n5, Chapter 6.

Indictment further ‘ethnicises’⁶² the Bridge which had, in fact, been considered to ‘belong’ to everyone and not to one particular community.

Religious connotations are amplified in the wording of Count 21 of the Indictment. This count charges the accused with ‘destruction or wilful damage done to *institutions dedicated to religion or education*’, the crime punishable under Article 3(d) of the *ICTY Statute*. The wording of this count constrains itself to the indicia of destruction or wilful damage done to institutions dedicated to religion or education. Similar to the issue raised in regards to paragraph 116 of the Initial Indictment, the Old Bridge was not an institution, nor was it dedicated to religion or education. It is not clear why the wording of this count did not extend to ‘historic monuments’ when Article 3(d) of the *ICTY Statute* explicitly covers this category of cultural property. As Presiding Judge Antonetti in his separate and partially dissenting opinion observes:

It is surprising to note that the destruction of the Stari Most was not alleged in a separate paragraph, given its importance at the time of the events and its fame following its inclusion on the UNESCO World Heritage List. Basically, in spite of its description as ‘an international landmark’, the fact that it appears in para[graph] 116 of the Indictment basically raises the difficult question of whether the Stari Most is primarily a religious monument comparable to the mosques referred to mainly in this paragraph [...] The Prosecution did not place any specific emphasis on the (secular) character of a historic monument which is one of the most symbolic cultural sites affected by the conflict in the Balkans.⁶³

Things should be called by their proper names, at least where adequate terminology does exist. As discussed, the Old Bridge easily fell into the category of ‘historic monuments’. Being charged under the rubric of ‘institutions dedicated to religion or education’ adds to the invisibility of the Old Bridge as an object of ‘cultural property’ in the Initial Indictment. Religious property (as well as institutions dedicated to education) is not necessarily cultural property. Mixing the two reduces (eliminates?) the distinctive character of cultural property, which under international law enjoys the *praesidium specialis* or specific protection.⁶⁴

Although it is often claimed that a considerable number of ICTY indictments have included cultural property charges, the fact is that where Article 3(d) of the *ICTY Statute* is concerned, the charges have been primarily focused on the destruction and damage to religious property. In most instances, there have been no details at all in the indictments as to whether those properties actually constituted cultural property (ie, their age, historical, artistic or architectural importance, whether they have been protected by adequate national laws or simply regarded as objects of high importance to the cultural heritage). As in *Prlić*, charges in indictments have often involved a number of municipalities and a number of religious objects. The absence of the necessary

⁶² Meaning further to ‘ethnicising’ the Old Bridge through shelling first by the Serb forces and then the Croat forces. See, Colin Kaiser, ‘Crimes against Culture’, *UNESCO Courier*, September 2000 [8], <<http://www.infotrac.galegroup.com/itw/infomark/109/511>> [‘Crimes against Culture’].

⁶³ Judge Antonetti’s Separate and Partially Dissenting Opinion, 303.

⁶⁴ Petrovic, *The Old Bridge of Mostar*, above n5.

details makes it difficult to determine whether such objects could be considered cultural property. The inclusion of these details is not necessary for the purpose of bringing charges under Article 3(d) of the *ICTY Statute*. Still, even if they are absent from the indictments such details could be sought out in the course of the proceedings. That way the confusion as to what does and does not constitute cultural property could be reduced. Ultimately, this would lead to the effective application of the *1954 Hague Convention*, as well as the relevant provisions of the *Additional Protocols*. In *Prlić*, put simply, the Initial Indictment wrongly categorised the Old Bridge and thereby undermined its cultural property character and, as discussed below, prevented the proper prosecution and sentencing of the destruction of cultural property.

