

SEPARATE AND PARTIALLY DISSENTING OPINION OF PRESIDING JUDGE JEAN-CLAUDE ANTONETTI
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2. Destruction of the Old Bridge in Mostar

The **Old Bridge in Mostar (Stari Most)**, for years a symbol of the meeting between the east and the west, between Islam and Christianity, came to symbolise the war in Bosnia. "[The "Old Bridge" made it possible for the town to develop and prosper. It was the town's raison d'etre.]"

Everyone seems to regard it as a symbol. Although its destruction was also symbolic, it should be noted that in its Pre-Trial Brief, ("Prosecution Pre-Trial Brief", 19 January 2006), the Prosecution devotes only one paragraph and one footnote to it. As for the Indictment, it reproduces paragraph 116 of the Prosecution's Pre-Trial Brief. Thus, in spite of the bridge's symbolism and the importance it seems to have, the Prosecution does not elaborate much on this subject. Furthermore, the Prosecution places the destruction of the Bridge within the context of the destruction during the siege of East Mostar, that is, within the context of the destruction of mosques and religious properties.

With regard to the question of heritage, some indictments have taken into account certain aspects such as secular cultural heritage.

Seven counts refer to para. 116 of the Indictment, four of which adopt the traditional grounds for the offence of destruction of a cultural heritage:

- **Count 1**, persecutions on political, racial and religious grounds, a crime against humanity, punishable under Article 5(h) 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, punishable under Article 2(d) 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 Article 3(b) 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 Article 3(d) of the Statute.

The heading of **Count 21** does not cite Article 3(d) of the Statute in full. This is not merely an abbreviated citation of the article, but a choice made by the Prosecution. Thus, Article 3(d) of the Statute, the most explicit ground for the charge of destruction of cultural heritage, is not cited in full, and the Indictment fails to characterise the **Stari Most** as a "cultural landmark" under Article 3(d).

Three counts which refer to para. 116 of the Indictment describe the destruction of the Stari Most in a broad sense as an attack against civilians, terror and cruel treatment:

- **Count 24**, unlawful attack on civilians (Mostar), a violation of the laws or customs of war, punishable under Article 3 of the Statute;

- **Count 25**, unlawful infliction of terror on civilians (Mostar), a violation of the laws or customs of war, punishable under Article 3(d) of the Statute;
- **Count 26**, cruel treatment (Mostar siege), a violation of the laws or customs of war, punishable under Article 3 of the Statute.

It should be noted that the destruction of the **Stari Most** is alleged on all conceivable grounds, including Article 2 of the Statute, which is without precedent in the case of the destruction of cultural heritage. 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. 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. Within the meaning of Article 3(d) of the Statute, **the Indictment alleges that the bridge was destroyed as "an institution dedicated to religion or education" and not as "a historic monument."** 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.

With regard to the ground on which crimes against humanity have been alleged, the Prosecution must demonstrate discriminatory intent. In the Blaškić Case, such proof was adduced by demonstrating "the particular significance for the Muslim community in Bosnia" of a destroyed village that "Muslims in Bosnia considered [...] to be a holy place" and "symbolised Muslim culture in Bosnia." In my opinion, its particular significance for the Muslim community in Bosnia has still not been convincingly proven.

More than merely a bridge, the **Stari Most** was a symbol connecting the different communities, a "symbol of reconciliation." The ceremony held to celebrate the reconstruction of the bridge shows the full symbolic dimension of its destruction and reconstruction. The very teleology of the international system for the protection of cultural heritage is that the restoration of the Stari Most, made possible by the international community, has no bearing on guilt. This also follows a fortiori from the Jokić Chamber's decision not to take into account the possibility of the edifice being restored when determining the sentence.

In April 2006, one of the Accused in the Prlić et al. Case wrote a book about the destruction of the bridge in which he sought for the factual truth about the destruction of the Old Bridge by means of various documents (expert reports, photographs, interviews). The book specifically mentions that an investigation was ordered by **Mate Boban** and promptly conducted by the Mostar Prosecutor as soon as it was destroyed in 1993. Despite the expert reports, the investigation did not produce any relevant results, because if had, the issue would no longer arise for the Chamber in the Prlić et al. Case.

