

EXCERPTS FROM [MILAN MILUTINOVIĆ et al. TRIAL JUDGMENT](#)

Volume 1 of 4

29 February 2009

Damage to or destruction of religious and cultural property as a form of persecution

Para 204. The charges of persecutions set out in count 5 of the Indictment also include “wanton destruction or damage of Kosovo Albanian religious sites[,]... cultural monuments and Muslim sacred sites”. While “destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science” is specifically made punishable as a violation of the laws or customs of war under Article 3(d) of the Statute, no such classification exists under Article 5. Nevertheless, it is now settled by the Appeals Chamber that “destruction of property”, which belongs to a given civilian population, can be punished pursuant to Article 5(h) depending upon the extent and the nature of that destruction and provided all the elements of Article 5(h) are satisfied. The Appeals Chamber in Blaškić based its analysis on an assumption that destruction of religious or cultural property is subsumed under the broader category of “destruction of property”. Having made this finding, the Appeals Chamber in Blaškić then proceeded on the assumption that destruction of religious or cultural property is subsumed under the broader category of “destruction of property”; this approach was likely affected by the way in which the indictment in that case was framed, whereby all property, including religious property, was subsumed under one heading of “destruction and plunder of property”. Some Trial Chambers, on the other hand, have treated destruction of religious or cultural property as a category of persecution separate from the broad category of destruction of civilian property. Thus, for example, the Trial Chamber in Stakić discussed two categories of destruction of property as persecution, namely, “destruction of, or wilful damage to, religious and cultural buildings”, and “destruction, wilful damage and looting of residential and commercial properties”. The Appeals Chamber has not determined whether destruction of religious and cultural property is serious enough to be an underlying offence of persecution separate from the broad category of destruction of civilian property.

Para 205. However, the Kordić Trial Chamber has held, and this Trial Chamber agrees, that destruction of religious property amounts to “an attack on the very religious identity of a people” and, as such, manifests “a nearly pure expression” of the notion of crimes against humanity. For this reason, the Chamber considers that the Tribunal’s jurisprudence specifically prohibits destruction of religious sites and cultural monuments as persecution, a crime against humanity.

Para 206. Extrapolating from the Tribunal’s jurisprudence regarding the elements of Article 3(d) of the Statute, as well as the jurisprudence dealing with destruction of property as an underlying offence of persecution as a crime against humanity, the Trial Chamber finds that, in addition to the general requirements of crimes against humanity and the specific requirements of persecution, the Prosecution must prove the actus reus and mens rea of wanton destruction or damage of religious sites and cultural monuments, as a form of persecution, a crime against humanity. The actus reus of this underlying offence is as follows: (a) the religious or cultural property must be destroyed or damaged extensively; (b) the religious or cultural property must not be used for a military purpose at the time of the act; and (c) the destruction or damage must be the result of an act directed against this property.

The mens rea required for the offence is that the physical perpetrator, intermediary perpetrator, or accused acted with the intent to destroy or extensively damage the property in question, or in reckless disregard of the likelihood of its destruction or damage.

Para 207. Regarding the first element of the actus reus, neither damage to nor destruction of property is explicitly mentioned as a crime under Article 5. In order to rise to the level of equal gravity of the enumerated crimes under Article 5 of the Statute, and therefore constitute persecution, Trial Chambers have held that the impact of the deprivation of destroyed property must be serious, such as where the property is indispensable, a vital asset to the owners, or the means of existence of a given population. For the same reasons, the Trial Chamber concludes that, if the property in question is not destroyed, the damage to it must be extensive in order to satisfy the equal gravity requirement. In this context, the terms “destruction” and “damage” are given their plain and common meanings, where the former term signifies demolition or reduction to a useless form, and the latter refers to physical injury or harm to an object that impairs its usefulness or value.

Para 208. Regarding the second element of the actus reus, in order for its damage or destruction to constitute a crime against humanity, the property in question must not have been used for a military purpose at the time when the acts of hostility directed against this property took place. According to the Appeals Chamber in the Brđanin case, the burden is on the Prosecution to establish that the destruction or damage in question was not justified by military necessity. In other words, there is no presumption to that effect. The Appeals Chamber also held that determining whether the destruction or damage occurred due to military necessity involves determination of what constitutes a military objective, and then referred to Article 52 of Additional Protocol I as containing the widely acknowledged definition of military objectives. The fact that the building in question was located in the immediate vicinity of the military objectives does not justify its destruction since it is its use, and not its location, that determines the loss of protection.