First and Second Amended Indictments

The Initial Indictment in *Prlić* was amended twice. Similar to the Initial Indictment, the *Prlić* First Amended Indictment of 16 November 2005 and the Second Amended Indictment of 11 June 2008, the latter of which became the operative indictment, invested a considerable space in enumerating the mosques damaged or destroyed in Mostar and retained the same brief reference to the Old Bridge at the very end of paragraph 116. Again, there are multiple mentions of paragraph 116. Of the 26 counts of the First and Second Amended Indictment, paragraph 116 is referred to in seven counts:

- Count 1 (persecution on political, racial and religious grounds, a crime against humanity, punishable under Articles 5(h), 7(1) and 7(3) of the *Statute*);
- Count 19 (extensive destruction of property, not justified by military necessity and carried out unlawfully and wantonly, a grave breach of the *Geneva Conventions of 1949*, punishable under Articles 2(d), 7(1) and 7(3) of the *Statute*);
- Count 20 (wanton destruction of cities, towns or villages, or devastation not justified by military necessity, a violation of the laws or customs of war, punishable under Articles 3(b), 7(1) and 7(3) of the *Statute*);
- Count 21 (destruction or wilful damage done to institutions dedicated to religion or education, a violation of the laws or customs of war, punishable under Articles 3(d), 7(1) and 7(3) of the *Statute*);
- Count 24 (unlawful attack on civilians (Mostar), a violation of the laws or customs of war, punishable under Articles 3, 7(1) and 7(3) of the *Statute*);
- Count 25 (unlawful infliction of terror on civilians (Mostar), a violation of the laws or customs of war, punishable under Articles 3, 7(1) and 7(3) of the *Statute*); and
- Count 26 (cruel treatment (Mostar siege), a violation of the laws or customs of war, punishable under Articles 3, 7(1) and 7(3) of the *Statute*).⁶⁵

⁶⁵ *The Prosecutor of the Tribunal v Prlić et al (First Amended Indictment)* (ICTY 16 November 2005, Case No.: IT-04-74-PT) [229] [*Prlić First Amended Indictment*]; *The Prosecutor of the*

Of all these counts only the crimes alleged in Count 21 are punishable under Article 3(d) of the *ICTY Statute*.⁶⁶ Between the Initial, First and Second Indictments, the Office of the Prosecutor had the opportunity to correct the mischaracterisation of the Old Bridge that was made in the Initial Indictment. The Prosecution, for unknown reasons, did not alter the Count, thus charging the Accused for the destruction of the Old Bridge under the rubric of ‘institutions dedicated to religion or education’. This is despite the fact that the Old Bridge was neither a religious institution nor an institution dedicated to education. The Prosecution’s failure to adequately amend the Initial Indictment further undermined the significance of the Old Bridge as an important object of cultural property. Notwithstanding this, considerable length of time was dedicated to the discussion of the destruction of the Old Bridge during the proceedings and in the Trial Judgment.

How Noticeable is the Old Bridge as an Object of Cultural Property in the Prlić et al Trial Judgment?

The *Prlić* trial opened on 26 April 2006 and closed on 2 March 2011. In the course of the proceedings the Trial Chamber III (with Presiding Judge Jean-Claude Antonetti; Judges Árpád Prandler and Stefan Trechsel, and Reserve Judge Antoine Kesia-Mbe Mindua) admitted nearly 10,000 exhibits into evidence and heard 145 Prosecution witnesses (including six expert witnesses) and 61 Defence witnesses (including seven expert witnesses).⁶⁷ A number of witnesses, including expert witnesses for both the Prosecution and the Defence, testified before the Tribunal, and a considerable amount of other evidence was admitted into the record in the course of the proceedings in relation to the destruction of the Old Bridge specifically. On 29 May 2016, the Trial Chamber delivered (only the French version of)⁶⁸ its six-volume, 2,629-page-long judgment, including four annexes and partially dissenting or separate opinions by the Presiding Judge Antonetti and Judge Trechsel.

The accused were found guilty of a number of crimes and sentenced to imprisonment⁶⁹ as follows:

Tribunal v Prlić et al (Second Amended Indictment) (ICTY, 11 June 2008, Case No.: IT-04-74-PT) [230] [*Prlić Second Amended Indictment*].