History of the Mostar Bridge

Mostar was founded in the 15th century and developed over the following four centuries under the rule of the Ottoman Empire. The Neretva river runs through the town of Mostar. Since 1566, a bridge has been suspended over the river – the Stari Most.

Mostar gets its name from this bridge. In fact "Mostar" means "bridge keeper" (the person to whom a toll had to be paid to cross over).

The Old Bridge in Mostar was built in 1566 by Hayruddin, an architect (mimar) in the service of the Ottoman Empire. This stone bridge connected the two banks of the Neretva. The bridge, formed of a single arch 27.30 metres long and 20 metres high, was flanked by a tower at either end.

From 1566, the core of the Muslim town developed around this bridge. The Old Bridge was so strong that it withstood the Nazi tanks that crossed over it in the Second World War. Prior to its destruction in 1993, UNESCO had warned that the main danger to the bridge was erosion caused by humidity, but this process of deterioration was kept successfully under control.

The Old Bridge in Mostar was shelled on 9 November 1993. UNESCO invited tenders for its reconstruction in March 1994. An identical bridge was reconstructed (under the auspices of UNESCO) in 2004 using much of the original stonework and the technique of the Ottoman period. The Stari Most and its neighborhood in the old town of Mostar were included on the UNESCO World Heritage List in 2005.

Various bridges destroyed in the past

Bridges are of **strategic importance** in wartime. Many bridges were destroyed in the two world wars. From the point of view of military strategy, bridges represent very important choices. The destruction of one or several bridges may have significant consequences for the enemy (cf. Operation Market Garden). One could for example mention the Vieux Moulin Bridge in Niderviller, Moselle, France, which was destroyed by the advancing allied troops on 21 November 1944, or the Sainte Maxence Bridge (Somme, France) destroyed in 1915, and also the Choisy-au-Bac Bridge in Oise (Picardy). The German Army dynamited several bridges in Lyon on 1 and 2 September 1944. In Europe, the Nazis destroyed all the bridges in Florence, Italy, with the exception of the Ponte Vecchio. The bridge over the River Kwai in Thailand was also destroyed by American bombing, although it has since been reconstructed by the Japanese. Numerous bridges were destroyed or simply damaged in the conflict in the Balkans. One could mention the Iron Bridge (Țeljezni Most) in Čapljina, the Čapljina Bridge, the Vojno Bridge, the Tito Bridge, etc. During the conflict in Lebanon, 92 bridges were partially damaged or destroyed.

Was the Old Bridge protected under international law?

The decision to include the Stari Most and part of the old town of Mostar on UNESCO's World Heritage List – which was postponed in 2003 pending completion of the restoration work – was taken by the World Heritage Committee on 15 July 2005. In the 1990s, UNESCO – with the help of international funding – established an international committee of experts for the reconstruction of the Old Bridge and the old town of Mostar. The work commenced in 2001 and was completed in 2004.

Thus, at the time of its destruction, the Stari Most was not listed on the UNESCO World Heritage List. However, the Security Council, UNESCO and the Council of Europe were informed of the risk of destruction in a letter dated 9 July 1993, in which the Government of the Republic of Bosnia and Herzegovina requested that the destruction of the Stari Most be prevented and that a UNESCO committee of experts be sent to ensure its protection.

At its 50th session, the United Nations Commission on Human Rights stated in its report on "The Situation of Human Rights in the Territory of the Former Yugoslavia" that at the time of its destruction, the Stari Most had been registered "with UNESCO as a monument of major cultural importance and was also the only means by which water could be obtained by people in the eastern part of the

town."However, this alleged inscription by UNESCO is not corroborated by other documents. At national law level, the law of 1985 on the protection and use of the cultural, historical and natural heritage of Bosnia and Herzegovina (Official Gazette, 20/85), 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

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. The preamble to the Hague Convention stipulates that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world."

The experience of the conflict in the former Yugoslavia, during which numerous sites were deliberately destroyed by all the parties involved, is considered one of the most striking examples of the need for legal protection of cultural heritage. The former Socialist Federal Republic of Yugoslavia was a contracting party to the Hague Convention from 1956, 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 Mechanism for Cultural Heritage Under International Treaty Law Like the Hague Convention of 1954

The Hague Convention of 1954 reflects the idea of the intrinsic value of cultural heritage which is to be protected in time of war. This is the first international convention which actually employs the term "cultural heritage." Cultural heritage includes, inter alia, "movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular, archaeological sites: (...)."

