



International Tribunal for the
Prosecution of Persons
Responsible for Serious Violations of
International Humanitarian Law
Committed in the Territory of
Former Yugoslavia since 1991

Case No. IT-95-9-T
Date: 20 December 2001
Original: English

IN TRIAL CHAMBER II

Before: Judge Florence Ndepele Mwachande Mumba, Presiding
Judge Amarjeet Singh
Judge Sharon A. Williams

Registrar: Mr. Hans Holthuis

Date: 20 December 2001

PROSECUTOR

v.

**BLAGOJE SIMIĆ
MILAN SIMIĆ
MIROSLAV TADIĆ
SIMO ZARIĆ**

**DECISION ON THE PROSECUTION'S MOTION FOR LEAVE
TO AMEND THE INDICTMENT**

The Office of the Prosecutor:

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Counsel for the Accused:

**Mr. Igor Pantelić and Mr. Srdjan Vuković for Blagoje Simić
Mr. Slobodan Zečević and Ms. Catherine Baen for Milan Simić
Mr. Novak Lukić and Mr. Dragan Krgović for Miroslav Tadić
Mr. Borislav Pisarević and Mr. Aleksandar Lazarević for Simo Zarić**

1. Pending before this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, (“International Tribunal”) is the “Prosecution’s Motion for Leave to Amend the Indictment”, dated 5 December 2001, filed pursuant to Rule 50 of the Rules of Procedure and Evidence (“the Rules”) and the “Addendum to the Prosecution’s Motion for Leave to Amend the Indictment” filed on 10 December 2001 (respectively the “Motion” and the “Addendum to the Motion”). The Trial Chamber further notes that in addition to making oral submissions on the amendments concerning destruction or wilful damage of institutions dedicated to religion, the defence of all four accused (the “Defence”) filed a “Joint Defense Response to the Prosecution’s Motion for Leave to Amend the Indictment” on 11 December 2001 (the “Response”).

2. Four distinct sets of amendments are being proposed by the Prosecution. They are as follows:

- (i) The addition of new sub-paragraphs 14(f), 15(g), 17(f) and 18(g), all comprising identical wording as follows:

“The destruction or wilful damage of institutions dedicated to religion including but not limited to the Catholic Churches and/or Mosques in Bosanski Šamac, Odžak, Donji Hasići and Hrvatska Tišina”.

The Trial Chamber shall refer to this set of amendments as the “amendments concerning destruction or wilful damage of institutions dedicated to religion”;

- (ii) The deletion of the words, “committed and aided and abetted the commission of the” in paragraphs 15, 16 and 17 and substitution of the words “planned, instigated, ordered, committed, or otherwise aided and abetted the planning, preparation, or execution of the”. Further, with regard to paragraph 18, the deletion of the words, “committed and aided and abetted the” and substitution of the words, “planned, instigated, ordered, committed, or otherwise aided and abetted the planning, preparation, or execution of”.¹ The Trial Chamber shall refer to this set of amendments as the “amendments concerning the forms of individual responsibility under Article 7(1) of the Statute”;
- (iii) The inclusion of: (a) the words, “acting in concert with others” in paragraphs, 15, 16, 17, 18, 20, 21, and 22; (b) the words, “acting in concert together and with others” in paragraphs 19

¹ The Trial Chamber sees no reason why the amendment requested with respect to paragraph 18 is any different from those of paragraphs 15, 16 and 17 and views this as an oversight by the Prosecution. Therefore, the Trial Chamber understands the amendment requested in paragraph 18, like that of the other paragraphs 15, 16 and 17, to be the deletion of the words, “committed and aided and abetted the commission of the” and substitution with the words “planned, instigated, ordered, committed, or otherwise aided and abetted the planning, preparation, or execution of the”.

and 23; and, (c) the words, “acting in concert together and” in paragraph 40. Additionally, in paragraph 40, the word “along” immediately after the name of “Simo Zarić” is to be deleted.² The Trial Chamber shall refer to this set of amendments as the “amendments concerning the words ‘acting in concert’”; and

- (iv) The inclusion of the words, “wanton and extensive” in sub-paragraphs 17(e) and 18(f) before the word “destruction”. The Trial Chamber shall refer to this set of amendments as the “amendments concerning the inclusion of the words ‘wanton and extensive’”.

