The Persecution of Stones: War Crimes, Law's Autonomy and the Co-optation of Cultural Heritage

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The Persecution of Stones: War Crimes, Law’s Autonomy and the Co-optation of Cultural Heritage

Timothy William Waters*

Abstract

In 1567, a bridge was built over a river in Bosnia—a bridge widely seen as a work of great beauty. In 1993, it was destroyed in a war. What did its destruction mean? Was it a crime—and which one? An assault on culture—and whose? Between 2004 and 2017, a trial held in The Hague sought to answer these questions. The way it did—the assumptions and categories the prosecutors and judges deployed, the choices they made—tells us something important about how law operates and how it appropriates other bodies of knowledge, whether in a now-obscure Balkan conflict or on the battlefields today’s courts confront.

Our inquiry begins with an interesting puzzle: why didn’t the prosecution of the Yugoslav war crimes tribunal charge the most obvious crime—destruction of an historical monument? The answer turns out to be obvious too, but the path by which that obvious answer was reached—and what happened after—was complicated in ways that tell us something even more interesting about what law does to the events and values it is supposed to serve. It also tells us something about what law can and cannot do in responding to the horrors and complexities of war. In answering questions about a cultural monument’s destruction, a war crimes tribunal, in its own, autonomous way, turned a beautiful bridge into something very different.

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I. INTRODUCTION: THE PUZZLE OF AN OBVIOUS PATH NOT TAKEN

The destruction of Stari Most, the Old Bridge of Mostar, in Bosnia, was just one event in a complex, violent war, and just one issue in the long, complex trial called Prosecutor v. Prlić et al. That trial—whose appeals judgment, in November 2017, was the last case decided at the International Criminal Tribunal for the Former Yugoslavia (ICTY)—was enormous: the trial judgment runs to six volumes, the appeals judgment four more, and one dissent exceeds five hundred pages.\(^1\) The passages dealing with the bridge are only a small part of those texts, which were mostly concerned with other matters—rape, murder, imprisonment, siege—and of course with the complex legal tests and proofs applied to those events, all of which constitute the business of a war crimes court.

Still, the bridge was an important part of the proceedings, which is no surprise if we view its destruction in that broader context. The wars of the former Yugoslavia\(^2\) proved seminal in shaping many parts of the post-Cold War international order, among them international criminal law and cultural heritage protection. Modern international criminal law (ICL) was founded in response to the violence and criminality of Yugoslavia’s dissolution.\(^3\) Cultural heritage norms were an important part of that response. The ethnic cleansing so characteristic of Yugoslavia’s wars expressed itself not only in biological destruction but in the erasure of material culture: “Cultural cleansing often went alongside ethnic

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\(^2\) Yugoslavia was founded after the First World War, and refounded as a socialist state after the Second. That state collapsed in a series of wars between 1991 and the early 2000s. The events discussed in this study occurred in the Bosnian war. Bosnia was a constituent republic of Yugoslavia but declared its independence in 1992. A three-way civil war between Bosniak (Bosnian Muslim), Croat, and Serb factions—the latter two supported by the neighboring states of Croatia and Serbia, themselves previously part of the single Yugoslav state—was fought between 1992 and 1995. See generally Susan L. Woodward, Balkan Tragedy: Chaos and Dissolution after the Cold War (1995).

\(^3\) Modern ICL traces its origins to the Nuremberg and Tokyo war crimes trials after the Second World War, but after those two tribunals closed, there were no international war crimes tribunals until the 1990s, when the Security Council created the International Criminal Tribunal for the Former Yugoslavia in 1993, followed by the International Criminal Tribunal for Rwanda in 1994. Those two tribunals’ processes and jurisprudence in turn profoundly influenced the development of the International Criminal Court and other recent tribunals. On the ICTY’s and ICTR’s influence, see generally Theodor Meron, War Crimes Law Comes of Age, 92 Am. J. Int’l L. 462 (1998).
cleansing, seeking to wipe out the links that unite communities around their culture.”

It was almost inevitable, therefore, that the ICTY—the premier institution designed to respond to the challenge of the Yugoslav wars, and itself one of the great normative and institutional shifts after the Cold War—would have to address the cultural heritage issues implicated by ethnic cleansing, the signal crime of that conflict. Indeed, a number of its judgments include convictions for acts that involved or included destruction of cultural heritage.

Of all the acts affecting cultural heritage in those conflicts, the destruction of the bridge at Mostar was perhaps the most iconic. There were other prominent incidents—the burning of the library in Sarajevo, for example, or the shelling of Dubrovnik—and the destruction of hundreds of mosques across Serb-held areas was a far more comprehensive cleansing—but the destruction of Stari Most was an event of immediately recognized significance.

But what did it signify, exactly? What would, or should, law say about it? One might suppose the answer obvious, that the crime was obvious, because it’s right there in the Tribunal’s statute: The ICTY has jurisdiction for the war crime of “destruction or wilful damage done... historic monuments[.]” But as it turned out, that wasn’t the crime the court considered; instead, it entertained a...

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5 Ethnic cleansing is not itself a named crime. Rather, it is a catchall for a variety of acts, including expulsion, killing, and rape, all aiming to remove or even erase another community’s presence on a territory. The term came into general use from the Serbo-Croatian phrase etničko čišćenje, used during the conflict to describe the cleansing of territory of undesirable communities. See William Safire, On Language: Ethnic Cleansing, N.Y. TIMES (Mar. 14, 1993), http://www.nytimes.com/1993/03/14/magazine/on-language-ethnic-cleansing.html. Roger Cohen, Ethnic Cleansing, in CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW 136–38 (Roy Gutman & David Rieff eds., 1999). On the cultural heritage aspects of the war, see generally HELEN WALASEK, BOSNIA AND THE DESTRUCTION OF CULTURAL HERITAGE (2015).


7 Stari Most’s destruction “has attracted more publicity than the destruction of any other bridge in the history of humankind.” Jadranka Petrovic, Miscategorisation of the Old Bridge of Mostar in the Pric et al Case, 8 J. PHIL. INT’L L. 1, 1 (2017). It was “arguably the most high-profile incident on appeal[.]” Maurice Cotter, Military Necessity, Proportionality and Dual-Use Objects at the ICTY: A Close Reading of the Prlic et al. Proceedings on the Destruction of the Old Bridge of Mostar, 23 J. CONFLICT & SEC. L. 283, 304 (2018). A personal anecdote suggests the bridge’s iconic status: At a conference at which I presented an early draft of this study, I was about to apologize for not having brought a picture of the bridge— until I realized that it featured prominently in the conference program.

8 Statute of the International Criminal Tribunal for the Former Yugoslavia art. 3(d) (Sept. 1993) [hereinafter “ICTY Statute”].
bewildering variety of different offenses, including persecution and infliction of terror. To reach these conclusions, the court relied on the cultural value of the bridge—the very thing protected elsewhere under the ICTY’s statute—but in very particular ways.

Looking at how and why this happened brings us to the first conclusion this Article makes: ICL’s autonomous logic instrumentalizes other values. In this case, those values concerned cultural heritage. ICL turned the bridge, and its destruction, from one thing into something else. The bridge’s cultural value did end up playing an important role in the trial, just not the one that one might have expected.

The reason the crime turned out to be something entirely different is fairly simple, but to show why turns out to be complicated. And that leads to the second conclusion this Article makes: war crimes trials create complexity. One might suppose this trial was complex because it was grappling with complex events, and that law has taken the forms it has to capture the manifold ways in which evil is done. But as this case shows, in fact what is happening is that the law has become complex in its own autonomous ways, which, rather than reflecting war’s own complexity, make war’s events conform to the categories and logic of the law. This has implications for the widespread belief, or the hope, that war crimes trials can serve as agents of reconciliation by telling authoritative stories.9

If so, that matters, not only for the legacy of a now-closed court, but for the efforts of ICL today in places like Syria or Iraq, whether at the International Criminal Court (ICC), other ad hoc tribunals, or in domestic jurisdictions. It matters for prosecuting crimes affecting cultural heritage and more generally, whenever ICL is used to protect other values.10 ICL is a flourishing field, but also

9 One of the principal justifications for ICL is that it can contribute to post-conflict reconciliation. The authoritative narrative theory suggests that courts, through neutral, professional adjudication, establish incontestable facts and authoritative interpretations that identify individuals who are culpable for crimes. This, in turn, encourages conflict-torn societies to move past collective blame and creates space for shared understandings of the past, allowing reconciliation. The justification has faced serious criticisms but continues to be a major claim about ICL. See, for example, Timothy William Waters, A Kind of Judgment: Searching for Judicial Narratives After Death, 42 GEO. WASH. INT’L L. REV. 279, 285–94 (2010) (elaborating and critiquing the authoritative narrative theory).

10 Several recent conflicts have involved destruction of cultural heritage, such as the Islamic State’s attacks on sites in Syria and Iraq. See generally MARINA LOSTAL, INTERNATIONAL CULTURAL HERITAGE LAW IN ARMED CONFLICT: CASE STUDIES OF SYRIA, LIBYA, MALI, THE INVASION OF IRAQ, AND THE BUDDHAS OF BAMIYAN (2017). A number of countries have initiated domestic prosecutions for these crimes, and the United Nations has created the International, Independent and Impartial Mechanism (IIIM) to assist states with investigation and prosecution of crimes in Syria. See G.A. Res. 71/248, International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic Since March 2011 (Jan. 11, 2017). The U.S. recently passed the Iraq and Syria Genocide Relief and Accountability Act of 2018, Pub. L.
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a highly rarified and complex one. As we will see, because of law’s autonomous complexity, it is unlikely the judgments we make—the stories we remember—can tell us much that is useful in accounting for and reconciling after great violence.