The Convention provides for the protection of cultural property in peace time and **respect for such property in time of armed conflict** (Article 2). The **general system** of protection is supplemented by a **special protection** system.

The second paragraph provides that these obligations may be waived "only in cases where military necessity imperatively requires [such a waiver]."

A limited amount of cultural property of great importance is accorded special protection under Article 8, provided it meets the condition of not being used for military purposes within the meaning of Article 8.1 of the Convention, and if the property has been entered in an international register. The signatory states can thus influence the decision to grant special or general protection by challenging the notion of great importance for the cultural heritage of peoples.

Lifting the immunity of cultural property under special protection is subject to the stricter condition of **"unavoidable military necessity"** (Article 11.2).

Under **Article 6 of the Convention marking cultural property within the meaning of Article 4 is optional**, while property under special protection must be marked with a distinctive emblem (Article 10).

Accordingly, **the Old Bridge in Mostar** was not marked with any distinctive emblem conferring special protection upon it. However, as Article 6 of the Convention grants protection even in the absence of a distinctive emblem, **it would therefore seem that the Old Bridge in Mostar was a cultural monument protected under the Hague Convention of 1954.**

Nevertheless, it is necessary to ask whether **this protection would include immunity**. Would it not have been possible to consider the Old Bridge in Mostar a military target? In order to answer this question, it is necessary to examine the case law.

B. Protection of Cultural Property at the Tribunal

a) Statutory Provisions

In accordance with its mandate to prosecute grave breaches of international humanitarian law, the Tribunal has the power to sanction the destruction of cultural heritage on the ground of the violations of the laws or customs of war (Article 3(d) of the Statute) and, more generally, on the grounds of grave breaches of the Geneva Conventions of 1949 (Article 2(d)) of the Statute) and crimes against humanity (Article 5(h) of the Statute).

The destruction of the Stari Most **is alleged on the basis of all these statutory provisions.**

aa) Violations of the laws or customs of war as a legal basis

As no accepted definition of the term "cultural heritage" can be found in the international legal instruments, it is not expressly put in the Tribunal's Statute. The Statute lists the elements of cultural heritage under Article 3(d). Recent jurisprudence refers to Article 3(d) as protection of "cultural heritage." According to the introductory paragraph of Article 3 of the Statute, the list is not exhaustive.

Article 3: Violations of the laws or customs of war

"The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

c) 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. "

Article 3(d) of the Statute reproduces in substance Articles 27 and 56 of the Regulations concerning the Laws and Customs of War on Land annexed to Geneva Convention IV of 1949 which has the character of customary international law. Thus, the destruction referred to under Article 3(d) can be described as war crimes.

bb) Grave breaches of the Geneva Conventions of 1949 as a legal basis

Article 2(d) of the Statute may constitute a second basis on which the destruction of cultural heritage may be punished.

Article 2 - Grave Breaches of the 1949 Geneva Conventions

"The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; "

To date, the Tribunal's jurisprudence has given priority to Article 3(d) of the Statute, a norm which sets out the various components of cultural heritage more specifically than Article 2 ("property"). No conviction for the destruction of cultural property has been entered under Article 2(d). Apart from the specific nature of Article 3(d), this can be explained by the fact that, according to the Appeals Chamber in the Tadić Case, Article 3 applies to both national and international conflicts, whereas Article 2 requires an international conflict and a sufficient link between the alleged crimes and the said conflict.

cc) Crimes against humanity as a legal basis

Provided that the destruction of cultural heritage is part of "widespread or systematic crimes directed against a civilian population, and that the [perpetrator knew] that his acts fitted into such a pattern", it can be charged under Article 5(h) of the Statute.

Article 5 - Crimes against Humanity

"The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (h) persecutions on political, racial and religious grounds."