⁶⁶ *Prlić First Amended Indictment*, [229]; *Prlić Second Amended Indictment* [230].

⁶⁷ See Judgment Summary for Jadranko Prlić and others, Trial Chamber, The Hague, 29 May 2013, <<http://www.icty.org>>. For the statistics and other information about the *Prlić* case see, ICTY Case Information Sheet, *Prlić et al* (IT-04-74), <<http://www.icty.org>>.

⁶⁸ It took a long time for the Judgment to be translated into the English language.

⁶⁹ Unless there are changes in respect of the length of sentences, given that the Accused have already spent years in the ICTY’s detention facility (excluding provisional releases during that time) and in light of the possibility that serving the sentence in the country determined by the Tribunal can be reduced on the basis of good behaviour, the six convicted persons might be able to return to their home States soon.

- Jadranko Prlić: found guilty of Counts 1, 2 to 5, 6 to 13, 15, 16, 18, 19, and 21 to 25 of the Indictment; pursuant to the principles relating to cumulative convictions, the Chamber did not enter a conviction for Counts 14, 17 and 20 of the Indictment; and sentenced to 25 years of imprisonment;
- Bruno Stojić: found guilty of Counts 1, 2 to 5, 6 to 13, 15, 16, 18, 19, 21 to 25 of the Indictment; pursuant to the principles relating to cumulative convictions, the Chamber did not enter a conviction for Counts 14, 17 and 20 of the Indictment; and sentenced to 20 years of imprisonment;
- Slobodan Praljak: found guilty of Counts 1, 2, 3, 6 to 13, 15, 16, 18, 19, 21 to 25 of the Indictment; acquitted of Counts 4 and 5 of the Indictment; pursuant to the principles relating to cumulative convictions, the Chamber did not enter a conviction for Counts 14, 17 and 20 of the Indictment; and sentenced to 20 years of imprisonment;
- Milivoj Petković: found guilty of Counts 1, 2 to 5, 6 to 13, 15, 16, 18, 19 and 21 to 25 of the Indictment; pursuant to the principles relating to cumulative convictions, the Chamber did not enter a conviction for Counts 14, 17 and 20 of the Indictment; and sentenced to 20 years of imprisonment;
- Valentin Ćorić: found guilty of Counts 1, 2 to 5, 6 to 13, 15, 16, 18, 19, 21 to 25 of the Indictment; pursuant to the principles relating to cumulative convictions, the Chamber did not enter a conviction for Counts 14, 17 and 20 of the Indictment; and sentenced to 16 years of imprisonment; and
- Berislav Pušić: found guilty of Counts 1 to 3, 6 to 13, 15, 16, 18, 19, 21, 24 and 25 of the Indictment; acquitted of Counts 4, 5, 22 and 23 of the Indictment; pursuant to the principles relating to cumulative convictions, the Chamber did not enter a conviction for Counts 14, 17 and 20 of the Indictment; and sentenced to 10 years of imprisonment.⁷⁰

Notably, all six Accused were found guilty of Count 21 which is punishable under Article 3(d) of the *ICTY Statute*. However, a closer look at the *Prlić Trial Judgment* reveals that the Old Bridge was not dealt with under this article. This is despite a substantive discussion of the destruction of the Old Bridge in the Trial Judgment. The omission of the cultural property aspect of Article 3(d) of the *ICTY Statute* under Count 21 meant that the Accused were not convicted for the destruction of the Old Bridge under the rubric of cultural property.⁷¹ This completely stripped the Old Bridge of its cultural character in the trial phase in *Prlić*.

⁷⁰ *Prlić Trial Judgment* Vol 4, Chapter 10: Disposition, 430-432.