Here’s the path this paper takes: First, Section I discusses the bridge and its destruction—the object and event that the law and court later had to interpret. Then, Section II surveys the development of two bodies of law of relevance to that object and event: ICL (including humanitarian law), and the law protecting cultural heritage, the two doctrinal frames the court would or could rely upon. Then, Section III parses what the ICTY in fact did with object, event and law, in the long legal process called Prosecutor v. Prlić et al. —the indictment, the trial, and the appeal—before concluding, in Section IV, with a reflection on what this one trial tells us more generally about the effects of ICL’s complexity. Because this trial, through its complex processes, turned a bridge into a metaphor, just not the one it had already become.

II. Events

First, there is the bridge itself: the material fact of it, the communities that formed in the space around it, the symbol it had become, its destruction and the uses to which that destruction has been put, one of which was the trial.

A. The Bridge Itself

The bridge that came to be known as Stari Most, the Old Bridge, was new in 1567, built under the direction of Hajruddin, a student of the great Sinan, when the area was part of the Ottoman Empire. A single stone span forming a wide, pointed arch, springing between the high banks of a fast-running river, the Neretva, it has long been recognized as a work of exceptional beauty and a feat of architectural and engineering prowess.

No. 115-300, 132 Stat. 4390 (2018), with a similar purpose. As we will see, although my argument focuses on the ICTY and cultural heritage, it is about a quality all international criminal tribunals share and how they process other value systems, not just culture.

Stari Most, ATLAS OBSCURA, http://perma.cc/R9YQ-D5HX.
The legends that arose around its construction—for example, that the architect prepared for his own death in case the bridge collapsed—are the kind that arise in connection with a work that evokes awe and amazement. It was also an important point for transit in Herzegovina. For a long time, it was the only bridge between the two sides of the city—Mostar, which grew up around it and took its name from the bridge and its keepers—and their hinterlands.

In time, other bridges were built, so that by the late Titoist era and the years with which we are concerned, Mostar, now one of the principal cities in the Socialist Republic of Bosnia-Herzegovina within the Socialist Federal Republic of Yugoslavia, was connected by ten bridges, and Stari Most was no longer a significant commercial crossing. Increasingly it served local pedestrian populations and tourists. It had become a symbol of the city.

12 Based on a drawing by Prof. Dr. Milan Gojkovic. Credit, Ardesia Group, with thanks to Dr. Manfredo Romeo.
B. Destruction

With the outbreak of the war in 1992, however, the bridge resumed its more direct, non-metaphorical importance. Early in the war, Mostar was besieged by Serbian forces opposed to Bosnia’s independence (or determined to create a Serb state on its territory), and defended by both Croats and Bosnian Muslims. At that time, Stari Most was already recognized as an important historical artifact, even by combatants. Slobodan Praljak, a commander of the Croat forces—and later one of the defendants in the Prlić trial charged with destroying the bridge—ordered the bridge defended against Serbian attacks in part “due to its historical importance.”

By 1993, the Serbs who had besieged the city withdrew over the shield mountains that rise immediately to the east, but its former defenders—who had agreed on resisting Serbian hegemony but little else—started fighting with each other. Bosnian Muslims fought to ensure the survival of an independent Bosnia; Bosnian Croats fought to create an independent state of their own or to join with Croatia. As the city divided into Croat and Muslim sides, the bridge became one of the few links between the main area of Muslim control on the eastern, left bank of the Neretva and a narrow band of Muslim-held territory running a couple of miles up and down the western, right bank. (The predominantly Muslim Army of the Republic of Bosnia and Herzegovina – the ABiH – had built a makeshift bridge at another location some months earlier; some other bridges were in use sporadically, often under very dangerous conditions and for foot traffic only.) There were civilians in that long narrow strip on the west side, pressed between the river and the frontline just 100 meters or so farther west—one of the most fiercely contested zones in the entire Bosnian conflict. I remember touring the frontline, called the Boulevard, just after the war; buildings along it had been carved by small arms fire into almost artistic skeletons. But nowhere was safe: behind the line, farther east, and over the river on the left bank, shelling reduced the besieged Muslim section to ruin.

Between June and November 1993, Stari Most was shelled on a number of occasions. Apparently the purpose was to prevent crossings, since generally the main target was the adjacent parapet, rather than the span itself. On November 8, however, Croat forces began an intensified attack on Mostar, including the bridge. According to the best accounts, a Croatian tank parked a kilometer or so south along the west bank shelled the bridge several times throughout the day, and again

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13 Prosecutor v. Prlić et al., Case No. IT-04-74, Trial Chamber Judgment, supra note 1, at ¶ 1297.
14 The basic facts here follow the summary accounts in the Trial and Appeals Judgments. There is no reason to disbelieve them, and anyway the argument this Article adduces does not depend on the truth of a particular interpretation of the facts; rather, it asks what the Tribunal did with the facts as it saw them.
the next morning. The bridge was effectively unusable by that evening, and the next morning, shortly after ten o’clock, Stari Most collapsed into the Neretva.

Fig. 2: The final assault

Croatian leaders, both locally and in Zagreb, denied they had had anything to do with the collapse; later, Croatian authorities tried a Croatian tank crew on the theory that they had acted without orders. Years later, during the Prlić trial, some of the accused questioned who had been in command and what forces had actually destroyed the bridge, or why exactly it had collapsed, since it had also been targeted (and thus weakened) by Serbian artillery earlier in the war; according to Praljak, it was blown up by the ABiH. But whatever else happened, it seems beyond doubt that Croatian forces intentionally targeted the bridge. For the question that concerns us, this is helpfully clarifying, since the interesting problem is not who did this, but what they did, and what it meant.

Credit, Ardesia Group, with thanks to Dr. Manfredo Romeo.

Prosecutor v. Prlić et al., Case No. IT-04-74, Trial Chamber Judgment, supra note 1, at ¶ 1327–45 (reviewing plausible evidence for this hypothesis, but rejecting the claim that it was the essential cause of the bridge’s collapse).
Not long after Stari Most collapsed, the last bridge to which Muslim forces and civilians had access was also destroyed, and the Muslims in West Mostar were compelled to rely on pontoons and pulleys for transit and supply until the establishment of a tenuous peace in 1994. The city remained effectively divided, however, and although the bridges have been rebuilt (including Stari Most), to this day Mostar’s governance and its social and economic life are radically bifurcated between a Croat West and a Muslim East.17

C. Recognition as Cultural Heritage

Long before the war, the importance of the bridge as a cultural artifact had been recognized—even one of the men charged with the final attack acknowledged this—and its destruction was a noteworthy and controversial event at the time, which is why Croatian leaders so vigorously denied their involvement.

One of the most prominent indications of cultural heritage status is inclusion on the list of world heritage sites maintained by the United Nations Economic, Social and Cultural Organization (UNESCO). Stari Most had not been listed prior to the war, but UNESCO had been appraised of the dangers to the bridge and had sent a team of experts to evaluate it, and it appears to have been provisionally listed it as a monument of importance18 and recommended for UNESCO’s World Heritage in Danger List.19 The bridge may also have been protected under a 1985 Bosnian law on the protection and use of the republic’s cultural, historical and natural heritage.20 In 2005, after its reconstruction, the bridge and surrounding environs were registered as a UNESCO world heritage site.21

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17 See, for example, Andrew Higgins, In Bosnia, Enraged Ethnic Divisions Are a Warning to the World, N.Y. TIMES (Nov. 19, 2018), http://perma.cc/9NHC-TDXA (describing divided city services, education systems, and social attitudes in Mostar).

18 Prosecutor v. Prlić et al., Case No. IT-04-74-T, Trial Chamber Judgment, Dissent of Judge Antonetti, Vol. 6, 301, n. 1186 (Int’l Crim. Trib. for the Former Yugoslavia May 29, 2013) (discussing the Prosecution Pre-Trial Brief, P 060697 ¶ 69, which claims it was listed). Id. at 305-6 (giving a similar discussion but referring to document P 06697 at p. 10—presumably the same document).


20 Prosecutor v. Prlić et al., Case No. IT-04-74-T, Trial Chamber Judgment, supra note 18, at 306 (Antonetti, dissenting).

Fig. 3: The reconstructed Stari Most

The designation was unusual, given the complete destruction of the site—UNESCO has sometimes expressed concern about reconstruction when considering listings—as is the justification UNESCO provided for listing it:

The Old Bridge area, with its pre-Ottoman, eastern Ottoman, Mediterranean and western European architectural features, is an outstanding example of a

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22 Credit, Wikimedia Commons.