Although no explicit reference is made to cultural heritage in this provision, it has been used to sanction the destruction of cultural property and has the advantage of also being applicable in peacetime. This is of particular importance as the Hague Convention of 1954 relates only to wartime.

b) Judicial Application

About a dozen judgements handed down by the Tribunal to date address the issue of the destruction of cultural heritage as a war crime and as a crime against humanity. They focus more on elements relating to the destruction of cultural heritage and less on the contextual elements specific to the various categories of crime.

aa) Violations of the laws or customs of war as a legal basis

Whereas the destruction of cultural heritage may constitute crimes within the meaning of Article 3(b), (c), (d) and (e), the direct reference to cultural heritage in Article 3(d) makes it the most relevant one. The first precedent was established in the Blaškić Case.

According to the Chamber in the **Blaškić Case**, the "damage or destruction must have been committed intentionally to institutions which may clearly be identified as dedicated to religion or education ...". The criterion of being clearly identifiable as dedicated to religion or education is also applicable to the other categories covered by Article 3(d) of the Statute.

Since the Kordić and Čerkez Trial Judgement, property protected within the meaning of Article 3(d) of the Statute has been determined in view of Article 1 of the Hague Convention of 1954 and applies to all "movable or immovable property of great importance to the cultural heritage of every people." **The Chamber recalled that the former Socialist Federal Republic of Yugoslavia had been a contracting party since 1956, as were the Republic of Croatia and of Bosnia and Herzegovina by way of succession.**

In the Strugar Case, as concerns the destruction of the **Old Town of Dubrovnik**, the Trial Chamber conducted an in-depth analysis of the sources in customary international law and treaty law criminalising the destruction of cultural heritage in order to determine the elements of the crime. The Chamber considered Article 27 of the Regulations on the Laws and Customs of War on Land, annexed to Hague Convention IV of 1907, Article 4 of the Hague Convention of 1954, Article 53 of Additional Protocol I and Article 16 of Additional Protocol II to the Geneva Conventions of 1949. It held that despite the terminological differences, the texts share a similar notion of cultural heritage. Accordingly, property considered protected within the meaning of Article 3(d) of the Statute is all property alternatively protected within the meaning of one of the above-mentioned instruments.

According to the Trial Chamber in the **Kordić and Čerkez Case**, the charge of seizure of, or destruction or wilful damage done to, cultural heritage within the meaning of Article 3(d) of the Statute is the *lex specialis* relative to the charge of unlawful attacks on civilian objectives within the meaning of Article 3 of the Statute. The Chamber notes that Article 52 of the Protocol Additional to the Geneva Conventions of 1949 grants "general protection" to civilian property, whereas Article 53 grants "enhanced protection" to the property concerned.

In the **Jokić Case**, the Accused was convicted by the Chamber for the destruction of the **Old Town of Dubrovnik**, inscribed on UNESCO's World Heritage List in 1975. Of all the cases before the Tribunal, **the destruction of Dubrovnik** is – in terms of its **symbolic character** – the attack directed against cultural heritage that most resembles the **destruction of the Stari Most**. Following the Accused's guilty plea, the Chamber ruled that the possibility of restoring the buildings destroyed does not constitute mitigating circumstances to be taken into account in determining the sentence. The main criteria considered by the Chamber are the level of legal protection for the heritage and the extent of the damage to the protected heritage.

bb) Crimes against humanity as a legal basis.

The first time that destruction of cultural heritage was considered constituent of a crime against humanity and persecution – with all other crimes – was in the **Blaškić Case**. The destruction of symbolic buildings, perpetrated with discriminatory intent, is comparable to a physical offence committed against the population concerned. This represents a major judicial contribution by the Tribunal to the protection of cultural heritage.

The Blaškić Chamber stated that: "[However], *persecution may take forms other than injury to the human person, in particular those acts rendered serious not by their apparent cruelty but by the*

discrimination they seek to instil within humankind. [P]ersecution may thus take the form of confiscation or destruction of [...] symbolic buildings [...] belonging to the Muslim population of Bosnia-Herzegovina."

