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Introductory Text

In this case, the International Criminal Tribunal for the former Yugoslavia (ICTY) sentenced the six accused for crimes committed within the context of the dissolution of the former Yugoslavia, on those parts of the territory of Bosnia and Herzegovina claimed as part of Herceg-Bosna. The accused were part of the Croatian Defence Council (HVO), the supreme executive, administrative and military body of Herceg-Bosna run by ethnic Croats that was involved in an armed conflict with the mainly Muslim armed forces of Bosnia and Herzegovina (ABiH). Two IHL issues raised in this case will be in the focus of this discussion: First, the classification of the Muslim members of the HVO detained by the HVO, and second, the destruction of the symbolic Old Bridge of Mostar. While the Trial Chamber and the Appeals Chamber agree on the first issue, their disagreement on the second issue along with two dissenting opinions on the question opens the ground for an in-depth discussion of the protection of cultural heritage in armed conflicts.

Acknowledgments

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N.B. As per the disclaimer ^[1], neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

A. ICTY, *The Prosecutor v. Prli? et al.*, Trial Chamber, Judgement and Opinion

[Source: ICTY, *The Prosecutor v. Prli? et al.*, IT-04-74-T, Trial Chamber, Judgement and Opinion, 29 May 2013, available at <http://www.icty.org> ^[2], footnotes omitted]

IN TRIAL CHAMBER III

PROSECUTOR

v.

Jadranko PRLI?

Bruno STOJI?

Slobodan PRALJAK

Milivoj PETKOVI?

Valentin ?ORI?

Berislav PUŠI?

JUDGEMENT

[Volume 1]

[...]

CHAPTER 1: APPLICABLE LAW

I. The Crimes

[...]

C. Violations of the Laws or Customs of War

4. Wanton Destruction of Cities, Towns or Villages, or Devastation Not Justified by
Military Necessity

[...]

166. [...] [T]he constituent elements of this crime are met when

- 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.

[...]

5. Destruction or Wilful Damage Done to Institutions Dedicated to Religion or Education

172. According to the Tribunal's case-law, international instruments provide for two types of protection for buildings of a cultural, historic and/or religious nature. On the one hand, they enjoy the broad protection afforded to civilian objects of property by Article 52 of Additional Protocol I. This protection continues 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. Article 52 makes clear that, if there is doubt, places of worship and schools are presumed not to be used for an actual contribution to military action.

173. In addition to this broad protection, certain objects of property also receive special protection granted under Article 53 of Additional Protocol I. This provision prohibits the commission of "any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples.

174. According to Article 1 of The Hague Convention of 1954, the cultural property protected in the event of armed conflict covers "movable or immovable property of great importance to the cultural heritage of [every] people [...]". The Hague Convention of 1954

is considered to form an integral part of customary international law.

175. [...] [T]he obligation of belligerents toward objects of property protected by Article 53 is stricter than that imposed by the 1954 Hague Convention because it provides for no derogation for “military necessity”. This implies that, as long as the object concerned is not made into a military objective, likewise forbidden under the article, no attack is permitted.
[...]

177. [...] [B]oth the Hague Regulations and Articles 6, 16, and 17 of the 1954 Hague Convention contemplate the use of distinctive signs on historic and cultural monuments in wartime. However, [...] 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.

178. By way of conclusion, the Chamber considers that the crime of destruction or wilful damage done to institutions dedicated to religion or education comprises the following elements: (1) an intentional act or omission; (2) causing destruction or damage to a cultural or religious object of property; (3) the property did not constitute a military objective within the meaning of Article 52 of Additional Protocol I and (4) the act or omission is perpetrated with intent to destroy the cultural or religious property.

[...]

[Volume 2]

CHAPTER 4: FACTUAL FINDINGS REGARDING CRIMES COMMITTED IN MUNICIPALITIES AND DETENTION CENTRES

[...]

Heading 4: The Municipality of Mostar

[...]

Section 8: Allegations Regarding the Siege of East Mostar and Subsequent Crimes (June 1993 – April 1994)

[...]

V. Alleged Destruction of the Old Bridge

1281. The Prosecution alleges [...] that “on 9 November 1993, the Herceg-Bosna/HVO forces destroyed the Stari Most (“Old bridge”), an international landmark that crossed the Neretva River between East and West Mostar. None of the parties disputed or debated the remarkable unique character of the Old Bridge.

1282. The Chamber recognises the exceptional character of this monument – built by architect Hairudin and almost 500 years old – as well as its historical and symbolic nature. All the evidence confirms the importance of the bridge both for the inhabitants of the town of Mostar to which it gave its name and for the BiH and the Balkan region. The Old Bridge also symbolised the link between the communities, despite their religious differences. Lastly, the Chamber notes that although the Old Bridge was one of the major symbols of the Balkan region, it was of particular value to the Muslim community.

[...]

[Volume 3]

[...]

CHAPTER 5: REVIEW OF THE GENERAL REQUIREMENTS FOR THE APPLICATION OF ARTICLES 2, 3 AND 5 OF THE STATUTE

[...]

Heading 2: Other General Requirements for the Application of Article 2 of the Statute

[...]

I. Existence of an International Armed Conflict or of an Occupation

[...]

A. Existence of an Armed Conflict That was International in Character

[...]

523. [...] [T]here was a conflict between the HVO and the ABiH. That conflict was [...] fundamentally internal, inasmuch as it took place between two entities of the RBiH. In determining whether this conflict, internal as of first impression, possesses the qualification

of an international armed conflict, it is necessary to prove either (1) the direct involvement of armed troops from Croatia in BiH alongside the HVO, or (2) that the HVO was [...] an organised hierarchically structured group over which Croatia wielded overall control, [...].

[...]

1. Evidence Regarding the Direct Intervention by HV [Hrvatska vojska, or Croatian Army] Troops alongside the HVO in the Conflict with the ABiH

[...]

543. After viewing this evidence, a majority of the Chamber is satisfied beyond a reasonable doubt, with Judge Antonetti dissenting, that the HV was directly involved alongside the HVO in the conflict between the HVO and the ABiH in most of the camps and municipalities to which the Indictment is directed and at all the relevant times.