23 UNESCO listing policy long disfavored reconstruction, though this has changed. See Christina Cameron, Reconstruction: Changing Attitudes, UNESCO COURIER, Jul.–Sept. 2017, at 58 (noting that UNESCO guidelines still provide that “[i]n relation to authenticity, the reconstruction of archaeological remains or historic buildings or districts is justifiable only in exceptional circumstances,” linking this to the influence of the Venice Charter, and mentioning that the listing of the Mostar bridge was “justified on the basis of the restoration of cultural value, an intangible dimension of the property”). The influential 1964 Venice Charter, adopted by the International Council on Monuments and Sites (ICOMOS) in 1965, affirmed the concept of authenticity and the importance of maintaining a site’s identifiable historical context. See 2nd Intl Cong. of Architects & Technicians of Historic Monuments, International Charter for the Conservation and Restoration of Monuments and Sites (The Venice Charter), May 31, 1964. In turn, the Charter’s doctrinaire position has been criticized and modified. See generally THE VENICE CHARTER REVISITED: MODERNISM, CONSERVATION AND TRADITION IN THE 21ST CENTURY (Matthew Hardy ed., 2008); INT‘L COUNCIL ON MONUMENTS AND SITES, THE NARA DOCUMENT ON AUTHENTICITY (1994).
multicultural urban settlement. The reconstructed Old Bridge and Old City of Mostar is a symbol of reconciliation, international cooperation and of the coexistence of diverse cultural, ethnic and religious communities.24

The formal basis for listing the bridge is Criterion (vi), which allows enrollment of sites “directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance.”25 Curiously, this is the only criterion (of six available) that the UNESCO committee invoked, even though UNESCO itself notes “this criterion should preferably be used in conjunction with other criteria.”26

Still, in this case, its symbolic value was deemed sufficient:

With the ‘renaissance’ of the Old Bridge and its surroundings, the symbolic power and meaning of the City of Mostar—as an exceptional and universal symbol of coexistence of communities from diverse cultural, ethnic and religious backgrounds—has been reinforced and strengthened, underlining the unlimited efforts of human solidarity for peace and powerful cooperation in the face of overwhelming catastrophes.27

Thus, to UNESCO, the bridge’s value as cultural heritage primarily was as a symbol of coexistence, diversity, and multiculturalism. It is as such that it is clearly identified as a part of universal cultural heritage. That is not the only way to think about cultural heritage, which can also be local and particular, but it is the dominant paradigm.28

24 Old Bridge and Area of the Old City of Mostar, supra note 21.
26 Id. The other plausible criteria refer to an object that:

1. represent[s] a masterpiece of human creative genius and cultural significance;
2. exhibit[s] an important interchange of human values, over a span of time, or within a cultural area of the world, on developments in architecture or technology, monumental arts, town-planning or landscape design;
3. bear[s] a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared;
4. [is] an outstanding example of a type of building, architectural or technological ensemble or landscape which illustrates (a) significant stage(s) in human history
5. [is] an outstanding example of a traditional human settlement, land-use, or sea-use which is representative of a culture (or cultures), or human interaction with the environment especially when it has become vulnerable under the impact of irreversible change. Id.

(Four other criteria relate to natural phenomena.)

27 Old Bridge and Area of the Old City of Mostar, supra note 21. See also The Operational Guidelines for the Implementation of the World Heritage Convention, UNESCO, WHC 17/01 (Jul. 12, 2017), http://perma.cc/RRF4-5B7P.
28 See, for example, Christoph Brumann, Creating Universal Value: The UNESCO World Heritage Convention in its Fifth Decade, in The Oxford Handbook of Public Heritage Theory and Practice (Angela M. Labrador & Neil Asher Silberman eds., 2018). Universalism’s conceptual dominance does not mean cultural heritage is actually controlled at the universal or global level; in fact states have the dominant role in administering and controlling notionally universal patrimony on their
Listing came long after the war, but well before the main trials in which the ICTY considered the bridge’s destruction. As we will see shortly in Section IV, the strategic logic of trial—really, of ICL as a project—led prosecutors and judges to a very different symbolic understanding of what the bridge meant. But before turning to the trial, we must consider one more history—of the law which notionally protected the bridge, and which the court applied, in its way, to weigh its destruction.

**III. LAW: CONVERGING PROJECTS OF PROTECTION**

Before turning to the trial, we must survey the interwoven development of two strands of law: ICL (including international humanitarian law (IHL)) and cultural protection norms. ICL and IHL norms pertaining to cultural protection are longstanding but limited in scope, and cultural heritage has long grappled with how to realize and enforce its protective prescriptions. Its answer, over time, has circled around and slowly converged towards reliance on international criminal law and the laws of war. By the time of the events with which we are concerned, they had come to have a seeming unity of form and purpose.

**A. ICL and IHL**

Beginning with the 1899 and 1907 Hague Conventions, we find indications of a commitment to protect cultural heritage within the context of the laws of war. Both conventions provide, in nearly identical language, that “in sieges and bombardments all necessary steps should be taken to spare as far as possible edifices devoted to religion, art, science, and charity, hospitals, and places where the sick and wounded are collected[.]” The 1907 Naval Convention contains a

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29 Annex to the Convention with Respect to the Laws and Customs of War on Land: Regulations Respect the Laws and Customs of War on Land (Hague II) art. 27, Jul 29, 1899, 32 Stat. 1803, T.S. 403. The language in the 1907 Convention’ is phrased in stronger terms, using “must” instead of “should.” Annex to the Convention Respecting the Laws and Customs of War on Land: Regulations Respect the Laws and Customs of War on Land (Hague IV) art. 27, Oct 18, 1907, 36 Stat. 2277, T.S. 539. Both articles also require a besieged party to indicate the presence of protected places by distinctive (or particular) and visible signs, and to notify the enemy about them beforehand. In addition, Hague IV provides that, in territory under occupation, “[t]he property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.” Id. at art. 56.
similar provision regulating naval bombardment.\(^{30}\) There are also more general provisions concerning wanton destruction, which, while not specifically focused on cultural objects, would equally apply to them.

This protection is quite limited and qualified: the relevant articles extend protection to cultural objects “provided they are not used at the same time for military purposes.”\(^{31}\) Moreover, the Hague Conventions don’t create mechanisms for adjudicating and punishing individuals—they establish norms, not institutions or decisional pathways. Still, individual responsibility is clearly compatible with the Hague framework, and states, through their own codes of military justice, could establish mechanisms and enact punishments.\(^ {32}\) The Hague Conventions are treaties binding specific states, but by midcentury their provisions and principles had passed into customary law with general application.\(^ {33}\)

In the meantime, the devastation of the Great War, including such events as the burning of Louvain and the destruction of Rheims Cathedral, prompted intensified interest in protecting cultural heritage. As with so many other aspects of the pre-war legal framework, cultural protection norms proved inadequate to the challenge of modern, industrialized, and totalized war. In particular, the Armenian massacres and the accompanying destruction of Armenian material culture contributed directly to one of the major developments in the field, as well as one of its missed moments. In the 1930s, Raphael Lemkin, known today as the originator of the concept of genocide, proposed a new category of crime—two discrete but related crimes, in fact: “barbarity” and “vandalism.”\(^ {34}\) The former we would recognize as something like genocide today. The latter, however, focused

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30 “In bombardments by naval forces all the necessary measures must be taken by the commander to spare as far as possible sacred edifices, buildings used for artistic, scientific, or charitable purposes, historic monuments, hospitals, and places where the sick or wounded are collected[.]” Convention Concerning Bombardment by Naval Forces in Time of War (Hague IX) art. 5, Oct. 18, 1907, 36 Stat. 2351, T.S. 542.

31 See Hague II, supra note 29, at art. 27; see also Hague IV, supra note 29, at art. 27. The 1907 Naval Convention similarly adds “on the understanding that they are not used at the same time for military purposes.” Hague IX, supra note 30, at art. 5.

32 As noted above, the Hague Convention Regulations provide that violations “should be made the subject of legal proceedings.” Hague IV, supra note 29, at art. 56.

33 “In 1946 the Nuremberg [sic] International Military Tribunal stated with regard to the Hague Convention on land warfare of 1907: ‘The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing International Law at the time of their adoption . . . but by 1939 these rules . . . were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war . . . .’” Int’l Comm. of the Red Cross, Treaties, States Parties and Commentaries: Convention (IV) Respecting the Laws and Customs of War on Land and its Annex, Regulations Concerning the Laws and Customs of War on Land (1907), http://perma.cc/GWJ9-AAM4 (internal citations omitted).

on the destruction of a group’s identity and culture—its material culture rather than its biological existence. Connecting the two forms, Lemkin argued:

[A]n attack targeting a collectivity can also take the form of systematic and organized destruction of the art and cultural heritage in which the unique genius and achievement of a collectivity are revealed in fields of science, arts and literature. The contribution of any particular collectivity to world culture as a whole, forms the wealth of all of humanity, even while exhibiting unique characteristics.

Thus, the destruction of a work of art of any nation must be regarded as acts of vandalism directed against world culture. The author [of the crime] causes not only the immediate irrevocable losses of the destroyed work as property and as the culture of the collectivity directly concerned (whose unique genius contributed to the creation of this work); it is also all humanity which experiences a loss by this act of vandalism.

Relying on claims of both uniqueness and commonality, vandalism was thus a crime against a particular cultural community and a global community—a double move that prompts as many questions about culture and our relationship to it as it presumes. But the questions were deferred. In the aftermath of the Second World War, Lemkin’s proposals found renewed traction and were enshrined in the Genocide Convention, but that treaty focused almost entirely on physical and biological destruction; the cultural component, vandalism, was missing.

There were other efforts in the interwar period that, like Lemkin’s efforts, had limited effect at the time but influenced later, post-WWII developments. The so-called Roerich Pact or Washington Pact of 1935 established a very high level of protection, effectively exempting identified cultural objects from the calculus of military necessity altogether. Yet even the Roerich Pact included a reciprocal logic: its protections cease if protected monuments are used for military purposes. The Pact is an inter-American treaty with 11 parties, not clearly incorporated as a general principle or customary rule in general international law. Still, its principles influenced the postwar cultural heritage conventions, to which we will turn in a moment.

35 Id.

36 Echoes of the broader, non-biological strand may be found in the Genocide Convention’s definition, which includes “forcibly transferring children of the group to another group[.]” Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, S. TREATY DOC. NO. 81-1, 78 U.N.T.S. 277. But the idea of cultural genocide has not found favor within existing doctrine, nor has destruction of material culture been found to constitute an independent ground for genocide, serving instead as evidence of intent that informs acts of biological destruction.