"In the context of the crime of persecution, the destruction of property must be construed to mean the destruction of towns, villages and other public or private property belonging to a given civilian population or extensive devastation not justified by military necessity and carried out unlawfully, wantonly and discriminatorily." It should be noted that it introduces two important factors:

- **extensive;**

- **not justified by military necessity.**

The Chamber provided detailed examples of the judicial grounds on which this view is based in the **KordiĆ and Ćerkez Case** by referring to the IMT and the International Law Commission. According to the Chamber, destruction of religious institutions "amounts to an attack on the very religious identity of a people [...] [and] manifests a nearly pure expression of the notion of 'crimes against humanity'". The question that may arise in the present case is whether this bridge has a religious connotation. This is conceivable for a place of worship but extending this to a bridge is a step I cannot take.

i) The discriminatory nature of the destruction

In order to demonstrate the discriminatory nature of the destruction of a Muslim village in Bosnia and Herzegovina, the Trial Chamber in the **Blaškić Case** took into account the "particular significance for the Muslim community of Bosnia" of a village that was destroyed and that "Muslims in Bosnia considered [...] to be a holy place" which "symbolised Muslim culture in Bosnia." The Chamber inferred from "[t]he methods of attack and the scale of the crimes [...] that the attack was aimed at the Muslim civilian population." I can subscribe to this view only if the Old Bridge symbolised Muslim culture.

ii) The cultural objects concerned

The nature of the objects whose destruction may constitute a crime against humanity was first specified in the Blaškić Appeals Judgement, without however specifically referring to cultural heritage.

"There may be certain types of property whose destruction may not have a severe enough impact on the victim as to constitute a crime against humanity, even if such a destruction is perpetrated on discriminatory grounds [...] unless [the property] constitutes an indispensable and vital asset to the owner."

The question can arise as to whether the Old Bridge was indispensable and vital. This can perhaps be claimed from the point of view of symbolism.

Although not all destruction of cultural heritage committed with the requisite discriminatory intent amounts to persecution as a crime against humanity, this threshold is reached if the acts constitute "a denial of or infringement upon a fundamental right laid down in international customary law" and are separately or in conjunction with other acts "of gravity equal to the other crimes listed in Article 5 of the Statute."

cc) Waiver in case of use for military purposes

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 under the above-mentioned treaties. Such an exception was first discussed in *Blaškić* in relation to the war crime of the destruction of property within the meaning of Article 2(d) of the Statute, which expressly provides for a waiver ("not justified by military necessity"). Although Article 3(d) of the Statute does not contain a clause of this kind, the judicial reasoning on using cultural heritage for military purposes no longer makes a distinction between the legal bases for war crimes and for crimes against humanity.

In the **Blaškić Case** the Chamber set out a double negative condition: property must not be "used for military purposes at the time of the acts." And, in addition, the "institutions must not be in the immediate vicinity of military objectives." While the first condition was affirmed in the *Naletili and Martinovi Case*, the second restriction was expressly lifted in this case.

The **Strugar Judgement** confirmed the lifting of this condition in that **mere proximity** to military objectives does not justify destruction. The Chamber conducted a detailed study of the sources of the waiver in international law. The notion is already found in the Regulations annexed to Hague Convention IV of 1907 and is set out in Article 4.2 of the Hague Convention of 1954.

"4.2 The obligations mentioned in paragraph 1 of the present Article may be waived only in cases where military necessity imperatively requires such a waiver."

The Chamber **noted that the additional Protocols to the Geneva Conventions of 1949 do not refer to the notion of military necessity.** However, given the supplementary nature of the Protocols, this does not challenge the fact that international law generally provides for a waiver in the case of military necessity.

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."**

It does not seem certain that, should the need arise, the definitions of the Protocol would be applied to the letter and would serve as the main reference point. In the *Strugar Case*, the Chamber did not have to rule on the question of whether the waiver within the meaning of the Hague Convention ("imperative") is to be more narrowly construed than the waiver in the Regulations of 1907. The concept of "use for military purposes" may thus not have the same extension as that of "military necessity."

Was the Old Bridge considered a military objective?