544. Such direct involvement supports a finding beyond all reasonable doubt that the conflict pitting the ABiH and the HVO against one another did indeed have the character of an international armed conflict.

2. Evidence Regarding the Indirect Intervention and Overall Control by Croatia

545. The Chamber has just found that the evidence enables it to establish [...] that the HV and thus Croatia intervened directly in the conflict between the ABiH and the HVO and that this intervention gave an international character to the armed conflict. It would therefore not be necessary for the Chamber to examine this issue in any greater detail, and particularly, to rule as to whether Croatia wielded overall control over the armed troops of the [...] HVO for it to find that the conflict was international in character. Nevertheless,

given the volume of evidence submitted by the parties on this point [...] and mindful of the need for thoroughness, the Chamber will present its findings in this regard. The Chamber admitted evidence supporting a finding by the majority, with Judge Antonetti dissenting, that Croatia did indeed wield overall control over the HVO. This control manifested itself in several ways:

a) Officers from the HV Were Sent by Zagreb to Join the Ranks of the HVO

[...]

b) The HV and the HVO Jointly Directed Military Operations

[...]

c) The HVO Dispatched Reports Concerning Its Activities to the Croatian Authorities

[...]

d) There Was Logistical Support From Croatia

[...]

i. Financial Support, Dispatching of Arms and Material

[...]

ii. Assistance in the Form of Training and Expertise

[...]

e) The Political Aspects of Overall Control Croatia Wielded Over the HVO [...]

[...]

567. In view of all this evidence, the Chamber is satisfied beyond a reasonable doubt by majority, with Judge Antonetti dissenting, that the authorities of Croatia and the HV wielded overall control of the HVO in the period relevant to the Indictment.

3. Overall Finding Concerning the International Nature of the Conflict

568. With regard to all the evidence analysed, the Chamber by majority, with Judge Antonetti dissenting, is satisfied beyond a reasonable doubt that the armed conflict was international in nature due both to the direct involvement of the HV in the conflict pitting the HVO and the ABiH against one another and to the overall control wielded by the HV and by Croatia over the HVO.

[...]

II. Protected Status of the Property and Persons Victims of the Crimes Alleged

590. [...] [T]he parties debated two matters of principle relating (A) to the status of the Muslim members of the HVO and (B) to the status of the Muslim men of military age. [...]

A. Status of the Muslim Members of the HVO Detained by the HVO

[...]

592. Several of the Defence teams allege that the Muslim soldiers in the HVO, who were detained by the HVO, are not protected persons within the meaning of applicable Geneva Conventions, and that, consequently, Article 2 of the Statute does not apply to them.

593. The ?ori? Defence does not dispute the case-law that assists in pinpointing the allegiance of a party to the conflict, which is the decisive criterion for ascertaining the status of protected persons under the Fourth Geneva Convention. However, the ?ori? Defence does argue that the HVO Muslims, due to their membership in the HVO, owed allegiance to the authorities of the HZ H-B. [...]

594. The Praljak, Petkovi? and ?ori? Defence teams contend that the Muslim soldiers of the HVO, placed in isolation by the HVO on 30 June 1993, did not forfeit their status as HVO soldiers. These Defence teams recall that the law of armed conflict does not criminalise acts of violence committed between members of the same armed forces, arguing that any crimes committed in such a context arise under the domestic law applicable to the said armed forces.

[...]

596. [...] The Prosecution argues that should the Chamber find that these men are neither civilians nor prisoners of war, they ought to be afforded the protective regime applicable to prisoners in customary international law under Article 75 of Additional Protocol I and under Common Article 3 of the Geneva Conventions. The Prosecution contends, more specifically, that the HVO Muslims detained by the HVO on grounds of their ethnicity and because they constituted a threat to security were persons *hors de combat* by virtue of their confinement and therefore may qualify for the protective regime under Common Article 3 of the Conventions.

[...]

601. [...] [T]he Chamber will assess whether the HVO Muslims detained by the HVO may be characterised as prisoners of war protected by the Third Geneva Convention.

602. Article 4 of the said Convention defines prisoners of war as being “[...] persons belonging to one of the following categories who have fallen into the power of the enemy: (1) [m]embers of the armed forces of a Party to the conflict [...]”.

[...]

604. The Chamber considers [...] that the HVO Muslims who were detained by the HVO cannot be considered to “have fallen into the power of the enemy” within the meaning of the Third Geneva Convention. The Commentary to Article 4 reminds us that “the term „enemy? covers any adversary in the midst of an „armed conflict? arising between two or more High Contracting Parties [...]”. The Chamber deduces therefrom that a member of the armed forces may not be considered a prisoner of war unless he is captured by that party to the conflict against which the armed forces to which he belongs are fighting. The Chamber recalls moreover that the purpose of the protection afforded to prisoners of war is to allow belligerents to place members of the enemy armed forces *hors de combat* while the conflict is ongoing. Thus, members of the armed forces of a party to the conflict may not be considered prisoners of war when they are placed into detention by their own armed forces.

[...]

606. The Chamber will now examine whether the HVO Muslims are protected by the Fourth Geneva Convention.

607. Article 4 of the said Convention provides that “persons protected [by the Convention ...] are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.” The Convention excludes from its ambit those persons protected by the other Geneva Conventions. [...]

608. To ascertain whether the Fourth Convention applies, it is necessary to establish whether the HVO Muslims had fallen into the hands of a party to the conflict of which they were not nationals. The Appeals Chamber clearly established that the criterion applicable to determine the status of protected persons is not nationality but allegiance. In the context of the conflicts in the former Yugoslavia, such allegiance may result from ethnic loyalties.

609. [...] From the time of the ABiH attack [...] on 30 June 1993, in which HVO Muslims participated, the HVO authorities considered that, generally, the Muslim HVO members constituted a threat to the security of the HVO and ordered that they be disarmed and detained *en masse*. [...]