The geneva conventions of 1949 do not have an explicit focus on cultural protection, though many of their general provisions for civilians and civilian objects can apply to cultural heritage as well. For example, “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” would also apply.\(^{38}\) Moreover the two additional protocols of 1977 address cultural heritage directly. additional protocol I forbids parties “(a) to commit 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; [and] (b) to use such objects in support of the military effort[.]”\(^{39}\) Additional protocol II, focused on internal conflicts, has a similarly worded provision.\(^{40}\) Additional protocol I also establishes heightened protection for monuments that have been given special protection subject to a treaty regime, though here too the usual qualifiers regarding military use (as well as a requirement of non-proximity to military objectives) are included.\(^{41}\)

When the ICL project was revived in the 1990s, with the establishment of ad hoc war crimes tribunals for Yugoslavia and Rwanda and later the ratification of the Rome statute for a permanent international criminal court, protections for cultural heritage were included. the ICTY statute, though drafted in response to the Yugoslav crisis, draws on widely recognized existing customary law and treaties recognized as having customary force.\(^{42}\) The most direct connection, in article 3, covers violations of the laws and customs of war. article 3(d) provides jurisdiction for the “seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic

\(^{38}\) Geneva convention relative to the protection of civilian persons in time of war art. 147, Aug. 12, 1949, T.I.A.S. 3365, 75 U.N.T.S. 287.

\(^{39}\) Protocol additional to the geneva conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts art. 53 (Protocol I), Jun. 8, 1977, 1125 U.N.T.S. 3. The official commentary to this article notes it was adopted with reference to the provisions of the 1954, which already provided protection for cultural heritage, which inclusion in the Protocol would confirm.

\(^{40}\) Protocol additional to the geneva conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts art. 16 (Protocol II), Jun. 8, 1977, 1125 U.N.T.S. 609.

\(^{41}\) Protocol I, supra note 39, at art. 85(4)(d) (prohibiting “making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, sub-paragraph b), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives[.]”).

monuments and works of art and science."Interestingly, the usual qualifier about protection being subject to the protected structure not being used for military purposes is missing. Other provisions of Article 3 could be relevant to cultural heritage protection, including prohibitions on wanton destruction not justified by military necessity and attack on undefended towns and buildings, and Article 2 incorporates grave breaches of the Geneva Conventions.

Lastly, in the Rome Statute, the ICC was given jurisdiction over war crimes, including “intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments . . . provided they are not military objectives.” Just as with the ICTY Statute, there are general provisions governing other crimes that can indirectly protect cultural heritage.

Some of these rules are embedded in specific treaties, but collectively they contribute to a generally recognized customary norm, which the International Committee of the Red Cross has summarized like this:

Each party to the conflict must respect cultural property:

A. Special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives.

B. Property of great importance to the cultural heritage of every people must not be the object of attack unless imperatively required by military necessity.

As a corollary, “[t]he use of property of great importance to the cultural heritage of every people for purposes which are likely to expose it to destruction or damage is prohibited, unless imperatively required by military necessity.”

Thus, IHL and ICL demonstrate a consistent, if qualified, commitment to the protection of cultural heritage, by classifying attacks on cultural objects not justified by military necessity as war crimes.

43 ICTY Statute, supra note 8, at art. 3(d).
44 Id. at art. 3(b)–(c).
45 Id. at art. 2 (listing eight named acts that would qualify as such).
46 Rome Statute of the International Criminal Court, arts. 8(2)(b)(ix) and 8(2)(c)(iv), U.N. Doc. A/CONF/183/9 (July 17, 1998) (applying the same language to international armed conflicts and armed conflicts not of an international character, respectively).
B. Cultural Heritage

The postwar period saw a separate codification project for cultural heritage, conducted through the auspices of UNESCO. The main lines of this project concerned cultural heritage as such, but inevitably, they linked that protection to the norms of IHL, and increasingly, to ICL’s focus on individual criminal responsibility.

The 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, a direct response to the depredations of the Second World War, protects cultural heritage from wartime destruction. It sets cultural protection directly in the framework of IHL—the Preamble of the 1954 Convention invokes the 1899 and 1907 Hague Conventions, as well as the Roerich Pact. It establishes clear prohibitions on states’ behavior in war: parties “undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties . . . by refraining from any act of hostility directed against such property.”50 The usual waiver is there too: “[t]he obligations . . . may be waived only in cases where military necessity imperatively requires such a waiver.”51

The 1954 Convention “reveals a change of philosophy” from a past in which destruction had “traditionally been a sign of triumph granted to the victor.”52 But the Convention is also a classic interstate treaty, whose provisions are by, for, and about states; it contains no individual criminal sanctions. Instead, states “undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention.”53 In 1999, a protocol was appended to the 1954 Convention—the so-called Second Protocol—which specifies criminal penalties for a defined set of five violations as criminal offenses, which states agree to take jurisdiction over, prosecute or extradite.54 The Protocol was a response to

51 Id. at art. 4(2). This is the so-called general protection; some objects are be eligible for special protection, for which the relevant limitation is “unavoidable” military necessity. The bridge was not in the special category, which requires a distinctive insignia.
52 Prosecutor v. Prlić et al., Case No. IT-04-74-T, Trial Chamber Judgment, supra note 18, at 307 (Antonetti, dissenting).
53 1954 Convention, supra note 50, at art. 28.
the destruction of the Balkan wars. Coming as it did just after the ratification of the Rome Statute, it suggested a convergence: a new reliance on ICL—itself a body of law revived in the 1990s—as the mechanism by which cultural heritage would henceforth be protected in times of conflict.

The earlier 1972 World Heritage Convention (1972 Convention)\(^{55}\) does not address armed conflict—the term appears only once and only in relation to provisions for keeping a list of threats to endangered sites, not as part of any specific prohibitions or restrictions.\(^{56}\) But the 1972 Convention does establish the standards for UNESCO’s formal system for identifying cultural and natural heritage that have become widely deployed—including, decades later, for Stari Most. These standards serve as a benchmark for claims about a common, universal heritage, even, as we shall see, in the context of war and adjudication of its crimes.

Such ideas, which underpin the earliest provisions in the Hague Conventions and are explicit in Lemkin’s proposals from the 1930s, also negotiate the tension between particular and universal claims about culture and heritage—the question, that is, of whether an object has significance because it belongs to a particular culture or to a universal human patrimony, and what the relationship between these two levels is. The 1954 Convention, for example, states 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[.]”\(^{57}\)

A recent case at the ICC laid out the question about how those values were to be understood in the context of a war crimes trial. Al-Mahdi\(^{58}\) was based on events in Mali long after the war in Bosnia, but adjudicated before the Prlić appeal, and the Prlić judges were presumably aware of it. As one analysis of the case noted:

> [T]he [prosecution] described the war crime of attacking protected objects as a crime ‘against that which constitutes the richness of whole communities. And it is thus a crime that impoverishes us all and damages universal values we are bound to protect […] to protect cultural property is to protect our culture, our history, our identity.’ . . . [E]ven crimes such as attacks on cultural property that, on the face of it, appear straightforward in terms of the values that underlie them, may be more complex once we ask whose cultural heritage


\(^{56}\) Id. at art. 11(4).

\(^{57}\) 1954 Convention, supra note 50, at 240.

\(^{58}\) Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC-01/12-01/15, Judgment and Sentence (Sept. 27, 2016). Al Mahdi pled guilty to and was convicted of war crimes for the destruction of Sufi shrines in Timbuktu in 2012.
the criminalisation of this act can be understood to protect. Do universalist values of the common heritage of all humanity . . . underlie this crime, or does a more local conception of common heritage, attached to the community in which the object is embedded, provide the justification for criminalising such acts. This question might influence not only what types of cultural property might be prioritised in international criminal cases, but would also be revealing of the type of global vision international criminal justice may be espousing.59

All in all, we can describe two great tracks of development, the first in ICL and the second in cultural heritage norms. Mostly, they run in parallel, separate magisteria, but equally, we might notice the overlaps and points of connection. Concern with cultural heritage and its protection is present from the inception of the modern laws of war; a marginal concern, but a discrete one, identifiable and expressive of a coherent set of values, which tend towards universal claims about common humanity and shared heritage.60 By the time of the events with the Old Bridge in the 1990s, and then the trial in the new century, these two bodies of law had intertwined.

But application is another matter. Now we will turn to the trial in which these seemingly complementary, converging projects of protection took strange paths, and in which a project that itself expresses universal values came to adopt a very particular interpretation.

IV. TRIAL: STRATEGIES AND INTERPRETATIONS

The Perišić appeal, issued in November 2017, was the last case decided before the ICTY closed.61 This fact alone gave the decision extra significance for some, especially as the Tribunal’s late trials, marked by acquittals reversing trial judgments, have been criticized for adopting conservative interpretations that narrowed its achievements.62 But the trial had begun long before. The six indictees made their initial appearance in April 2004, and trial began two years later, in April

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60 This convergence is evident even in criticisms of international law’s insufficient attention to issues of cultural heritage. See, for example, Patty Gerstenblith, The Destruction of Cultural Heritage: A Crime Against Property or a Crime Against People?, 15 J. MARSHALL REV. INTELL. PROP. L. 336 (2016).

61 The small number of cases remaining—appeals, a retrial—are being tried at the International Residual Mechanism for the Criminal Tribunals, a follow-on institution in The Hague.

62 Criticism focused especially on the acquittals, on appeal, of Generals Gotovina and Perišić, which were seen as cutting back on the ICTY’s early jurisprudence expanding liability for commanders, as well as of Ramush Haradinaj, and argued that this turn damaged the legitimacy of the tribunal. See, for example, Jelena Subotić, Legitimacy, Scope, and Conflicting Claims on the ICTY: In the Aftermath of Gotovina, Haradinaj and Perišić, 13 J. HUM. RTS 170 (2014).
2006; it ended in March 2011, and judgment was delivered in May 2013—nearly 20 years after Stari Most was destroyed.