⁷¹ Review of the literature reveals that it is not widely stated by authors that the conviction of the Accused with respect to the Bridge was not under a crime punishable under Article 3(d) of the *Statute*. Casaly, above n 6, 1209-1210 (points to the Trial Chamber's surprise at the Prosecution's omission to charge the Accused under Count 21). Similarly, Roger O'Keefe, 'Protection of Cultural Property' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press, 2004) 492, 512, n 119 (observing in a footnote that '[t]he Trial Chamber's decision in this regard appears to have overlooked the Old Bridge at Mostar, the destruction of which was not pleaded (or at least, in one instance, was not adequately pleaded) under Art[icle] 3(d) of *ICTY Statute*').

However, as discussed below, the Trial Chamber does explain why they omitted the destruction of cultural property from their judgment. Before embarking onto that segment of this section of the article it is worth noting that discussing the applicable law in relation to ‘destruction or wilful damage done to institutions dedicated to religion or education’ alleged in the Second Amended Indictment as a serious violation of the laws or customs of war punishable under Article 3(d) of the *ICTY Statute*, the Trial Chamber acknowledged that the *1954 Hague Convention* forms part of customary international law. However, the Chamber emphasised the *Additional Protocol I* rather than the relevant provisions of the *Convention* even though the *Protocol* applies without prejudice to the *Convention*.⁷² Notwithstanding this, the Chamber followed the findings by other ICTY Chambers vis-à-vis the elements of this crime: an intentional act or omission; causing destruction or damage to a cultural or religious property; the act or omission is perpetrated with intent to destroy the cultural or religious property; and the property did not constitute a military objective within the meaning of Article 52 of *Additional Protocol I*.⁷³

With respect to the concept of a military objective the Chamber made reference to the specific, cumulative requirements spelt out in Article 52 of *Additional Protocol I* (and to the *Kordić Appeals Judgment*)⁷⁴ explaining that a cultural, historic and/or religious object is protected ‘as long as the edifice makes no actual contribution to military action *and* its destruction or capture does not offer a specific military advantage at the moment of attack’.⁷⁵ In relation to a military objective, the Chamber also stressed that ‘[t]he military advantage for each object of property must be definite and cannot offer merely an indeterminate or potential advantage’ and that ‘[k]nowing whether a definite military advantage may be achieved must be decided from the perspective of the person contemplating the attack, taking into account the information available to the latter at the moment of the attack’.⁷⁶

While this article does not focus on the issue of military necessity with respect to the destruction of the Old Bridge, it suffices to say that it is debatable whether both requirements of Article 52 of the *Additional Protocol I* were met at the time of the attack. Based on evidence presented to the Tribunal it appears that it is more likely that the attack and the destruction of the Bridge was due to other reasons, for instance, ‘retaliation’ by the Croatian Defence Council (HVO)

⁷² *Prlić Trial Judgment*, Vol 1 [171-178].

⁷³ *Prlić Trial Judgment*, Vol 1 [178]. The Praljak Defence argued that pursuant to Article 27 of the *1907 Hague Regulations* the protected building must have ‘distinctive and ‘visible’ signs. However, the Chamber correctly noted that ‘not using such a sign does not in any event withdraw protection from the property provided that the property has not been transformed into a military objective’. *Ibid* [177]. It should be noted that the *1954 Hague Convention* only requires the distinctive sign to be displayed on cultural properties under ‘special protection’. As far as the Old Bridge is concerned, it did not enjoy immunity under that type protection. The Bridge was only protected under the so-called ‘general protection’ under which a cultural object may but does not have to display a distinctive sign.

⁷⁴ *Prosecutor v Kordić and Čerkez (Judgment)* (Appeals Chamber, 17 December 2004, Case No.: IT-95-14/2-A) [*Kordić Appeals Judgment*] [89].

⁷⁵ *Prlić Trial Judgment* Vol 1 [172] (emphasis added).

⁷⁶ *Ibid* [123].