610. The Chamber therefore considers that from at least 30 June 1993, the HVO Muslims were perceived by the HVO as loyal to the ABiH.

611. The Chamber consequently finds that the HVO Muslims, detained by the HVO from 30 June 1993 onwards, had indeed fallen into the hands of the enemy power and were thus persons protected within the meaning of Article 4 of the Fourth Geneva Convention.

B. Status of the Muslim Men Between Ages 16 and 60 Detained by the HVO

612. [...] [T]he Petkovi? Defence argues that the Muslim men aged between 16 and 60 who were detained by the HVO on 30 June 1993 were reservists who were part of the ABiH as

non-combatant members pursuant to legislation in effect in the RBiH at the time of the events [...], and that they were thus afforded the protection applicable to prisoners of war.
[...]

[...]

618. The Chamber considers [...] that the Muslim men of military age, even if they are part of the reserves of the armed forces of the RBiH under national law, do not fit the definition of members of armed forces within the meaning of the applicable international humanitarian law.

619. [...] [A] reservist becomes a member of the armed forces within the meaning of international humanitarian law once he has been mobilised and has taken up active duty, that is, once he has been incorporated into an organised structure and placed under a command accountable for the conduct of its subordinates. It is only then that a member of the reserves acquires the status of combatant and becomes a prisoner of war if he falls into the hands of the opposing party during an international armed conflict. Such a person thus retains the status of combatant from the instant he is mobilised and enters into active duty until such time as he is permanently demobilised. Outside this temporal framework, a member of the reserves is a civilian and cannot in any event be considered a prisoner of war if put in detention by the opposing party during a conflict.

620. For this reason, a party to an international conflict cannot justify the detention of a group of men solely on the ground that they are of military age and that national law obliges the general mobilisation of the men in this age group in the event of war. Such a party must verify whether the person has actually entered into active duty.

[...]

CHAPTER 6: LEGAL FINDINGS OF THE CHAMBER

[...]

Heading 10: Unlawful Confinement of Civilians (Count 11)

[...]

V. The Heliodrom

1025. [B]etween 9 May 1993 and 18 or 19 April 1994, the HVO held women, Muslim members of the HVO, members of the ABiH and men who were not members of any armed forces at the Heliodrom. The Chamber can therefore find that the HVO held prisoners of war and civilians at the Heliodrom and that these civilians had been arrested in the course of large-scale operations during which HVO forces detained all the Muslims, irrespective of their status. The authorities did not make any individual assessments of the security reasons which could have led to the detention of the civilians. The detained Muslim civilians did not have the possibility of challenging their detention with the relevant authorities either.

[...]

Heading 19: Wanton Destruction of Cities, Towns or Villages, or Devastation not Justified By Military Necessity (Count 20)

[...]

IV. Municipality of Mostar

[...]

1581. [...] [O]n 8 November 1993, as part of the offensive on Mostar [...] an HVO tank [...] fired on the Old Bridge of Mostar all day long. [...] [O]n the evening of 8 November 1993, the Old Bridge could be considered destroyed since it was on the point of collapse.

1582. [...] [T]he Old Bridge, real property normally used by civilians, was used by both the ABiH and the inhabitants of the right and left banks of the Neretva between May and November 1993 as a means of communication and supply. [...] [T]he Old Bridge was essential for the ABiH for combat activities of its units on the front line, for evacuations, for the sending of troops, food and material, and that it was indeed utilised to this end. Furthermore, the ABiH was holding positions in the immediate vicinity of the Old Bridge. For this reason, the armed forces of the HVO had a military interest in destroying this structure since its destruction cut off practically all possibilities for the ABiH to continue its supply operations. Consequently, at the time of the attack, the Old Bridge was a military target.

1583. [...] [H]owever, [...] the destruction of the Old Bridge put the residents of [...] the Muslim enclave on the right bank of the Neretva, in virtually total isolation, making it impossible for them to get food and medical supplies resulting in a serious deterioration of the humanitarian situation for the population living there. [T]here were very few supply routes available to the inhabitants, other than the old bridge [...] and [...] the destruction of the *Kamenica* bridge by the armed forces of the HVO [...] only a few days after the destruction of the Old Bridge, cut off all access across the Neretva River in Mostar definitively. The Chamber also determined that the destruction of the Old Bridge had a very significant psychological impact on the Muslim population of Mostar.

1584. The Chamber therefore holds that 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 [...] 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.

1585. The Chamber also holds that the destruction of the Old Bridge, in view of its immense cultural, historical and symbolic value for the Muslims in particular, was extensive.

[...]

1587. The Chamber finds by a majority [...] that the armed forces of the HVO destroyed the Old Bridge of the town of Mostar, thereby committing the crime of wanton destruction of cities, towns or villages, or devastation not justified by military necessity, a crime recognised by Article 3 of the Statute.

[...]

**Heading 24: Unlawful Infliction of Terror on Civilians (Municipality of Mostar)
(Count 25)**

[...]

1690. [...] [T]he Chamber also established [...] that [...] the HVO deliberately destroyed [...] the Old Bridge of Mostar on 8 November 1993, whose destruction had a major psychological impact on the morale of the population; that the HVO had to be aware of that impact [...] in particular because of its great symbolic, cultural and historical value.

1691. In addition, the Chamber established that by blocking or hindering the regular provision of humanitarian aid or access of the international organisations to East Mostar, including by deliberately attacking the members of the international organisations, and by deliberately keeping the civilian population, which was caught in a vice, in an enclave as small and overcrowded as East Mostar from June 1993 to April 1994, the HVO aggravated and heightened the appalling living conditions to which the Muslim inhabitants of East Mostar were subjected. The Chamber is satisfied that the deliberate isolation of a population in an area as small as East Mostar for several months – and doing so after forcibly transferring a large part of the population there – and thus the exacerbation of their distress and difficult living conditions is part of the same plan and demonstrates the specific intention of the HVO to spread terror among the civilian population of East Mostar.

1692. [...] [T]he Chamber finds that the HVO committed acts of violence, the main aim of which was to inflict terror on the population, thereby committing the crime in question, recognised by Article 3 of the Statute.