The entire issue is to determine whether the **Old Bridge in Mostar** had a civilian or military character. There is a general prohibition on attacking civilian property. Nevertheless, this prohibition does not apply to military works or "military objectives."

a) Protecting the Stari Most because of its character as a cultural heritage

According to the **Strugar Judgement**, for the **Stari Most** to be considered part of the cultural heritage within the meaning of Article 3(d) of the Statute, it should also be protected under one of the instruments referred to. At the time of its destruction, the Stari Most had not yet been put on the **UNESCO** World Heritage List nor was there any indication that it had been placed under special protection. This does not necessarily rule out protection under the Hague Convention of 1954 according to which bearing an emblem is not mandatory (Article 6). It is highly probable that the Stari Most was granted protection under Article 1 of the Hague Convention. Nevertheless, it was necessary for the BiH Government to recognise that the Stari Most was of "great importance to the cultural heritage of people." However, on 24 September 1992, and within the context of the reconstruction of the town of Mostar, Boro Puljić issued a decision appointing a temporary committee for the protection of cultural objects in HZ HB. Item 2 of this Decision states that the duty of the committee is to determine the state of the Bridge (which had already been damaged in other attacks) and to protect it. This may lead one to believe that the BiH Government was aware of the exceptional cultural heritage that the Old Bridge in Mostar represented. I fully agree with this approach.

b) Justifying the destruction on grounds of military necessity?

According to the testimony, the Stari Most was **useful for the ABiH** troops who controlled it and used it to transport troops and military materiel. **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.

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."

The definition of a **military objective is complex and is an essential component of the mechanism for the protection of civilians in time of conflict**. It appears to be an essentially negative definition.

According to Hague Convention IX of 1907 concerning Bombardment by Naval Forces in Time of War: "The bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings is forbidden [...]. Military works, military or naval establishments, depots of arms or war materiel, workshops or plants which could be used for the needs of the hostile fleet or army [...] are not, however, included in this prohibition. "These rules are accompanied by provisions on warnings that must precede the attacks. They have hardly been applied, but give an idea of what military objectives were taken to mean in 1907.

In 1922, the Commission of Jurists, assigned the task of examining a partial amendment to the laws of warfare, prepared a draft. Article 24 focused on providing the definition of civilian property and military objectives. According to this article, a military objective is "**an objective whereof the total or partial destruction would constitute an obvious military advantage for the belligerent.**" The purpose of the attack makes it possible to distinguish a military objective from civilian property. The attempt to provide a definition was not subsequently codified, and although the two Geneva Conventions of 1929

relative to the wounded and sick and prisoners of war make a distinction between civilian property and military objectives, none of their provisions relate to this definition.

When the four Geneva Conventions were drafted in 1949, although they refer explicitly to military objectives, they did not include a clear definition. Thus, during the Second World War, although the states had generally accepted that attacks should not be directed against military objectives, no definition of such military objectives existed. The belligerents thus defined the meaning of "military objective" as they saw fit. The definition they provided often differed depending on the various situations with which they were faced. It was essential to provide an objective and definite definition.

A **military objective** can very often be distinguished from civilian property on the basis of its external features. However, the jurisprudence of the Second World War identified certain general criteria which were subsequently used to define this notion. In the List Case (the Hostages Trial), the American Military Tribunal in Nuremberg placed the emphasis on the possibility of using property for military purposes:

"The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces. It is lawful to destroy railways, lines of communication or any other property that might be utilised by the enemy. Private homes and churches even may be destroyed if necessary for military operations."

It is on the basis of these criteria that the Tribunal found that under the circumstances in this case the destruction of villages, roads, bridges, port facilities and all the means of transport and communication ordered by the Accused to slow down the advance of the Soviet forces while the German Army was retreating from Norway was not a crime.

In the **von Lewinski Case** (alias von Manstein), the Judge advocate showed that the advantages obtained by destruction were not sufficient to justify it. An additional requirement according to Article 23(g) of the Hague Regulations is that such destruction be a **real necessity**:

"Now the first and obvious comment on the wording of this article is that the requirement is "necessity" and not "advantage." The second is that that necessity must be an imperative one. For a retreating army to leave devastation in its wake may afford many obvious disadvantages to the enemy and corresponding advantages to those in retreat. That fact alone, if the words in this article mean anything at all, cannot afford a justification."

In 1954, Article 8 of the Hague Convention for the Protection of Cultural Property provided a partial and restrictive definition of a "military objective."