‘in the wake of the fall of Vareš’⁷⁷ rather than military necessity. According to some sources the destruction of the Old Bridge had a bigger political impact than a military one.⁷⁸ But even if Article 52 requirements were satisfied it does not mean that the HVO automatically ‘ought to’ proceed with an attack, let alone to completely destroy this invaluable object of cultural property. In such a situation the attacker can, but does not ‘have to’, attack a cultural object. There are always alternatives how to avoid the destruction of cultural property. After all, even the Accused themselves were of the opinion that there was no military justification for the destruction of the Bridge: ‘[N]o military goals or military targets that were there can justify destruction of that bridge.’⁷⁹ As the Chamber notes, there was another bridge still standing over the Neretva at the time of the destruction of the Old Bridge. If it was militarily necessary to halt the alleged use of the two bridges, still standing at the time, for military purposes by the Army of Bosnia and Herzegovina (ABiH) (ie, the Old Bridge, a historic monument, and the other nearby bridge, the *Kamenica* Bridge, a makeshift construction erected by the ABiH) one must wonder why the HVO forces did not opt to first attack the bridge with no cultural significance. Also, why did the Croat forces continue the shelling of the Old Bridge on the morning on 9 November when there is no evidence that the Old Bridge was used for military purposes on that day at all? After all, the Trial Chamber found that the Old Bridge was of no use to anyone after the shelling by an HVO tank on 8 November (and that it was practically then when the Old Bridge was destroyed even though the shelling continued the following day after which the Old Bridge finally collapsed into the Neretva River).⁸⁰

The destruction of the Old Bridge had a significant impact on the population in Mostar. The predominantly Muslim population on the East bank of the Neretva was particularly affected. In addition to the shock created by the loss of the beloved monument (felt by many, irrespective of their ethnicity),⁸¹ they ended up being totally isolated which made it impossible to get water, food and medical supply as they could no longer use the Old Bridge for such purposes.⁸² This resulted in ‘a serious deterioration of the humanitarian situation of the population living [in East Mostar]’.⁸³ The Chamber held:

⁷⁷ *Prlić Trial Judgment* Vol 2 [1352].

⁷⁸ *Ibid* [1356].

⁷⁹ *Ibid* [1286] (the statement by the Accused Jadranko Prlić).

⁸⁰ *Ibid* [1300, 1318, 1342]; *Prlić Trial Judgment* Vol 3 [1581]; *Prlić Trial Judgment* Vol 4 [583] (the Chamber noted that ‘as of the evening of 8 November 1993, the [B]ridge could be considered completely unusable’).

⁸¹ See, eg, Petrovic, *The Old Bridge of Mostar*, above n5.

⁸² *Prlić Trial Judgment*, Vol 2 [1355-1357]. See also, Susan Forde, ‘The Bridge on the Neretva: Stari Most as a Stage of Memory in Post-Conflict Mostar, Bosnia-Herzegovina (2016) 51(4) *Journal of Cooperation and Conflict* 467, 473 (observing that the destruction of the Old Bridge can be considered a ‘re-staging of spatiality in two ways: functionally this impacted civilian access to supplies; and culturally the destruction of Stari Most restaged the city in destroying a key landmark with strong cultural ties to all Mostarians, but in particular, the Muslim residents of Mostar’).

⁸³ *Prlić Trial Judgment* Vol 3 [1583].

Although the destruction of the Old Bridge by the HVO may have been justified by military necessity, the damage to the civilian population was indisputable and substantial. It therefore holds by a majority, with Judge Antonetti dissenting, that the impact on the Muslim civilian population of Mostar was disproportionate to the concrete and direct military advantage expected by the destruction of the Old Bridge.⁸⁴

The Chamber recalled that it already established that the HVO command knew that the ABiH was using the structure for military purposes and that it was perfectly aware of the major consequences the destruction of the Old Bridge would have on the morale of the population of Mostar, but that despite this, the HVO continued to shell the Old Bridge between June and 9 November 1993 and more specifically fired on the Old Bridge with a tank for two days until it collapsed on 9 November 1993.⁸⁵ In the Chamber's view the HVO command intended to destroy the Old Bridge of Mostar, thereby sapping the morale of the Muslim population.⁸⁶

The Chamber also found that 'the destruction of the Old Bridge, in view of its immense cultural, historical and symbolic value for the Muslims in particular, was extensive',⁸⁷ and concluded, by a majority, with Judge Antonetti dissenting, that 'the armed forces of the HVO destroyed the Old Bridge [...] thereby committing the crime of wanton destruction of cities, towns or villages, or devastation not justified by military necessity',⁸⁸ alleged in Count 20 of the Indictment, and punishable under Article 3(b) of the *ICTY Statute*.