[...]

[Volume 6]

[...]

Separate and Partially dissenting opinion of presiding judge jean-claude antonetti

[...]

2. Destruction of the Old Bridge in Mostar

[...]

[1] [...] [A]t the time of its destruction, the *Stari Most* was not listed on the UNESCO World Heritage List. [...]

[...]

[2] At national law level, the law of 1985 on the protection and use of the cultural, historical and natural heritage of Bosnia and Herzegovina [...] may have conferred on the historic town of Mostar, including the *Stari Most*, a special protected status. This protection was in place at the time it was included on the UNESCO World Heritage List in 2005, but there is no reference to it for the preceding period.

A. The System of Legal Protection for Cultural Heritage

a) The Philosophy behind the Legal Protection of Cultural Heritage

[3] The destruction of cultural heritage, by desecrating the losing side's prestigious sites, has traditionally been a sign of triumph granted to the victor. Following the Second World War, the proliferation of international texts on the protection of cultural heritage, in particular the *Convention for the Protection of Cultural Property in the Event of Armed Conflict* ("The Hague Convention") of 1954, reveals a change of philosophy. [...]

[...]

[4] The former Socialist Federal Republic of Yugoslavia was a contracting party to the

Hague Convention from 1954, as were the Republic of Croatia and the Republic of Bosnia and Herzegovina – by way of succession – from the day they gained independence. Under such conditions, one can emphasise the fact that the Old Bridge in Mostar was protected under the Hague Convention.

[...]

B. Protection of Cultural Property at the Tribunal

[...]

[5] The protection of cultural objects remains subject to their military use. A variation on the doctrine of “military necessity”, a principle frequently used in international humanitarian law, limits the protection of cultural objects [...]. [...]

[...]

[6] Nevertheless, the exact scope of this waiver is not specified. The Hague Convention of 1954 does not clarify the scope of the criterion of “imperative necessity.” Protocol II to the Convention of 1999 provides a clarification. According to the Second Protocol, “imperative necessity” may be invoked only when the property has been made into a military objective and no similar military advantage can be obtained without targeting the protected object. Article 1 (f) of the Protocol defines a “military objective” as “an object which by its nature, location, purpose, or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.”

[...]

b) Justifying the destruction on grounds of military necessity?

[...]

[7] [...] [T]he *Stari Most* was useful for the ABiH troops who controlled it and used it to transport troops and military material. The ABiH used the *Stari Most* for supplying weapons and food. There is no textual support for the claim that use for military purposes – in the sense of military necessity – must be the *only* or even main mode of use.

[8] According to the Second Protocol to the Hague Convention (1999), whose relevance to the case in 1993 should of course be based on customary law, imperative military necessity within the meaning of Article 4.2 of the Hague Convention of 1954 has a twofold condition: making property into a military objective and the absence of a “feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective.”

[...]

[9] Thus, according to the definition that appears in the Second Protocol to the Hague Convention, a "military objective" consists of two elements. The target is considered a military objective as soon as both these elements are present.

[10] According to the first condition, such objects must be "objects which by their nature, location, purpose or use make an effective contribution to military action." [...]

[11] [...] The second criterion concerns "the location" of objects. It is obvious that there are objects which, although not military by nature, make an effective contribution to military action as a result of their location. For example, such an object could be a bridge or some

other construction; it could also be, as noted above, an area of particular importance for military operations on account of its location whether because the objective is to take it, to prevent the enemy from occupying it, or to force the enemy to abandon it. [...]

[12] Other establishments or edifices dedicated to the production of civilian property can also be used to the advantage of the military; in such cases this refers to mixed property which has value both to the civilian population and to the soldiers. In such situations, the time and place of the attack must be considered together with the expected military advantage on the one hand, and the expected loss of human life among the civilian population and the damage that will be caused to civilian property on the other hand.

[...]

[13] In respect of the two elements constituting a military objective according to the commonly accepted definition, the conclusion that can be drawn from the testimony is that because of the *Stari Most*'s location and use, it made an effective contribution to ABiH military action during the period preceding its destruction. The fact that the *Stari Most* was one of the two remaining bridges still intact in Mostar must be taken into account.

[14] The Old Bridge in Mostar allowed the ABiH to transport supplies and personnel and was the only route through which one part of East Mostar was resupplied with military materiel. By destroying the Old Bridge, the HVO cut off the supply route for food and ammunition, which gave it a military advantage. The Old Bridge in Mostar was therefore a military objective for the HVO.

[...]

[15] I fail to see how the principle of proportionality could be applicable in this case. If the

Old Bridge was a military objective, it quite simply had to be destroyed. In any event, there is no such thing as proportionate destruction.

[...]

B. ICTY, *The Prosecutor v. Prli? et al.*, Appeals Chamber, Judgement and Opinion

[Source: ICTY, *The Prosecutor v. Prli? et al.*, IT-04-74-A, Appeals Chamber, Judgement and Opinion, 29 November 2017, available at <http://www.icty.org> ^[2], footnotes omitted]

IN THE APPEALS CHAMBER

PROSECUTOR

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Jadranko PRLI?

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JUDGEMENT

[Volume 1]

[...]

**VI. CHALLENGES TO CHAPEAU REQUIREMENTS OF ARTICLE 2 OF THE
STATUTE**

[...]

C. The Protected Persons Requirement

346. The Appeals Chamber recalls that, to constitute grave breaches of the Geneva Conventions, the crimes enumerated under Article 2 of the Statute must be committed against persons or property protected under the provisions of the relevant Geneva Convention. [...]

347. The Trial Chamber separately considered the protected status of two categories of Muslim men detained by the HVO: (1) Muslim members of the HVO; and (2) military-aged Muslim men. [...]

1. Muslim members of the HVO [...]

348. The Trial Chamber held that the Muslim members of the HVO who were detained by the HVO were not prisoners of war (“POWs”) protected under Geneva Convention III

because, as members of the authority by which they were detained (*i.e.* the HVO), they “cannot be considered to ‘have fallen into the power of the enemy’” within the meaning of that Convention. Instead, the Trial Chamber held that the HVO Muslim members were protected by Geneva Convention IV because the criterion for determining the status of protected persons is not nationality but allegiance, and from at least 30 June 1993, the HVO Muslims were perceived by the HVO as loyal to the ABiH and therefore “had fallen into the hands of the enemy power”.