A. Amendments concerning destruction or wilful damage of institutions dedicated to religion

3. The Prosecution submits that the changes it seeks to make to the persecution charge through the amendments concerning destruction or wilful damage of institutions dedicated to religion do not amount to new charges. The Trial Chamber is of the view that the amendments sought are additional particulars under Count 1, Persecution. The Trial Chamber notes that the Prosecution did not seek to introduce a separate charge under Article 3(d) of the Statute.³

4. The Trial Chamber arrives at this conclusion after carefully considering the arguments of both parties, and, particularly, the argument of the Prosecution that the destruction or wilful damage of institutions dedicated to religion are charged as part of the discriminatory attack against non-Serbs, the institutions being part of their religious identity, under “persecution” as a crime against humanity.

5. In response to the Defence’s argument that the amendment constitutes a new charge, the Trial Chamber stresses that the Prosecution’s case is not alleging a crime under Article 3. These acts are particulars under persecution and impact the right of victims to practice the religion of their choice. The Trial Chamber sees a distinction between charging the destruction or wilful damage of religious institutions as part of a discriminatory campaign of persecution based on religious or ethnic grounds as a crime against humanity, and the destruction of religious institutions under

² The Trial Chamber notes that there appears to be inconsistency as to the proposed amendments requested by the Prosecution in the Motion and what it has attached by way of Annex A to the Motion. In the Motion, the Prosecution requests the “insertion of the words “acting in concert” in the relevant places in paragraphs 14 – 19” and “the words “acting in concert” in the relevant places in paragraphs 20 – 23”. However, as noted above by the Trial Chamber, the amendments requested as set out in Annex A involve the inclusion of: (a) the words, “acting in concert with others” in paragraphs, 15, 16, 17, 18, 20, 21, and 22; (b) the words, “acting in concert together and with others” in paragraphs 19 and 23; and, (c) the words, “acting in concert together and” in paragraph 40. Additionally, in paragraph 40, the word “along” immediately after the name of “Simo Zarić” is to be deleted.

³ Article 3(d) of the Statute states the following acts constitute “violations of the laws or customs of war”: “seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science”.

Article 3. The latter provides for the destruction of, *inter alia*, religious institutions as a violation of conventional international law⁴.

6. In response to the Defence argument in paragraph 11 of their Response, the Trial Chamber agrees that the lack of details in the language of an indictment can undermine the rights of the accused pursuant to Article 21 of the Statute. At the same time, however, the Trial Chamber cannot ignore the fact that there have been allegations on point mentioned in other documents served on the Defence. Accordingly, the Trial Chamber will limit the amendments to be granted to those acts for which the accused had previous information.

7. The Prosecution Pre-Trial Brief in this case stated in paragraph 120, “Numerous witnesses will testify to events such as the confiscation of belongings, *the destruction of places of worship*, and the extensive looting of private residences and commercial property belonging to non-Serbs.” The Trial Chamber finds that the Defence had information that evidence of the destruction or wilful damage to religious institutions was part of the Prosecution's case.

8. Further, the Defence was informed that evidence would be provided by at least four witnesses on the destruction and looting of mosques and churches.⁵ According to the summary statements provided in the “Confidential Prosecution Witness List pursuant to Rule 65 *ter*(E)(iv) – Annex A” filed on 9 April 2001, evidence would be given about attacks, destruction or looting of the mosque in Bosanski Šamac (witness 3), the mosque in Odžak (witness 5), the Catholic church in Bosanski Šamac (witness 14), and the Catholic church in Hrvatska Tišina (witness 27).⁶

9. Finally, in its opening statement, the Prosecution stated that it will call one witness who would testify to having been assigned the task of demolishing and removing the remains of the Catholic Church in Bosanski Šamac. The Prosecution stated that places of worship for Catholics and Muslims were not restricted to Bosanski Šamac and that it would introduce photographic evidence of the “extensive destruction of Catholic churches and mosques that occurred within the municipality and adjoining villages.”⁷

⁴ See, e.g., 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, 18 Oct. 1907; Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 19 May 1954.

⁵ While the Motion referred to four witnesses (Witnesses 3, 5, 14 and 27), the Trial Chamber notes that additional witnesses, who were removed from the witness list shortly before the trial began, were also included in the “Summary Statement” as testifying to the destruction or wilful damage to religious institutions (witness 18 – mosque in Bosanski Šamac; and witness 44 – “mosques in the area.”)

⁶ The Trial Chamber notes that the same information was provided to three of the accused on 31 March 1999 in the “Prosecution Witness List” and “Annex”, with regards to the four witnesses the Prosecution is currently referencing.