A. Indictment

It might seem obvious what crime the destruction of the bridge was: a crime against cultural heritage. Just such a crime is widely identified in customary law, and expressly included in the ICTY Statute as a war crime under Article 3(d). But the objection is equally obvious: the bridge was clearly being used for military purposes, including resupply of the front line. In almost all instruments from the 1899 Hague Convention on, protections for cultural monuments in wartime depend upon maintaining civilian status; military use voids the protection, and with it the prohibition against targeting cultural objects.

And so the bridge—along with being one of the most iconic and historically significant structures in the former Yugoslavia—was special in another way: unlike the Sarajevo library, or Dubrovnik’s old city, or countless mosques that were destroyed, all of which were clearly civilian objects, the bridge was probably a legitimate military target. Its normal function, allowing the transit of goods and people over a river, made it an essential supply conduit, not only for the civilians still living on the West side, but for ABiH soldiers on the fighting front.

Prosecutors therefore faced a difficult doctrinal obstacle: the status of the bridge as cultural heritage was clear, but its use for military resupply clearly made it a legitimate military target. So a charge under 3(d) for an assault on a cultural monument faced a predictable path to failure—to acquittal. Yet weighing in the balance against this doctrinal obstacle was the fact of this iconic bridge’s destruction, and the sense that this was precisely the kind of thing for which ICL had been revived. The destruction of Stari Most had been open, notorious, and controversial—one of the most publicized and shocking episodes of the wars. How could the Tribunal not say anything about such an atrocity?

It was with this double recognition in mind—the impossibility of prosecuting on cultural heritage grounds, and yet the need to charge the bridge’s

63 Prosecutor. v. Prlić et al., Case No. IT-04-74-T, Trial Chamber Judgment, supra note 1, at Vol. 2 ¶ 1286–90.

64 Ironically, the ICTY Statute is the only instance in which this is not true, yet it was evidently clear and uncontroversial to the judges at all levels, even when they disagreed on other issues, that in fact the normal restriction should be read in, probably as a function of customary law. They did not appear seriously to consider reading the statute as lex specialis imposing a higher level of protection for cultural objects. See, for example, Prosecutor v. Strugar, Case No. IT-01-42-T, Trial Chamber Judgment, ¶¶ 1298-1312 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005) (discussing customary law and ICTY jurisprudence, and noting, at 310, “the established jurisprudence of the Tribunal confirming the ‘military purposes’ exception which is consistent with the exceptions recognized by the Hague Regulations of 1907 and the Additional Protocols. . .”).
destruction as some kind of crime—that the prosecution sought a different rationale: that the bridge was a carrier not only of material goods, munitions, and food, but of symbolic value, and that the community for whom it signified something was the true victim of the bridge’s destruction. As we shall see, this had consequences for the prosecution’s strategies and the court’s interpretation of what happened.

One of the earliest strategies was blurring or distraction. A charge under Article 3(d) was brought—Count 21—but its relationship to Stari Most was deliberately unclear. The bridge was folded into a paragraph along with a list of ten mosques, and at the end, Article 3(d) was invoked, but only its language referring to religious and educational structures—the bridge, of course, is neither—not historical monuments. So Count 21, the cultural heritage charge, appears to include the bridge, but actually says nothing about it, instead discussing only other incidents. The structure of the indictment, distributing its argument and information across several paragraphs and then incorporating them into a final operative paragraph, makes this ambiguous, and makes the ambiguity almost invisible.

But this was a weak move—it’s simple to make an allegation in an indictment, another thing to prove it in court. The risk remained that the charge relating to the bridge would be struck from the count once the facts of its military use were introduced at trial. And indeed, at trial the court dismissed the allegation regarding the bridge under Count 21. Its formal reasoning was that the defense

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65 “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 Statute Article[ ] 3(d)].” Prosecutor v. Prlić, et al., Case No. IT-04-74-T, Second Amended Indictment, at ¶ 229 (Intl’l Crim. Trib. for the Former Yugoslavia June 11, 2008) (emphasis and capitalization original).

66 In his dissent from the trial judgment, Antonetti notes that the Prosecution purposely abbreviated its citation to Article 3(d), calling this “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 characterize the Stari Most as a ‘cultural landmark’ under Article 3(d).” Prosecutor v. Prlić et al., Case No. IT-04-74, Trial Chamber Judgment, supra note 18, at 302 (Antonetti, dissenting).

67 Count 21 is based on claims “alleged in Paragraphs 15-17.6, 39, 53, 68, 83, 84, 97, 116, 152, 162, 163, 165, 166 and 179-181.” Prosecutor v. Prlić, et al., Case No. IT-04-74-T, Second Amended Indictment, supra note 65, at ¶ 229. The extensive list of paragraphs might make one think there is considerable discussion, but in fact, paragraph 116 is the only one mentioning the bridge; the others refer to destruction of mosques or religious institutions or formal elements of the count. This language is almost entirely unchanged from the initial indictment of 2004, with the exception of the additional of paragraphs 17.1–17.6, which are enormous, highly redundant, formal elaborations of the six individual indictees’ involvement in the joint criminal enterprise. The sub-paragraph referring to Slobodan Praljak, for example, refers to his “directing military operations and actions during and as part of which cultural and religious property such as mosques were destroyed,” and this same language appears in the sub-paragraphs for the others, but for none of the six does it mention the bridge. Id. at 17.3(k).
had not been put on notice of the charge (and so there was nothing to answer), but as the court itself noted, the destruction of the bridge had been mentioned “and is alleged in particular under Count 21.” 68 So lack of notice was pretextual: the real problem was that the prosecution had chosen to narrow the count to cover religious and educational facilities only, thus excluding historic monuments to avoid the bridge, which had been used for military purposes.

But other pathways were available, to which the bridge could be connected: other crimes and characterizations. The bridge reappears—unnamed, but by implication—in six other counts:

a. one crime against humanity not specifically focused on cultural heritage:
   • “Count 1: persecutions on political, racial and religious grounds, a crime against humanity, punishable under Statute Article 5(h)” 69

b. two war crimes under Article 2, which (like Count 1) though general in nature and not specifically focused on cultural heritage, “adopt the traditional grounds for the offence of destruction of a cultural heritage [sic]” 70
   • “Count 19: extensive destruction of property, not justified by military necessity and carried out unlawfully and wantonly, a grave breach of the Geneva Conventions of 1949, punishable under Statute Article 2(d)”
   • “Count 20: wanton destruction of cities, towns or villages, or devastation not justified by military necessity... punishable under Statute Article 3(b)” 71

c. and three violations of the laws or customs of war under Article 3 that focus on treatment of civilians, not structures or cultural heritage as such:
   • “Count 24: unlawful attack on civilians (Mostar)... as recognised under customary law and Article 51 of Additional Protocol I and

68 Prosecutor v. Prlić et al., Case No. IT-04-74-T, Trial Chamber Judgment, supra note 63, at Vol. 3, 467, ¶ 1611.
69 Prosecutor v. Prlić et al., Case No. IT-04-74-T, Second Amended Indictment, supra note 65, at ¶ 229.
70 Prosecutor v. Prlić et al., Case No. IT-04-74-T, Trial Chamber Judgment, supra note 18, at 302 (Antonetti, dissenting).
71 Prosecutor v. Prlić et al., Case No. IT-04-74-T, Second Amended Indictment, supra note 65, at ¶ 229.
The astute reader will note that these last three counts have no direct connection to either cultural heritage or even physical property. Instead, the Additional Protocol articles provide for “general protection against dangers arising from military operations... Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”

Similarly, Article 3(1)(a)—drawn from the four Geneva Conventions’ Common Article 3, which applies to non-international conflicts—prohibits “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture[.]”

The most consequential counts for our purposes are Count 1 (persecution) and Count 25 (unlawful infliction of terror) as well as Count 20 (wanton destruction), on which the analysis of the other counts ultimately rested.

Count 25, the terror count, has no essential content relating to cultural heritage, so an obvious question is what role, if any, concepts of culture played in its articulation.

72 The trial judgment’s legal findings for Count 24 do not mention the bridge specifically (nor the mosques) but speak of shelling in general. In his dissent, Antonetti seems to believe the indictment included the bridge in Count 24. Prosecutor v. Prlić et al., Trial Chamber Judgment, supra note 18, at 303 (Antonetti, dissenting).

73 Prosecutor v. Prlić et al., Case No. IT-04-74-T, Second Amended Indictment, supra note 65, at ¶ 229; The trial court declined to consider this count because the crime of ‘cruel treatment in siege’ is not provided in the Statute or case-law. Prosecutor v. Prlić et al., Case No. IT-04-74-T, Trial Court Judgment, supra note 1, at Vol. 4, ¶ 1260–70. It noted that this count duplicated Count 17 (cruel treatment). In the indictment’s summation of the counts, when discussing Count 17 the Prosecution did not mention paragraph 116 (the paragraph that mentions the bridge).

74 Additional Protocol I, supra note 39, at art. 51 and Additional Protocol II, supra note 40, at art. 13 (using identical language, but applied to civilians in international and non-international conflicts respectively).

75 Geneva Convention of 1949 (IV), supra note , at art. 3.

76 The bridge is not the only basis for any of these counts; it is only one charge, and each count contains many charges. It is enough for a single charge to be upheld for conviction on a count. So, when the court eventually discusses the bridge in relation to, say, persecution, conviction on that charge would mean conviction on Count 1; but acquittal on that charge might not mean acquittal on that count, if some other charge were upheld. That is in fact what ultimately happened. With this in mind, we can productively consider how the various judges considered the persecution and terror counts in relation to the bridge.
As for the law underpinning Count 1, we will see that persecution is a capacious category, but also one that makes particular demands about the identity of the victim, which in turn placed pressure on the prosecution and court to make claims about what the bridge was, and meant, and to whom.