[...]

(b) Analysis

353. At the outset, the Appeals Chamber will address Stojić's, Praljak's, and Petković's arguments that only civilians are entitled to protection under Geneva Convention IV. It considers that while Geneva Convention IV primarily concerns the protection of civilians, the plain language of Article 4 defines protected persons more broadly, encompassing all persons - not just civilians - who fall into the hands of a party to the conflict, or occupying power of which they are not nationals, and who are not protected under the other Geneva Conventions. The Appeals Chamber thus dismisses this argument.

354. The Appeals Chamber now turns to Stojić's, Praljak's, Petković's and *Žorić's* arguments challenging the legal standard applied by the Trial Chamber to determine the status of the HVO's Muslim members and their protection under Geneva Convention IV.

[...]

355. [...] In this case, the Trial Chamber correctly took into account the allegiance of the Muslim HVO members rather than merely considering their nationality. Moreover, to reach the conclusion that Muslim HVO members were protected by Geneva Convention IV from 30 June 1993 onwards, the Trial Chamber relied on the perceived allegiance of the Muslim HVO members by the HVO. Recalling that the detaining authority's view of the

victims' allegiance has been considered a relevant factor by the Appeals Chamber, the Appeals Chamber considers that Stojić, Praljak, Petković and Đorić have failed to show an error on the part of the Trial Chamber.

[...]

359. *As to Stojić's, Petković's and Đorić's allegation that the Trial Chamber contradicted itself by finding that the HVO's Muslim members detained by the HVO were, on one hand, not "[m]embers of the armed forces of a Party to the conflict" who had "fallen into the power of the enemy" under Geneva Convention III, but on the other, that they had "indeed fallen into the hands of the enemy power", under Geneva Convention IV, the Appeals Chamber considers that the Trial Chamber's findings, read in context, are not contradictory. The Appeals Chamber finds that the Trial Chamber reasonably concluded that the Muslim HVO members could not be deemed POWs within the strict meaning of Geneva Convention III as they did not formally belong to the ABiH, the "armed forces of a Party other than the detaining Party". They could nevertheless be protected under Geneva Convention IV because they were in fact in enemy hands, and "[e]very person in enemy hands must have some status under international law [...]. There is no intermediate status; nobody in enemy hands can be outside the law." [...]*

(c) Conclusion

360. For the foregoing reasons, the Appeals Chamber affirms the Trial Chamber's ruling that the HVO's Muslim members who were detained by the HVO were protected persons under Geneva Convention IV. [...]

2. Muslim men of military age [...]

361. The Trial Chamber held that the Muslim men of military age, even if they were part of the reserves of the armed forces of BiH under national law, did not fit the definition of members of armed forces within the meaning of the applicable international humanitarian law. It reasoned that a reservist becomes a member of the armed forces once he has been mobilised and has taken up active duty. It held that it is only then that a member of the reserves acquires the status of combatant and becomes a POW if he falls into the hands of the opposing party during an international armed conflict. The Trial Chamber further reasoned that from that moment on, until he is demobilised, a member of the reserves is not a civilian. It therefore concluded that a party to an international conflict cannot justify the detention of a group of men solely on the ground that they are of military age and that, at the outbreak of war, national law required the general mobilisation of the men in this age group. According to the Trial Chamber, such a party must verify whether the person has actually mobilised and entered into active duty.

[...]

(b) Analysis

365. The Appeals Chamber notes that Praljak's, Petković's, ?ori?'s and Pušić's challenges is essentially that the Trial Chamber failed to consider that, pursuant to a general mobilisation order, Muslim men of military age were reserve members of the ABiH, and therefore members of the armed forces, protected under Geneva Convention III.

366. [...] [O]ne of the pieces of evidence that Petković and ?ori? relied upon is the “Decree Law on Compulsory Military Service”, published on 1 August 1992 [...], which states that “all citizens of [BiH] who are fit to work shall be subject to compulsory military service”. It defines “compulsory military service” as “the recruitment obligation, the obligation to complete military service and the obligation to serve in the reserve forces.” However, the Appeals Chamber considers that this same Decree [...] also defines several categories of citizens of BiH who are, or may be, excused from military service regardless

of their age. Similarly, the “Decree Law on Service in the Army of the Republic of Bosnia and Herzegovina”, also published on 1 August 1992, [...] states that “military personnel shall be understood to mean active military personnel, soldiers and persons in the reserve force as long as they are on military duty in the Army.” In other words, even according to the evidence referred to by Petković and Žorić, military-aged Muslim men could not be considered as a group belonging to the ABiH. [...]

[...]

368. Moreover, the Appeals Chamber observes that the Trial Chamber made other relevant findings that demonstrate that the military-aged Muslim men were arrested *en masse* together with Muslim women, children, and the elderly, and *all* Muslims were detained and treated in the same manner, irrespective of their status. [...]

[...]

(c) Conclusion

370. For the foregoing reasons, the Appeals Chamber finds that Praljak, Petković, Žorić and Pušić have failed to show that no reasonable trier of fact could have reached the same conclusion as the Trial Chamber. [...]

[...]

VII. CHALLENGES TO THE UNDERLYING CRIMES

[...]

C. Alleged Errors Relating to Wanton Destruction Of Cities, Towns Or Villages, or Devastation Not Justified by Military Necessity [...]

[...]

2. Challenges to the legal and factual findings upon which the wanton destruction findings were based

[...]

(b) The Old Bridge of Mostar

[...]

(i) Arguments of the Parties

[...]

408. Praljak submits that the Trial Chamber erred in its conclusions pertaining to the Old Bridge, notably by finding that HVO forces were responsible for its destruction and in its analysis relating to the protection of cultural property and the principle of proportionality [...]. Petkovic submits that the Trial Chamber erred in law and fact in this regard, notably in relation to the elements of the crime of wanton destruction of property not justified by military necessity and in its proportionality analysis.