As noted above, despite the significance of the Old Bridge to the cultural heritage of Bosnia and Herzegovina and to the cultural heritage of all humankind, the Chamber did not find the Accused guilty of the crime concerning the destruction of cultural property recognised by Article 3(d) of the *ICTY Statute*. The Chamber noted that the destruction of the Old Bridge was referred to in paragraph 116 of the Indictment and that it was alleged in particular under Count 21, but that the Prosecution chose to keep only 'destruction or wilful damage to institutions dedicated to religion or education' and that thus it did not include the destruction of 'historic monuments' as envisaged by Article 3(d) of the *Statute*.⁸⁹ The Chamber explained that the Defence teams were not sufficiently informed that the destruction of the Bridge could be alleged under Count 21 due to 'the lack of an official Prosecution notice of the allegation of the destruction of the Old Bridge under Count 21' and that

⁸⁴ Ibid [1584].

⁸⁵ Ibid [1586].

⁸⁶ Ibid [1586]. In *Galić*, the Trial Chamber held that '[t]o establish the *means rea* of a disproportionate attack the prosecution must prove [...] that the attack was launched wilfully and in knowledge of circumstances giving rise to the expectation of excessive civilian casualties'. *Prosecutor v Galić (Judgment)* (ICTY Trial Chamber I, 5 December 2003, Case No.: IT-98-29-T [*Galić Trial Judgment*] [59]. For an excellent discussion about the relation between absence of proportionality and lack of military necessity with respect to destruction of property see Nobuo Hayashi, 'Requirements of Military Necessity in International Humanitarian Law and International Criminal Law' (2010) 28(1) *Boston University International Law Journal* 39, 114-122.

⁸⁷ *Prlić Trial Judgment* Vol 3 [1585].

⁸⁸ Ibid [1587].

⁸⁹ Ibid [1611].

therefore the Chamber was 'unable to take into account the destruction of the Old Bridge of Mostar — a historic monument of major historical and symbolic value, in particular for the Muslim community — under Count 21 which deals only with the destruction or wilful damage to institutions dedicated to religion or education'.⁹⁰ Therefore, the Accused were found guilty under Count 20 of the Indictment (Article 3(b) of the *ICTY Statute*) with respect to the Old Bridge.

Pursuant to the principles relating to cumulative convictions (ie, where several charges, corresponding to different offences under the *Statute*, are retained for what is essentially the same criminal conduct, the aim of which is to convict the accused only for distinct offences and, at the same time, to ensure that the convictions entered fully reflect their criminality),⁹¹ the Chamber did not enter a conviction for Counts 14, 17 and 20 of the Indictment. In relation to the destruction of the Old Bridge this meant that although all Accused were found guilty under Count 20 vis-à-vis the destruction of the Old Bridge, a conviction was not in fact entered for this count of the Indictment.

The Chamber instructed that with respect to the crime of the extensive destruction of property not justified by military necessity and carried out unlawfully and wantonly (Count 19, Article 2(d) of the *Statute*) and the crime of the wanton destruction of cities, towns or villages, or devastation not justified by military necessity (Count 20, Article 3(b) of the *Statute*) only a single conviction for the crime of extensive destruction of property not justified by military necessity and carried out unlawfully and wantonly (Count 19, Article 2(d) of the *Statute*) may be entered.⁹² Therefore, the Accused were found guilty under Count 20 of the Indictment (Article 3(b) of the *ICTY Statute*) in relation to the destruction of the Old Bridge, but due to the principles of cumulative conviction, only a single conviction for the crime of extensive destruction of property not justified by military necessity and carried out unlawfully and wantonly (Count 19, Article 2(d) of the *Statute*) may be entered.