The charging strategies the prosecution adopted shaped the trial—judges decide, but prosecutors have considerable discretionary power of initiative in determining what is charged.\(^77\) In the trial and appeal, judges who disagreed about many things ultimately adopted this frame and proceeded to judgment—here for conviction, there for acquittal, deciding or dissenting—in a rhetorical space in which cultural heritage became increasingly instrumentalized.

### B. Trial\(^78\)

Much of the trial judgment’s 80 or so paragraphs about the bridge are given over to a forensic discussion of who exactly was shooting at the bridge, from where, and when.\(^79\) The court performed a rather cursory evaluation of considerable close argument at trial, at the end of which all six defendants were convicted for the destruction of the bridge, on Counts 1 (persecution) and 25 (terror). They were all found guilty for Count 20 (wanton destruction) as well, but the court decided not to enter a conviction because of the cumulative charging rule.\(^80\)

The actual evaluation on the merits is brisk, almost clipped. The fact that the bridge was used for military resupply was largely uncontested, and therefore its status as a legitimate military target was clear. Nonetheless, the trial court found that the destruction of the bridge caused substantial harms, of two kinds.

First, “although the Old Bridge was necessary to the ABiH considering the way in which it was used, its destruction had the immediate effect of preventing supplies from reaching the Muslim enclave on the right bank of the Neretva and

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78 See generally Petrovic, supra note 7.

79 In addition, Judge Jean-Claude Antonetti appended a sprawling, 500-page dissent to the trial judgment, parts of which addressed the bridge. The dissent has been heavily criticized, as has Judge Antonetti more generally. See, for example, Marko Milanovic, The Sorry Acquittal of Vojislav Seselj, EJIL-TALK! (Apr. 4, 2016), http://perma.cc/2A27-2JHV (calling the dissent “unreadable” and a “doozy”). I discuss his dissent below.

80 This was also applied to Counts 14 and 17. The cumulative charging rule provides that when a defendant is convicted on two counts that share all material elements—for which the legal tests are not substantially different—they should only have a conviction for the more specific offense. Prosecutor v. Pfić et al., Case No. IT-04-74-T, Trial Chamber Judgment, supra note 1, at Vol. 4, ¶ 1260–70 (discussing the rule and disposition for this case).
seriously exacerbating the humanitarian situation of the people living there.\textsuperscript{81} In part, this was a straightforward issue—the harmful effects of a lack of supplies—but as a doctrinal matter restricting supplies could form part of a claim of persecution or terror.

Yet this is not simply a reference to the material effects of the bridge’s destruction on the local population as an incident of geography, or even the psychological effects of physical deprivation. There was an additional element, and a critical one, which was \textit{symbolic} harm. Indeed, rather than focus on the material usefulness of the bridge, the court emphasizes its symbolic value as a basis for conviction.

The result, the court’s judgment, was that “by destroying the Old Bridge, a structure with tremendous symbolic value that was used for military purposes by the ABiH, the HVO [Croatian Armed Forces] caused harm to the Muslim population of East Mostar out of proportion to the legitimate military objective sought[.]”\textsuperscript{82}

This is a curious formulation. Normally, disproportionality has to do with collateral damage: some legitimate target is attacked, in the course of which some other civilian object is harmed, and that harm is disproportionate.\textsuperscript{83} In part, the court is saying just that: the destruction of an otherwise licit target improperly reduced the flow of supplies to the civilian population. But on the court’s reading, the bridge’s destruction \textit{itself} appears to be disproportionate—and itself constitutes a harm because of the symbolic value of the bridge.

The logic is quite similar for Count 25, infliction of terror: sustained shelling, isolation and deprivation were intended to demoralize the population—an ambiguous standard, as demoralizing the enemy is a licit purpose in war. (The crime, after all, is \textit{unlawful} infliction of terror.) And, just as with persecution, the destruction of the bridge contributed to this terror in two ways: materially, by increasing the isolation of the civilian population, and symbolically, by striking at an object of great value to those civilians.

\textsuperscript{81} Prosecutor v. Prlić et al., Case No. IT-04-74-T, Trial Chamber Judgment, \textit{supra} note 1, at Vol. 2, ¶ 1293.

\textsuperscript{82} Prosecutor v. Prlić et al., Case No. IT-04-74-T, Trial Chamber Judgment, \textit{supra} note 1, at Vol. 4, ¶ 59.

\textsuperscript{83} Pocar rightly notes in dissent on appeal that “a disproportionate attack is per se unlawful and therefore cannot be justified by military necessity.” Prosecutor v. Prlić et al., Case No. IT-04-74-A, Appeals Chamber Judgment, Dissent of Judge Pocar, Vol. 3 ¶ 9 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 29, 2017) (citing Prosecutor v. Kordić & Ćerkez, Case No. IT-95-14/2-A, Appeals Judgment, ¶ 686 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004)). However, that does not affect the legitimacy of targeting the \textit{object} itself as such; it is the \textit{attack} that is illegitimate. On proportionality generally, see Int’l Comm. of the Red Cross, \textit{Rule 14, Customary IHL Database}, http://perma.cc/Z3GV-NUMT. On broader effects, see Isabel Robinson & Ellen Nohle, \textit{Proportionality and Precautions in Attack: The Reverberating Effects of using Explosive Weapons in Populated Areas}, 98 \textit{Int’l Rev. Red Cross} 107 (2016). Pocar’s argument is discussed further below.
C. Appeal

On appeal, the court overturned the principal decisions of the trial court concerning the bridge. The first line of revision concerned “wanton destruction” and once this fell, the “persecution” and “terror” counts collapsed as well. In fact, the defendants were found not guilty on all charges relating to the bridge (though some of the counts were sustained because of other charges). But, as we shall see, this reversal did not represent a repudiation of the framework the prosecution and trial court had accepted: reversal on appeal had to do with specific legal tests that did not challenge the narrative about the bridge and its cultural value.

On appeal, defendants argued that the trial court’s finding of disproportionality, which underpinned the “wanton destruction charge,” was in error, since the trial court had “bas[ed] its finding that the destruction was disproportionate entirely on indirect effects, particularly the long-term harm through isolation and the psychological impact on the civilian population.” 84 And it is true the trial chamber had not found that the attack had caused any collateral damage to other property—the bridge, after all, had been quite accurately targeted 85—so the disproportionate harm had to be the destruction of the bridge itself and its effects in isolating the civilian population or terrorizing them.

Evidently, for the Appeals Chamber, these effects were not closely linked enough. It agreed that the bridge was a legitimate military target whose destruction offered a definite military advantage, and that largely decided the question: its destruction “cannot be considered, in and of itself, as wanton destruction not justified by military necessity[.]” 86 The prosecution argued, in part, that although the bridge itself was a lawful military target, it was not targeted as such, but as part of a “protracted campaign of terror against the Muslims of Mostar.” 87 But the Appeals Chamber called this “circular reasoning. It cannot be said that destruction was not justified by military necessity because of the existence of a campaign of

85 Personally, I continue to be confused as to why the bridge’s destruction was ever considered a plausible instance of “wanton destruction,” since it was clearly a military objective. So, unless one could argue that the target itself was illegitimate, rather than the attack indiscriminate—which is something like Judge Pocar’s argument in dissent (q.v.)—then its destruction may have been disproportionate, but wanton destruction properly implies the lack of any possible justification, not one that results in disproportionate harm.
87 Id. at ¶ 410, n. 1248 (citing Transcript of the Appeal Hearing at 450–54, Case No. IT-04-74-A (Mar. 22, 2017) and Order for the Preparation of the Appeal Hearing, at ¶ 2, Case No. IT-04-74-A (Mar. 1, 2017)).
terror, if the fact that the bridge was a military target raises reasonable doubt as to whether its destruction was part of that campaign.”

And indeed, whether one agrees with the Appeals Chamber’s reading or not, it uncovered the contingent, circular logic of the prosecution’s reading. Because in turn, the collapse of the “wanton destruction” conviction undermined the charges which the prosecution theory had most directly linked to the cultural value of the bridge: the persecution and terror charges. The prosecution conceded that if the attack was lawful, it could not form the basis for a conviction on persecution or terror, and the appeals court reversed the conviction of all six indictees on those charges under Counts 1 and 25 that pertained to the bridge. However, convictions on those counts were affirmed on other grounds; only the bridge dropped out.

D. Pocar’s Dissent

Judge Fausto Pocar dissented from the appellate judgment on acquittal for the destruction of Stari Most. Pocar criticized the majority’s logic on three grounds: its reading of military necessity; its insufficient attention to proportionality; and its failure adequately to account for the cultural status of the bridge. In doing so, he drew extensively on the law of cultural heritage, the 1954 and 1972 Conventions, arguing directly for the “additional protections afforded to the bridge — under IHL — as a landmark constituting cultural property.” For Pocar, the bridge’s admitted status as a military objective was not the end of analysis, because its status as a cultural monument requires that there be an imperative military necessity for striking it — an even more stringent standard than the normal one applicable to civilian objects, and an analysis which, he says, the majority did not undertake. He noted that according to “the UNESCO Protection of Cultural Property Military Manual. . . 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.’”