[...]

410. The Prosecution rejects Praljak's and Petkovic's arguments and submits that the Trial Chamber properly concluded that the destruction of the Old Bridge amounted to the crime of wanton destruction not justified by military necessity.

(ii) Analysis

[...]

411. [...] The Appeals Chamber recalls that the elements of wanton destruction not justified by military necessity, as a violation of the laws or customs of war, include, *inter alia*, the destruction of property that occurs on a large scale and that the destruction is not justified by military necessity. Since the Trial Chamber found that the Old Bridge was a military target at the time of the attack, and thus, its destruction offered a definite military advantage, the Appeals Chamber, Judge Pocar dissenting, finds that it cannot be considered, in and of itself, as wanton destruction not justified by military necessity. Moreover, the Appeals Chamber, Judge Pocar dissenting, notes that when outlining the damage caused to the civilian population in its determination of whether the crime of wanton destruction had been committed, the Trial Chamber did not make any finding about other property being collaterally destroyed as a result of the attack on the Old Bridge. Rather, in reaching its conclusion that the attack on the Old Bridge was disproportionate, the Trial Chamber found that the attack isolated the Muslim population in Mostar and caused a very significant psychological impact. Thus, in the absence of any destruction of property *not justified by military necessity* in the Trial Chamber's legal findings for Count 20, the Appeals Chamber, Judge Pocar dissenting, concludes that a requisite element of the crime was not satisfied.

[...]

3. Conclusion on wanton destruction not justified by military necessity

[...]

414. With respect to the Old Bridge of Mostar, the Appeals Chamber [...] recalls that the Trial Chamber erred in finding that the destruction of the Old Bridge of Mostar constituted the crime of wanton destruction not justified by military necessity. [...]

[...]

[Volume 3]

[...]

XIV. DISSENTING OPINIONS OF JUDGE FAUSTO POCAR

[...]

B. Alleged Errors Relating to Wanton Destruction of Cities, Towns or Villages or Devastation not Justified by Military Necessity

[...]

7. [...] I disagree with the Majority with respect to: (i) it erroneously conflating the notion of a military target with that of military necessity; [...] (iii) its failure to account for the fact that the Old Bridge of Mostar constitutes cultural property protected under the general principles of international humanitarian law [...].

(a) Military necessity

8. The Majority reasons that because "the Trial Chamber found that the Old Bridge was a military target at the time of the attack, and, thus, its destruction offered a definite military

advantage, [...] it cannot be considered, in and of itself, as wanton destruction not justified by military necessity.” In so doing, the Majority errs in conflating the well-established IHL notion of military target or military objective and the principle of military necessity. The Majority errs when reasoning that because the Old Bridge of Mostar was a military target, its destruction was justified by military necessity. [...] While I do not disagree with the Majority that the Old Bridge of Mostar could be classified as a military objective, I strongly disagree with the Majority’s reasoning that the Old Bridge of Mostar being a military objective is *per se* determinative of the issue of whether or not its destruction was justified by military necessity. The notion of justified by military necessity is distinct from and more stringent than that of a military objective. According to the jurisprudence of the Appeals Chamber, military necessity is defined as "the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war".

9. Under IHL, the means and methods for engaging in an armed attack in an armed conflict are not unlimited. The Geneva Conventions, their Additional Protocols, various treaties, and customary international law govern the lawfulness of attacks under IHL. While there are various provisions of IHL, the three most general protections governing the lawfulness of an attack under IHL are distinction, proportionality, and precaution. According to IHL, an attack is unlawful if it violates *inter alia*, any of these three principles. In this context, the paucity of the Majority’s discussion on the lawfulness of the attack on the Old Bridge of Mostar is glaring. Perhaps most glaring is the Majority’s scant discussion on the disproportionate nature of the attack, which is a dispositive finding that the Majority appears to uphold. The Majority appears to even be aware of its own flawed reasoning as it observes that the Trial Chamber, “having discussed the question of proportionality, did not enter a discrete finding that the destruction was not justified by military necessity.” However, instead of addressing this issue, the Majority buries this observation in a footnote and repeats the same mistake. In this respect, the Majority’s silence on the disproportionate

nature of the attack on the Old Bridge of Mostar is both misleading and legally incorrect; a disproportionate attack is *per se* unlawful and therefore cannot be justified by military necessity.

[...]

(c) The implications of the Old Bridge of Mostar being cultural property

12. While I am of the view that the destruction of the Old Bridge of Mostar, in this case, constitutes the crime of wanton destruction not justified by military necessity as a violation of the laws or customs of war, because of the remarkable cultural significance of the Old Bridge of Mostar, I would be remiss not to discuss the additional protections afforded to the bridge – under IHL – as a landmark constituting cultural property. *En passant*, I note the missed opportunity of the Prosecutor in failing to specifically charge the destruction of the Old Bridge of Mostar as “destruction or wilful damage done to institutions dedicated to religion, charity, education, the arts and sciences, historic monuments and works of art and science” under Article 3 (d) of the Statute, which protects specifically cultural property.

13. [...] [T]he findings of the Trial Chamber undoubtedly establish that the Old Bridge of Mostar is a landmark of cultural property. [...]

14. Under IHL, cultural property is afforded special protections. Specifically, Article 53(a) of AP I prohibits “any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples.” This provision of AP I is however without prejudice to those protections already established in the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict (“1954 Convention”), which aimed to protect cultural property belonging to any people in order to preserve cultural heritage during armed conflict.

15. The 1954 Convention – which the Majority fails to cite, let alone discuss, and to which Croatia is a State party – specifically states that the obligation of States to protect cultural property, by refraining from directing acts of hostility at such property, can only be waived "in cases where military necessity imperatively requires such a waiver". The imperative nature of the military necessity required under the 1954 Convention obliges States to assess military necessity even more stringently in order to direct acts of hostility at cultural property. I further emphasise that the protection afforded to cultural property under Article 53 of AP I to the Geneva Conventions cannot be waived. Therefore according to the applicable law at the time relevant to the Indictment, except for in extremely limited situations, targeting and thereby destroying cultural property is prohibited. Accordingly, I am of the view that the Majority erred in failing to consider this when assessing the legality of the destruction of the Old Bridge of Mostar [...].