Para 209. Regarding the third element of the actus reus, the requirement of causality will be satisfied when the damage to or destruction of property results from an act directed against this property. Thus, for example, damage to protected property caused by ongoing fighting in its vicinity or even within it would not constitute a crime against humanity.

Para 210. The mens rea for this underlying offence is satisfied when the physical perpetrator committed the act that resulted in the destruction, with the intent to destroy or damage the religious or cultural property in question, or in reckless disregard of the likelihood of such destruction or damage.

Conclusions on responsibility of Nikola Šainović / Nebojša Pavković / Sreten Lukić

Para 473/786/1136. Destruction of or damage to religious property. The Chamber has already found that four mosques were destroyed by the forces of the FRY and Serbia and that these offences fell into the category of persecution. The Chamber finds that it was reasonably foreseeable to Šainović/Pavković/Lukić that the forces of the FRY and Serbia would commit wanton destruction or damage of Kosovo Albanian religious sites, cultural monuments, and Muslim sacred sites during their forcible displacement of the Kosovo Albanian population. The conflict was one that involved ethnic divisions. Moreover, the common purpose was to be achieved through a campaign of terror and violence against the Kosovo Albanian civilian population. Under these conditions, and keeping in mind Šainović's detailed knowledge of events on the ground in Kosovo during the conflict, the inescapable conclusion is that it was reasonably foreseeable to Šainović that, while the forces of the FRY and Serbia were forcibly transferring and deporting the Kosovo Albanian population, they would at the same time wantonly destroy or damage their religious sites, cultural monuments, and sacred sites.

EXCERPTS FROM [VLASTIMIR ĐORĐEVIĆ TRIAL JUDGMENT](#)
23 February 2011

Destruction of religious and cultural sites

Para 1770. The charges of persecution set out in Count 5 of the Indictment include “the wanton destruction or damage of Kosovo Albanian religious sites”. Destruction of property is not specifically listed under Article 5 of the Statute. It is listed as a war crime under Article 3 of the Statute. It is well established that the destruction of property which belongs to a given civilian population can be punished pursuant to Article 5(h), provided all the elements of the crime of persecution are satisfied.

Para 1771. Whether the destruction of property meets the equal gravity requirement depends on the nature and extent of destruction.⁶²⁴³ A number of Trial Chambers have noted that the destruction of religious property amounts to “an attack on the very religious identity of a people” and as such manifests “a nearly pure expression” of the notion of crimes against humanity. Article 3(d) of the Statute penalises “the seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science” as violations of the laws or customs of war. As noted by Trial Chambers, the destruction or damage to religious institutions as an act of persecution “is the same as the ‘destruction or wilful damage done to institutions dedicated to religion’, a violation of the laws or customs of war enumerated under Article 3(d) of the Statute”. The International Military Tribunal, the 1991 ILC Report, and national courts, inter alia, have singled out the destruction of religious buildings as a clear case of persecution as a crime against humanity. In the view of the Chamber, therefore, the destruction and wilful damage to Kosovo Albanian religious sites, coupled with the requisite discriminatory intent, may amount to an act of persecution.

Para 1772. The property destroyed must not have been used for military purposes at the time when the acts of hostility directed against this property took place. This is equally applicable in the case of the destruction of religious sites. The “military purpose” exception to the protection of institutions dedicated to religion has been confirmed consistently by this Tribunal. It is for the Prosecution to establish that the destruction or damage was not justified by military necessity.

Para 1773. The destruction of religious sites as an underlying act of persecution is understood as the destruction or damage of an institution dedicated to religion, when the perpetrator acted with the intent to destroy or damage that property or in the reckless disregard of the substantial likelihood of the destruction or damage. In addition to the general elements of crimes against humanity and the specific elements of persecution, the Prosecution must prove the following elements of destruction of religious sites as an underlying offence:

- (a) The religious site must be destroyed or damaged extensively.
- (b) The destruction or damage must follow from an act directed against the property.
- (c) The destruction or damage must not be justified by military necessity, that is, the religious institution must not have been used for a military purpose or been in the immediate vicinity of military objectives.
- (d) The physical perpetrator, intermediary perpetrator, or accused acted with the intent to destroy or extensively damage the property, or in reckless disregard of the likelihood of destruction or damage.