However, it is important to note that with respect to the municipality of Mostar the Chamber held that since the Old Bridge (together with the 10 mosques that were allegedly seriously damaged or destroyed by the armed forces of the HVO) was situated in East Mostar, which was not considered to be occupied by the HVO at the time, the Bridge (and the mosques) did not enjoy the protection of the *Geneva Conventions* which is a prerequisite for the protection under Article 2(d) of the *ICTY Statute*.⁹³ Thus the Chamber found

⁹⁰ Ibid [1611]. See also Walasek, above n 5 (noting that the decision of the Prosecution to 'negligently' omit the Old Bridge from Count 21 and the failure to include 'historic monuments' in that count was to have significant implications in the Trial Judgment in respect of the case of the Old Bridge).

⁹¹ *Prlić Trial Judgment*, Vol 4 [1253].

⁹² Ibid [1266].

⁹³ *Prlić Trial Judgment* Vol 3 [1545]. According to the *Brđanin* Chamber, two categories of property are protected under Article 2(d) of the *Statute*: 'real or personal property in occupied territory, belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organisations protected under Article 53 of the *Fourth Geneva Convention*' and 'property that is generally protected under the *Geneva Conventions*, regardless of location'. *Prosecutor v Brđanin (Judgment)* (ICTY Trial Chamber II,

that the destruction of the Old Bridge (and the mosques concerned) in East Mostar could not amount to the extensive destruction of property, not justified by military necessity and carried out unlawfully and wantonly within the meaning of Article 2 of the *Statute*.⁹⁴

It would follow that the Accused were not found guilty for the destruction of the Old Bridge under Count 21 of the Indictment (covering ‘cultural’ property). With respect to the Bridge, they were rather found guilty under Count 20 of the Indictment (concerning any ‘ordinary’ civilian property). However, due to the principles of cumulative convictions the Trial Chamber did not enter a conviction for Count 20 of the Indictment. Instead, the Chamber only entered a single conviction for Count 19 (Article 2(d) of the *Statute*). However, the Chamber found Article 2(d) to be inapplicable to the destruction of the Old Bridge. This makes it unclear under which count of the Indictment, and for which crime in the *ICTY Statute*, the Chamber entered a conviction for the destruction of the Old Bridge.

CONCLUSION

Relative to the size of the six-volume Judgment, the discussion concerning the destruction of the Old Bridge of Mostar occupies a considerable amount of space in the *Prlić* Trial Judgment. However, a closer look at the Indictment and the Trial Judgment reveals that the Old Bridge is lost in the ocean of charges in the Indictment and that despite being mentioned on many pages of the Trial Judgment it is difficult to determine where exactly it stands in terms of a conviction. It is unfortunate that a monument of an outstanding historical, architectural and scientific significance such as the Old Bridge of Mostar was not dealt with by the Tribunal under the category to which it incontrovertibly belonged – cultural property of great importance to the cultural heritage of Bosnia and Herzegovina and the cultural heritage of all humankind. The Prosecution’s failure to recognise this important dimension of the Bridge has not only undermined the intrinsic value of this cultural object, but by squeezing it among religious objects has further ‘ethnicised’ it. The failure to properly address the Old Bridge as cultural property in the Initial and the two Amended Indictments is a serious lesson-learned for the Office of the Prosecutor. It signals other international criminal courts and tribunals that the judiciary will not allow those accused to be prosecuted for something which they cannot anticipate and appropriately defend.

1 September 2004, Case No.: IT-99-36-T) [*Brđanin* Trial Judgment] [586]. See also *Naletilić* Judgment [575].

⁹⁴ *Prlić* Trial Judgment Vol 3 [1545].