16. Additionally, I would like to take this opportunity to highlight that the protection of cultural property under IHL has been consistently reinforced since the time relevant to the Indictment in this case. As has been exemplified in many recent armed conflicts, such as those in Mali, Syria, Libya, Yemen, and Iraq, the protection of cultural property is paramount. According to the UNESCO Protection of Cultural Property Military Manual ("UNESCO Military Manual") [published in 2016] – which UNESCO states mirrors the protections of cultural property under customary international law – it "is prohibited to attack cultural property unless it becomes a military objective *and there is no feasible alternative for obtaining a similar military advantage.*" Accordingly, the UNESCO Military Manual essentially dictates that customary international law has developed such that when cultural property is at issue, the military objective analysis becomes more rigorous by requiring that there is no feasible alternative for obtaining a similar military advantage. In this context, while not necessarily controlling in this case, I note that the HVO may have had many feasible alternatives for obtaining a similar military advantage to destroying the Old Bridge of Mostar including, just to name a few (and not speculating as

to the otherwise lawful nature of these alternatives under IHL), blocking or destroying ABiH access to the Old Bridge of Mostar and engaging in direct combat with ABiH in East Mostar. [...]

17. [...] [I]t is clear that cultural property is subject to enhanced protection under IHL. Accordingly, I strongly believe that the Majority contravened the law in not considering the enhanced protection afforded to the Old Bridge of Mostar as a landmark of cultural property and cultural heritage.

[...]

Discussion

I. Classification of the Situation and Applicable Law

1. (*Document A, Vol. 3, paras 523 – 568*)

a. How would you classify the conflict between the HVO and the ABiH? What about the conflict between the HV and the ABiH? If the conflict between the HVO and the ABiH was a NIAC, did the HV's direct involvement against the ABiH internationalise it? Does the HV's direct involvement against the ABiH change the nature of the relations between the HVO and the ABiH? According to the Trial Chamber? In your opinion? (GC I-IV, Arts 2 ^[3], 3 ^[4])

b. What effect does the HV's control over the HVO have on the classification of the conflict between the HVO and the ABiH? What is the degree of control necessary to make IHL of IACs applicable in this regard? According to the Trial Chamber? In your opinion?

II. Qualification of the Persons and the Power to Detain under IHL

2. Does IHL define membership of the armed forces? (GC III, Art. 4 ^[5]; P I, Art. 43 ^[6]; CIHL, Rules 3 ^[7], 4 ^[8])

3. (*Document A, Vol. 3, paras 612 – 620; Document B, Vol. 1, paras 365 – 368*)

According to the Trial Chamber, under which conditions do reservists become members of the armed forces of a State? What importance does national legislation have in this regard?

4. Which persons qualify as POWs protected by GC III? (GC III, Art. 4 ^[5]; P I, Art. 44 ^[9]; CIHL, Rule 106 ^[10])

5. Which persons qualify as protected persons under GC IV and thus benefit from the protection offered to civilian internees? What is the effect of the allegiance theory for defining the status of protected persons under GC IV? (GC IV, Art. 4 ^[11]; ICTY, *The Prosecutor v. Tadic* ^[12])

6. (*Document A, Vol. 3, para. 596; Document B, Vol. 1, para. 353*) Are all those who are not POWs under GC III necessarily protected persons under GC IV? If not, are those persons left without protection under IHL when being detained in an international armed conflict? (P I, Art. 75 ^[13])

7. (*Document A, Vol. 3, paras 601 – 604, 608 – 611; Document B, Vol. 1, paras 355, 359*) How does the Trial Chamber qualify the Muslim members of the HVO detained by the HVO with regard to their protection under GC III or GC IV? According to the Trial Chamber, why are the Muslim members of the HVO detained by the HVO not POWs? In your opinion, why did the Trial Chamber not extend the application of the allegiance theory to the passive scope of application of GC III? What is your opinion on the application of

the allegiance theory for protection under GC IV to those excluded from protection under GC III?

8. (*Document A, Vol. 3, para. 1025*) What grounds and procedures must be respected for the detention of civilians under IHL? What procedural guarantees to they benefit from? Where they respected with regard to the detention of the Muslims at the Heliodrom? Are there similar provisions for POWs? (GC III, Arts 21 ^[14], 118 ^[15]; GC IV, Arts 42 ^[16], 43 ^[17], 78 ^[18], 132 ^[19], 133 ^[20])

9. (*Document A, Vol. 3, para. 1025*) How must civilian internees be treated during internment? How must POWs be treated during internment? In which aspects does the protection offered to civilian internees and POWs differ? Can civilians and POWs be detained together?

III. Protection of Cultural Heritage in Armed Conflicts

10. What is cultural heritage? What is the difference between cultural heritage and cultural property? (Hague Convention for the Protection of Cultural Property, Art. 1 ^[21]; P I, Art. 53 ^[22]; P II, Art. 16 ^[23])

11. (*Document A, Vol. 1, paras 171 – 178*) How is cultural heritage protected in times of armed conflict? Which rules on the conduct of hostilities are applicable regarding cultural heritage? Does it benefit from the general protection afforded to civilian objects? Does it benefit from special protection under IHL? If yes, what does it entail? Why is cultural heritage specially protected? What is the relationship between the protection of cultural heritage in Additional Protocols I and II and in the 1954 Hague Convention? Is the standard of protection different and, if yes, to what extent is it different? Does the indication in the provisions of the Additional Protocols that they apply “without prejudice to” the Hague

Convention incorporate the exceptions in case of military necessity into the Additional Protocols? Does the standard of protection differ depending on whether the situation is an IAC or a NIAC? (Hague Regulations, Arts 27 ^[24], 56 ^[25]; Hague Convention for the Protection of Cultural Property, Arts 4 ^[26], 19 ^[27]; P I, Arts 52 (2) ^[28], 53 ^[22]; P II, Art. 16 ^[23]; CIHL, Rules 8 ^[29], 38 ^[30], 39 ^[31], 40 ^[32])

12. (*Document A, Vol. 2, paras 1281 – 1282 and Vol. 6, Opinion of Judge Antonetti, paras 1 – 2; Document B, Vol. 3, Opinion of Judge Fausto Pocar, paras 12 – 13*) What significance does the listing of cultural heritage on the UNESCO World Heritage List established by the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage have under IHL? Is cultural heritage specially protected even if it is not included in the UNESCO World Heritage List? Did the Old Bridge of Mostar qualify as cultural heritage?