Persecutions committed through wanton destruction or damage of Kosovo Albanian religious sites

Para 1798. In support of the charge of persecutions the Indictment also alleges that during and after the attacks on towns and villages, Serbian forces systematically damaged and destroyed cultural monuments and Muslim sacred sites, including the mosques in Vučitrn/Vushtrri, Suva Reka/Suharekë, Celina/Celinë, Rogovo/Rogovë, Bela Crkva/Bellacërkë, Cirez/Çirez, Kotlina/Kotlinë, Ivaja/Ivajë, Mitrovica/Mitrovicë, Vlastica/Llashticë, Landovica/Landovicë, and Đakovica/Gjakovë.

Para 1799. The Prosecution’s expert witness on religious and cultural sites is András Riedlmayer. Riedlmayer has been director of the Documentation Centre for Islamic Art and Architecture of the Aga Khan Program at Harvard University’s Fine Arts Library since 1985. He has worked and published extensively on the Ottoman Empire and Islamic culture, which are his academic specialties. He has been studying the Balkans for over three decades and throughout the 1990s, he specifically studied the destruction of cultural property in the conflicts in Croatia and Bosnia and Herzegovina. He has written many papers and articles about the Balkans and about the destruction of cultural heritage.

Para 1800. Riedlmayer carried out a survey of the wartime damage to the cultural and religious heritage in Kosovo covering the period from the spring of 1999 until June 1999 for this Tribunal. The survey provides a description of the condition of buildings, the likely cause of damage and the patterns of destruction. Riedlmayer enlisted an architect, Andrew Herscher, to collaborate in the survey. Mr Herscher had previous experience in on the

restoration of buildings in Mostar, in Bosnia and Herzegovina, after the war which ended in 1995.

Para 1801. The Defence objects that Riedlmayer is not an expert in military matters and so could not determine the cause of damage to buildings. Riedlmayer acknowledged that he had no such specific expertise but countered, in the Chamber's view most persuasively, that he has a wide range of experience in assessing damaged buildings so that, in certain cases, he was able to determine the cause of damage.

Para 1802. Riedlmayer, however, did not visit all the sites the subject of allegations in paragraph 77(d) of the Indictment. In such cases he relied on a range of secondary sources to assess the damage and its cause, including photographs and a database provided by the "International Management Group" which is an expert group in the identification and assessment of damage to buildings.

1803. The Chamber finds that while Riedlmayer's report and evidence are of obvious assistance to the determination of the scope of the damage to religious and cultural buildings, it is only of assistance in identifying the cause of the damage in some cases. The Chamber, therefore, will consider the weight to be given to Riedlmayer's evidence on a case by case basis.

Conclusion

Para 1854. Hence, the Chamber is satisfied that the offence of persecutions by destruction of the following mosques by Serbian forces has been established: the mosque in Celina/Celinë, the mosque in Bela Crkva/Bellacërkë, the mosque in Landovica/Landovicë, Xhamia-e-Bardhe (White Mosque) in Suva Reka/Suharekë town, Hadum Mosque in Đakovica/Gjakovë, the mosque in Rogovo/Rogovë, the mosque in Vlačica/Llashticë, and the market mosque (Charshi Mosque) in Vučitrn/Vushtrri town.

Para 1855. The Chamber is satisfied further that the destruction of these mosques occurred pursuant to a campaign by Serbian forces, against the Kosovo Albanian population based in particular on religious grounds, which included the systematic damage and destruction of cultural monuments and Muslim sacred sites.

Were the crimes established in this Judgement part of the common plan?

Para 2151. With regard to the crime of the wanton destruction or damage of Kosovo Albanian religious sites, the Chamber accepts that this widespread destruction was committed with persecutory intent as symbols of Kosovo Albanian heritage and identity, and finds that this was part of the common plan. In particular, the fact that the mosques were targeted in coordinated and pre-planned actions of the Serbian forces – often with the use of explosives and detonating equipment – from the first few days of the NATO campaign, persuade the Chamber that their destruction was part of the plan to terrorise the ethnic Albanian population into leaving Kosovo.