88 Id. at ¶ 411, n. 1259.
89 The Prosecution argued, successfully, that conviction on these counts should survive because they were “based on the aggregation of numerous crimes and acts”—in other words, on acts other than destruction of the bridge. Id. at ¶ 421 (citing Transcript of the Appeal Hearing, at 449–450, Case No. IT-04-74-A (Mar. 22, 2017)).
91 Id. at ¶ 12.
92 Id. at ¶ 15.
93 Id. at ¶ 16 (italics original to Pocar) (citing UNESCO, PROTECTION OF CULTURAL PROPERTY MILITARY MANUAL, 29 (2016)).
So, if there had been an alternative, perhaps destruction would be disproportionate. What alternatives were there? Several could be imagined. Pocar mentions “blocking or destroying ABiH access to the Old Bridge of Mostar and engaging in direct combat with ABiH in East Mostar[,]” and one might add rendering it unusable or seizing the bridge. Of course, these options were not feasible—Pocar himself notes that these alternatives were “not necessarily controlling in this case”—and indeed the very fact that the bridge was being used for resupply would have made the options of seizure or direct combat more difficult. Similarly for Count 25, many of the notional alternatives to destruction would not be available; demoralization would occur even if the bridge were merely rendered unusable or if access were impossible. To be sure, total destruction might have an even greater effect.

Still, for Pocar it might have been possible to avoid the dominant view that military use voids protection—because his view of military necessity demands a much higher threshold. In turn, this suggests an opportunity the prosecution forwent—though, because it did, this is something Pocar can only regret in dicta: “En passant, I note the missed opportunity of the Prosecutor in failing to specifically charge the destruction of the Old Bridge... under Article 3(d)...”

We might debate who has the right argument. The majority does seem to conflate military use and the question of an attack’s necessity, which are conceptually separate; but Pocar limits the logic of military necessity more than is normally done, and doesn’t fully answer the problem of cultural heritage protections being contingent on not being used as military objects. Yet rather than decide, we can simply note the pathways of the two logics: one, the dissent, looks outside to other bodies of law to inform the norms of ICL; the other, the majority view, does not. For Pocar is right about one thing: the majority never discusses the 1954 Convention, whose logic—like the idea that cultural heritage is a thing meriting protection for its own sake—has long since disappeared from the discourse around which both the trial and appeals judgments are circling.

94 Id. at ¶ 16.
95 Id. at ¶ 16.
96 Id. at ¶ 12.
97 See Maurice Cotter, Military Necessity, Proportionality and Dual-Use Objects at the ICTY: A Close Reading of the Prlić et al. Proceedings on the Destruction of the Old Bridge of Mostar, 23 J. CONFLICT & SECURITY L. 283 (2018) (discussing the proportionality aspects of the decisions, and criticizing the Appeals judgment for its reading of the dual-use doctrine pertaining to targets that have both military and civilian purposes, as the bridge did).
98 For example, Pocar concludes his argument about cultural heritage by stressing the “imperative military necessity” standard—which he has argued suggests a higher threshold—yet as he himself notes, this language from the UNESCO Military Manual applies to cultural property “under one’s own control,” which the bridge clearly was not. Prosecutor v. Prlić et al., Case No. IT-04-74-A, Appeals Chamber Judgment, supra note 83, at Vol. 3, ¶ 16 (Pocar, dissenting) (quoting UNESCO, PROTECTION OF CULTURAL PROPERTY MILITARY MANUAL, 40 (2016)).
V. IMPLICATIONS: COOPTATION AND COMPLEXITY

The thing the Chambers are circling is an act of interpretation, which arose because of the prosecution’s original decision about how to charge the events surrounding Stari Most. The prosecution’s key move was to characterize the destruction of the bridge as part of a campaign of persecution and an attempt to terrorize civilians. There were rational reasons to do this. A cultural heritage charge, though seemingly the most direct route, was vulnerable because the bridge had been used for military purposes. Recasting the bridge’s destruction as persecution and terror allowed a plausible prosecution for crimes against humanity and war crimes—one that nearly succeeded.

But these moves came with particular requirements—elements of those crimes that go far beyond what a more straightforward charge focused on the bridge’s cultural value would have required.

Consider persecution. It might seem odd to imagine that blowing up a bridge is “persecution.” It is hardly the first way one would characterize the act—especially if one knew about “wanton destruction without military necessity” or 3(d)’s protection of cultural heritage, both of which seem more direct ways to characterize such an act. Still, there is nothing problematic or unprecedented in arguing that destroying a structure might constitute part of a campaign of persecution, and this is all the more plausible if the building is essential to the maintenance of life or has a special link to the persecuted community. One has only to think of, say, the destruction of synagogues on Kristallnacht to get the idea. And, in another, related case at the ICTY (focused on Croat crimes against Muslims in central Bosnia), the court noted that


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 [sic] within humankind... [P]ersecution may thus take the form of confiscation or destruction of... symbolic buildings... belonging to the Muslim population of Bosnia-Herzegovina.99

Similarly, in our case, in his dissent at trial, Judge Antonetti noted that the general principle that “destruction of symbolic buildings, perpetrated with discriminatory intent, is comparable to a physical offence committed against the population concerned.”100

But this brings us to the interesting and problematic part, because persecution as a crime against humanity requires an element of discrimination, and

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100 Prosecutor v. Prlić et al., Case No. IT-04-74-T, Trial Chamber Judgment, supra note 18, at 314 (Antonetti, dissenting).
discrimination cannot be general; it must be targeted against a particular group. And therefore, the structure must be either essential in some material way to the survival of, or symbolically important to, some particular group.

And this is precisely what happens in the trial: the bridge is consistently characterized as a symbol of Muslims. The court repeatedly notes the “symbolic importance of the Old Bridge, particularly for the Bosnian Muslim community” and that “the destruction of the Old Bridge had a significant psychological impact on the Muslim population in Mostar.” There are numerous examples—the analysis is shallow, conclusory, but consistent.

The trial court also acknowledges broader, potentially universal frames of symbolic meaning, similar to what UNESCO described: “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.” Yet it immediately reverts to its main theme, the priority of meaning for a particular community: “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.”

Criticizing the majority, Antonetti recalls that in Blažkić, the trial court 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... “that the attack was aimed at the Muslim civilian population.” I can subscribe to this view only if the Old Bridge symbolised Muslim culture.

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101 See Prosecutor v. Akayesu, Case No. ICTR-96-4-A, Appeals Chamber Judgment, ¶ 464 (Int’l Crim. Trib. for Rwanda June 1, 2001) (“except in the case of persecution, a discriminatory intent is not required by international humanitarian law as a legal ingredient for all crimes against humanity.”); Prosecutor v. Šainović et al., Appeals Judgment, Case No. IT-05-87-A, ¶ 579 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014) (“persecution as a crime against humanity requires evidence that the principal perpetrator had the specific intent to discriminate on political, racial, or religious grounds.”).

102 Prosecutor v. Prlić et al., Trial Chamber Judgment, supra note 1, at Vol. 2, ¶¶ 1356, 1364 (“[T]he Chamber is satisfied that the bridge had great symbolic importance, primarily for the Muslims.”).

103 Id. at ¶ 1356.

104 Id. at ¶ 1282.

105 Id. at ¶ 1282.

106 Prosecutor v. Prlić et al., Case No. IT-04-74-T, Trial Chamber Judgment, supra note 18, at 315 (Antonetti, dissenting) (bracketed omission in original).
The Persecution of Stones

For Antonetti, of course, this meant Stari Most, as a secular structure, didn’t meet the test. But this describes exactly what the trial court is in fact doing—has to do. To be clear: as noted above, the court isn’t just discussing the psychological effects of resource deprivation, but of the symbolic blow to that particular community—as Muslims, as such—of destroying an object of unique cultural value to them.

Contrast the dissent, in which Antonetti describes the bridge as “a symbol of the meeting between the east and the west, between Islam and Christianity, [that] came to symbolise the war in Bosnia.” He is almost surely channeling UNESCO’s formulation, which, as we saw, characterized the bridge as cultural artifact in dramatically different ways from the trial court. For UNESCO, the bridge’s meaning was broader, emphasizing its universal value and its symbolic connection of different communities. But the logic of persecution as a doctrinal category led the prosecution and court to focus on how the bridge had special meaning for the Muslim population. Persecution requires an element of discrimination, and discrimination must have a specific target population. So the bridge had to be symbolic of, or important to, a particular community, not just humanity in general. Its postwar status as a bridge between communities—itself a discretionary narrative choice, even an ideological one, not an immanent truth—wouldn’t serve at all in the trial. It must be a Muslim bridge.

The appeals court says much less about this question; its reasons for reversing the trial judgment are based not on a different symbolic evaluation, but other, internal standards. Although the trial and appeals courts differed on the standard for conviction, they don’t disagree on the basic premise that this act of

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107 To the degree one thinks of the Muslim population in religious terms, assigning this sort of value to a bridge—a purely secular structure—is a leap (for Antonetti, “a step I cannot take.” Id.). But if we accept that “Bosnian Muslim” is an ethnic identity only nominally related to religious belief or praxis, the linkage is more plausible. On Bosnian Muslim identity, see TONE BRINGA, BEING MUSLIM THE BOSNIAN WAY: IDENTITY AND COMMUNITY IN A CENTRAL BOSNIAN VILLAGE (1995). It is also plausible to argue that the bridge became more identified with Muslims through its destruction. See Colin Kaiser, Crimes against Culture, UNESCO COURIER, 41, 42 (Sept. 2000) (noting that “before the war, nobody in Mostar would have said that the Old Bridge was a ‘Muslim’ monument” and suggesting that its destruction had “ethnicized” the bridge), But that would be of questionable relevance to a trial focused on deciding the criminality of the act at the time of the bridge’s destruction.