13. From what additional legal protection, if any, would the Old Bridge of Mostar have benefited if it had been the subject of special or enhanced protection under the 1954 Hague Convention? (Hague Convention for the Protection of Cultural Property, Arts 8 ff. ^[33]; Second Protocol to the Hague Convention for the Protection of Cultural Property, Arts 10 ff. ^[34])

14. (*Document A, Vol. 3, para. 1582*) Is it lawful under IHL to use cultural property for military purposes? Did the ABiH violate IHL by using the Old Bridge of Mostar as a means of communication and supply? By holding positions in the immediate vicinity of the bridge? What consequences, if any, does this use of the bridge have for its protection under IHL? (CIHL, Rule 39 ^[31])

15. (*Document A, Vol. 3, para. 1582 and Vol. 6, Opinion of Judge Antonetti, paras 9 – 14; Document B, Vol. 1, para. 411 and Vol. 3, Opinion of Judge Fausto Pocar, para. 8*) Can

cultural property become a military objective? In which circumstances? Do the Trial Chamber and the Appeals Chamber, as well as Judge Antonetti and Judge Fausto Pocar qualify the Old Bridge of Mostar as a military objective? Do you agree with their qualification? Do you agree with Judge Antonetti that both the expected military advantage of the attack as well as the expected effects of the attack on the civilian population must be considered for the qualification of an object as a military objective?

16. (*Document A, Vol. 1, paras 172 – 178 and Vol. 6, Opinion of Judge Antonetti, para. 15; Document B, Vol. 1, para. 411 and Vol. 3, Opinion of Judge Fausto Pocar, para. 8*) If cultural property is considered a military objective, is any attack lawful under IHL? Do you agree with Judge Antonetti when he states that since the Old Bridge of Mostar was “a military objective, it quite simply had to be destroyed” because there is “no such thing as proportionate destruction”? Does the Appeals Chamber develop this issue? Do you agree with the Appeals Chamber when it reasons that in the absence of other damage from the attack, the destruction of the Old Bridge of Mostar was justified *per se* since it is a military objective? What is Judge Fausto Pocar’s opinion on this question? (Hague Convention for the Protection of Cultural Property, Art. 4 (2) ^[26]; P I, Art. 53 ^[22]; P II, Art. 16 ^[23])

17. (*Document A, Vol. 6, Opinion of Judge Antonetti, paras 5 – 6, 8, 15; Document B, Vol. 3, Opinion of Judge Fausto Pocar, paras 15, 17*) What is meant by “imperative military necessity”? Who determines whether the military necessity of attacking cultural property is imperative? Is there a difference between the targeting of a protected object for “imperative military necessity” and the targeting of a “military objective”? If yes, which standard is higher? At which stage is the standard of “imperative military necessity” taken into account? Does the principle of proportionality under IHL still apply to attacks on cultural property when it has turned into a military objective? What is Judge Antonetti’s approach? What is Judge Fausto Pocar’s approach? What is your opinion? (Hague Convention for the Protection of Cultural Property, Art. 4 (2) ^[26]; CIHL Rule 38 ^[30])

18. (*Document A, Vol. 3, paras 1584 – 1585*) What conclusion does the Trial Chamber reach concerning the legality of the attack on the Old Bridge of Mostar? What standard does the Trial Chamber apply? What elements does it consider? Is the psychological impact of an attack on the population relevant under IHL? How can it be measured? How can the “cultural, historical and symbolic value” of the bridge be measured? Is it clear how the Trial Chamber proceeded in weighing the different elements against each other? In your opinion, and considering the elements provided by the Trial Chamber, is the destruction of the bridge proportionate?

19. (*Document A, Vol. 3, para. 1585 and Vol. 6, Opinion of Judge Antonetti, para. 13*) Both the Trial Chamber and Judge Antonetti refer to the fact that the Old Bridge of Mostar was one of the two remaining bridges still intact in Mostar. Do they take this factor into account at the same stage of their reasoning? Do you agree with Judge Antonetti that this factor must be considered when determining whether the bridge was a military objective? Do you agree with the Trial Chamber that this factor must be considered when determining the proportionality of the attack? What is the danger of taking into account the results of a military campaign as a whole in the determining the proportionality of an attack?

20. (*Document B, Vol. 1, para. 411 and Vol. 3, Opinion of Judge Fausto Pocar, paras 8 – 9*) What conclusion does the Appeals Chamber reach concerning the legality of the attack on the Old Bridge of Mostar? Does the Appeals Chamber address the question of proportionality? Do you think that the Appeals Chamber implicitly overturned the Trial Chamber’s assessment on the proportionality of the attack, considering that it refers to the fact that no “other property” was destroyed in the attack? Or do you think that it simply deemed that the question of proportionality is irrelevant for determining whether the destruction was justified by military necessity? What is the relationship between the notion of “military necessity” and the principle of proportionality? What does Judge Fausto Pocar’s opinion indicate on this question? Do you agree with his criticism concerning the

reasoning of the Appeals Chamber? In your opinion, how should proportionality be assessed with regard to dual-use objects such as this bridge: if that object qualifies as a military objective, should its civilian uses be disregarded, or should they be taken into account?

21. In your opinion, why did neither the Trial Chamber nor the Appeals Chamber refer to the special protection from which the Old Bridge of Mostar benefited under IHL?

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