In 1956, the ICRC presented its Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in time of war. Article 7 of the draft provided a definition of "military objective". According to this Article, "[i]n order to limit the dangers incurred by the civilian population, attacks may only be directed against military objectives.

Only objectives belonging to one of the categories of objectives which, in view of their very nature, are generally acknowledged to be of military importance, may be considered as military objectives. Those categories are listed in an annex to the present rules.

However, even if they belong to one of those categories, **“they cannot be considered as a military objective where their total or partial destruction, in the circumstances ruling at the time, offers no military advantage.”**

This definition comprises two cumulative elements. For a target to be considered a military objective, it must be acknowledged to be of military importance, and its destruction must offer a military advantage. However, a list, subject to modification, delimited the notion of "military objective."

In 1969, the Institute for International Law also provided a fairly similar definition of the notion of "military objective." Thus, the Institute of International Law "included [in its definition of] military objectives only those which by their very **nature or purpose or use, make an effective contribution to military action, or exhibit a generally recognized military significance**, such that their total or partial destruction in the actual circumstances gives a substantial, specific and immediate military advantage to those who are in a position to destroy them."

The ICRC also proposed a mixed definition for the draft Protocol in 1970-1971. According to this draft, "[a]ttacks shall be strictly limited to military objectives, **namely, to those objectives which are, by their nature, purpose or use, recognized to be of military interest and whose total or partial destruction, in the circumstances ruling at the time, offers a distinct and substantial military advantage.**

Consequently, objects designed for civilian use, such as houses, dwellings, installations and means of transport, and all objects which are not military objectives, shall not be made the object of attack, except if they are used mainly in support of the military effort."

The diplomatic conference that established the notion of "military objectives" declared that immunity was conferred on civilian property, which it then defined in contrast with "military objectives." This was the first time that an international treaty provided a definition of the notion of "military objective." The definition adopted at the conference was to a large extent inspired by the previous documents.

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.

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."** This element refers to objects that by their "nature" make an effective contribution to military action. All property directly used by the armed forces – weapons, equipment, means of transport, fortifications, depots, edifices sheltering the armed forces, staffs, communication centres, etc. – is included in this category.

The requirement for fulfilling the second condition is that **"total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage."** 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. It should be noted that the Working Group of Commission III introduced the criterion of location without providing any reasons.

The criterion of "purpose" relates to the future and current "use" of property. Most property that is civilian by nature can be transformed into property useful to the armed forces. For example, a school or a hotel are civilian property but become military objectives if used to accommodate troops or staffs. We will see, in relation to paragraph 3, that in case of doubt, they are presumed to be civilian property.

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.

Last, the destruction, capture or neutralisation must offer a "definite military advantage" under the prevailing spatial and temporal circumstances. In other words, it is not lawful to launch an attack that offers only indefinite or potential advantages. Those ordering or carrying out the attack must have sufficient intelligence to allow them to take this requirement into account; in the case of doubt, safeguarding the population – which is the Protocol's objective – is what must be considered.

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.

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.

An analysis of the video footage did not make it possible for the Chamber to determine beyond reasonable doubt who caused the final collapse of the Stari Most. This may be a matter of characterising the continuous tank fire before the Stari Most collapsed which damaged but did not destroy it.

Similarly, a video shows the impact of a shot which, according to an answer given to a question from the **Accused Petković**, came from the Serbian lines.

In this scenario, a distinction between the various grounds for the allegation in para. 116 of the Indictment must be made. Article 3 of the Statute refers explicitly to "wilful damage" in addition to destruction, whereas Article 2 refers only to destruction. With regard to crimes against humanity, it is necessary to determine whether the gravity of causing damage is equal to the gravity of destroying "an indispensable and vital asset to the owner."

In conclusion, I believe that the identity of the person who fired the shot that caused the **Old Bridge to collapse** was not categorically established by the Prosecution.

As far as the damage is concerned, there is no doubt that the tank fire could have damaged the Old Bridge, but it had already been damaged as a result of the conflict with the Serbs. It is therefore difficult to attribute the damage to either of the parties with certainty. In any event, to my mind, the **Old Bridge was a legitimate military objective** whose destruction gave the HVO a definite military advantage by cutting off communications and the supply of food.

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.