108 Prosecutor v. Prlić et al., Case No. IT-04-74T, Trial Chamber Judgment, supra note 18, at 301 (Antonetti, dissenting).

109 This fundamental agreement is more general. See, for example, Marko Milanovic, An Eventful Day in The Hague: Channeling Socrates and Goering, EJIL: TALK! (Nov. 30, 2017), http://perma.cc/32UH-A4QJ (“despite the many problems, and reversals on numerous points, the Appeals Chamber essentially endorsed the basic factual and culpability account of the trial judgment... Throughout its judgment the Appeals Chamber is in a constructive, repair mode in relation to the trial judgment.”).
destruction was to be analyzed, if at all, as an act of persecution or terror, to which the bridge’s cultural status was ancillary and contributory, not the thing itself.

For Count 25, infliction of terror as a war crime, the logic is similar. There is a material component—the terror produced by the threat of starvation—but also a symbolic component, which is the psychological blow to identity and morale caused by the destruction of the bridge as a symbol of the community. Certainly terrorization and demoralization are real effects, and ICL has increasingly dealt with them.\footnote{See Solon Solomon, Bringing Psychological Civilian Harm to the Forefront: Incidental Civilian Fear as Trauma in the Case of Recurrent Attacks, EJIL: Talk! (Apr. 25, 2018), http://perma.cc/2CDG-WMPM.} In this sense, Prilić is part of a trend. But here it is the act of interpretation that is of interest, the way in which the terror and trauma are understood as products of cultural identification and attachment. This is not the kind of biophysical trauma associated with shelling—shellshock or concussive trauma—or even the socially mediated, psychological effects of witnessing a horrifying event or of sustained fear, such as PTSD.\footnote{All such diagnoses contain a social or cultural context. See Tracey Lougran, \textit{Shell Shock, Trauma, and the First World War: The Making of a Diagnosis and Its Histories}, 67 J. Hist. Med. & Allied Sci. 94 (2012); Sebastian Junger, \textit{How PTSD Became a Problem Far Beyond the Battlefield}, VANITY FAIR (May 7, 2015), http://perma.cc/9D5B-4RJH.} Instead, it is entirely the cultural meaning of the act, whose trauma might be just as great even if one only heard about the event, assuming one identified with the correct cultural frame.

So we can conclude with two related observations: first, that, as we see done here with cultural heritage, law instrumentalizes the meaning we assign to other norms for its own ends; and second, that law’s processes are complex, in ways that limit law’s usefulness.

A. Instrumentalizing Culture

First, what one might naively imagine as a legal process intended to protect cultural heritage in fact has coopted cultural heritage norms to develop its own autonomous arguments. The Prilić trial instrumentalized the question of cultural heritage in order to answer very different questions, which it prioritized.

Article 3(d) criminalizes the destruction of cultural heritage, a move we might plausibly think was intended to protect broadly shared values consistent with the development of cultural heritage protection norms. But in the event, that crime was not charged. Instead, other categories were invoked—ones that better fit the most promising legal strategies—but which required particular interpretations quite different from what a cultural heritage focus might have suggested.

In formal terms, it is difficult to see that cultural heritage as such was the object of this process. No cultural heritage crime was prosecuted for the bridge. Instead, the destruction of Stari Most was not a crime in itself, but proof of
persecution and terror. Its cultural value was not the thing protected, merely evidence of another crime.

This suggests two additional implications. The first is a troubling issue that goes beyond the scope of this study but follows logically from its observations: the court’s claims and judgments do not simply fail to rely on cultural heritage, they fundamentally challenge one of its premises. The dominant logic of cultural heritage focuses on its universality, but the court—though itself an institution committed to universalist values—insists on the particularity of the bridge’s meaning. Of course, within cultural heritage discourse, universality is itself challenged both by theoretical claims about particularist value and by the fact that states own and manage cultural heritage, giving them power over the production and interpretation of cultural monuments’ meaning. But the particularism advanced by the court raises a very different problem. It challenges us to consider whether in war, as in any contested political environment, there truly are universal values. The very fact that destroying the bridge can strike a blow against one cultural community demonstrates that culture can be weaponized. For, after all, if the destruction of the bridge was a blow against that culture, was not its survival a weapon of that culture too?

The other implication is broader: instrumentalization is not unique to cultural heritage.\[^{112}\] Although that was the system at issue here, the process by which cultural heritage was subordinated to the logic of the law and its imperatives would potentially lead to the instrumentalization of any autonomous value system that we tried to protect in this way: human rights, self-determination, any given form of economic, social or cultural being. This study is about cultural heritage, but the point is general.

\[\text{B. Inventing Complexity}\]

ICL’s instrumentalization of cultural heritage or any other value system is simply an observable fact, not necessarily a criticism. It might be worth it, after all, if subordinating those other systems to law’s imperatives produced something of greater value. Yet there is reason to doubt it does, and that brings us to the second main conclusion of this study: ICL invents complexity that undermines the purposes we want war crimes tribunals to serve.

The process by which the Prlić trial coopted and instrumentalized cultural heritage norms was extraordinarily complex. The core point—that instead of

\[^{112}\] Not every war crimes trial involving cultural heritage will necessarily be so thoroughly instrumentalized. At the ICC, al-Mahdi focused on cultural destruction—so much so that it was criticized for not addressing issues of sexual violence. Indeed, al-Mahdi was seen as a demonstration case—though, in a sense, that simply means it was deploying cultural heritage for a different institutional purpose. On al-Mahdi, see Mark S. Ellis, The ICC’s Role in Combating the Destruction of Cultural Heritage, 49 CASE W. RES. J. INT’L L. 25 (2017).
prosecuting the destruction of an object of cultural heritage, the court interpreted its destruction as proof of other crimes—is quite simple, but arriving at it turns out to be complicated. The story I’ve described is not a simple one to follow, because the thing I’m describing—the court’s process—is an inherently, irreducibly complex way to account for these events.

This suggests a larger challenge. If one believes that ICL has a teleological purpose—to contribute to reconciliation by creating decisive, authoritative narratives, by telling stories about what happened113—this complexity is a problem. The 2600-page trial judgment and 1400-page appeals judgment hardly make for a good read, and I’ve tried to show how unclear they actually are. The story must be told elsewhere, derivatively—by journalists or historians—if it is to be told at all, in a way anyone will read or understand.

But this is more than just the challenge of narrative summation, or of catching the gist. War crimes trials are not complex because of their subject. The events of the Yugoslav wars were complex; all wars are. But the legal means we have developed to evaluate them are complicated and convoluted, not in response to war’s complexity, but because they have been designed that way. The enormous, almost archival quality of the factual findings in Prlić may look like a project of discovery, but the real work is done by legal interpretation, and that is an act of invention. It is the creation of meaning, and the meaning we have created is both numbingly complex and not necessarily related to the actual events. We may defend it to ourselves as a praiseworthy refusal to simplify, but in fact the complexity is our own design. These courts are complex in their own, autonomous ways, which do not match the complexities of war, but ramify them.

Recall what we have seen: the Prlić trial described the shelling of Stari Most as six different crimes, but not as the destruction of an historical monument. This is either a sensitive effort to express the many values one complex event offended, or it is a kind of uncontrolled machine, generating complexity in response to its own imperatives.

To decide which, consider one other response that did not happen: silence. We began with a simple question and an obvious answer: the bridge was clearly the kind of thing Article 3(d) was meant to protect, but equally clearly its use for military purposes voided those protections. That’s been the law for over a century, and it is as sensible as it is harsh. So an obvious response might be not to charge anything. There was certainly enough else to deal with. And none of the counts depended in any essential way on the bridge—counts of persecution or terror could have been sustained on all the other things that happened and were charged (as indeed in the end they were). But the imperative logic of ICL and its

113 See note 9, supra, concerning the authoritative narrative theory. For a recent survey of various purposes of ICL, which argues in favor of tribunals pursuing defined social and political goals, see Patrick J. Keenan, The Problem of Purpose in International Criminal Law, 37 Mich. J. Intl L. 421 (2016).
institutions isn’t to say nothing, but always to say something—to find some way to characterize every act as some crime, even if that characterization adds complexity. Thus, when it became obvious that the obvious crime was also impossible, some other characterization had to be found: six other ones.

So I think “uncontrolled machine” may be a more accurate description—or if not “uncontrolled,” then perhaps better to say “autonomous machine.” ICL has long since departed from a lay understanding of criminality. Its categories are abstract, esoteric, hyperprecise and multivariate. Even when the usual names for crimes appear, they are qualified, rendered as exemplars of some more essential, Platonic category: murder as a crime against humanity, rape as a war crime. They are crimes of characterization, just as the court’s treatment of the bridge—its decision to treat it as a particular kind of symbol—is a characterization as well.

VI. CONCLUSION

This is not to say the alternative is simpler—or would be better if it were—or even more true. Stari Most’s UNESCO status—its status as a symbol of shared humanity, of coming together across differences and divides—is itself an act of characterization, and a highly politicized one, as many of UNESCO’s decisions are. It is no more objectively true, no less constructed, than the interpretations of the ICTY. They are quite different acts, for different purposes. But we need not decide which is right to note the difference, or those purposes, and the choices they imply.

Because before it was destroyed, Stari Most was neither just a Muslim icon nor a symbol of connection between cultures. It was neither heritage nor evidence. It was not a metaphor. Before it was any of those things, it was, as it is now again, a bridge. And a beautiful one, that’s true: a graceful stone arch connecting two banks of a river, allowing passage of people and their goods—if not always, it seems, their values—from one side to another.

On the political aspects of UNESCO decision-making, see Enrico Bertacchini et al., The Politicization of UNESCO World Heritage Decision Making, 167 PUB. CHOICE 95 (2016).