⁷ T.959: “The Prosecution will call one witness who will give evidence of being specifically assigned the task of demolishing the Catholic church in Bosanski Šamac. He watched Serb men demolish the church with demolition balls, and then the labourers were forced to load the ruins onto trucks to be taken away. It took ten days of forced labour to

10. The Trial Chamber does not, however, agree with the Prosecution that the word “including” in paragraph 14(e) or the words “among others” before the enumerated acts in paragraphs 15, 17 or 18, provide any additional support for this amendment. Terms such as “including” or “among others”, particularly when used in relation to material facts including the underlying acts upon which the persecution charge is based, do not provide the accused with sufficient notice of the nature of the case that they have to answer.⁸

11. Additionally, the Trial Chamber is not persuaded by the Prosecution's argument that the wording of paragraphs 14(e), 15(f), 17(e) and 18(f) particularly the word “property” is sufficient in itself to cover religious institutions. In those paragraphs, “property” is that of “Bosnian Croats, Bosnian Muslims and other non-Serb civilians.” Thus, it is property of individuals and not groups. The list of property included in these paragraphs, namely dwellings, businesses, personal property and livestock, would support the assertion that “property” is limited to individual property, and not to communal property, such as institutions shared by a particular religious group.

12. Having decided that the amendments regarding the destruction or wilful damage of religious institutions does not constitute a new charge and that some information was provided to the accused to allow for the amendment to specify a new particular, the Trial Chamber is not, however, satisfied with the manner in which the amendments are formulated. The words “including but not limited to” allow for vagueness that cannot be permitted. The Prosecution cannot seek to introduce evidence of destruction or wilful damage to religious institutions for which the accused has no notice and expect the Trial Chamber to consider the new evidence because of the words “including but not limited to.” This undermines the right of the accused to be informed promptly of “the nature and cause of the charge against him” in Article 21(4)(a) of the Statute. The Trial Chamber recalls that the guarantees set out in Article 21(4) are the “minimum” guarantees to which the accused are entitled; wording such as “including but not limited to”, as requested by the Prosecution, do not even satisfy the minimum guarantees for the accused.

13. In addition, the amendment requested does not name the specific churches or mosques that the Prosecution is alleging were destroyed or damaged, or for which the accused allegedly incur any criminal responsibility. Rather, it provides the names of four places, which in itself is unclear as to

remove the Catholic church from the landscape in Bosanski Šamac. The destruction of places of worship for Catholics and Muslims and hence the destruction of the religion of the Croat and Muslim people was not, however, restricted to the town of Bosanski Šamac. The Prosecution will be able to show the Chamber photographic evidence of the extensive destruction of Catholic churches and mosques that occurred within the municipality and adjoining villages. It is utterly inconceivable that the Crisis Staff, which was the highest civilian body in the municipality, did not have control over this process.” (10 Sept. 2001)

⁸ See, *Prosecutor v. Enver Hadžihasanović et al.*, Decision of Form of the Indictment, 7 Dec. 2001 at paras. 42-43.

whether the names “Bosanski Šamac” and “Odžak” are those of towns or municipalities. As the Trial Chamber stated above, the witnesses referenced by the Prosecution did not refer to religious institutions in all four locations sought in the amendment. According to the Trial Chamber's review of the witness summaries of these four witnesses, only the mosque and Catholic church in Bosanski Šamac, the mosque in Odžak and the Catholic church in Hrvatska Tišina were mentioned. Accordingly, the Prosecution is limited to including these four religious institutions in the Third Amended Indictment, and must do so by providing the proper name and location for each religious institution.

14. The Prosecution is alleging one of two particular acts with regards to the religious institutions, namely the destruction or wilful damage thereof. In order to be in a position to prepare a defence to the alleged involvement of the accused in these acts, the Defence would be aided by information as to the date or approximate time periods when the acts alleged occurred. In recalling that the Trial Chamber will not allow any prejudice to the accused by this amendment, it therefore requires the Prosecution to insert the date or approximate time periods, where the exact date is unavailable, on which the alleged acts occurred.

15. The Trial Chamber, therefore, instructs the Prosecution to delete the words “including but not limited to” in paragraphs 14(f), 15(g), 17(f) and 18(g); delete the words “the Catholic Churches and/or Mosques in Bosanski Šamac, Odžak, Donji Hasići and Hrvatska Tišina” in paragraphs 14(f), 15(g), 17(f) and 18(g) and replace them with the words “two Catholic churches, one in the town of Bosanski Šamac and the other in the village of Hrvatska Tišina, and two mosques, one in the town of Bosanski Šamac and the other in the town of Odžak”; and insert the date or approximate time period, where the exact date is unavailable, when the alleged destruction or wilful damage to each religious institution occurred.

B. Amendments concerning the forms of individual responsibility under Article 7(1) of the Statute

16. In considering whether to grant the amendments with regards to the forms of individual criminal responsibility under Article 7(1) of the Statute, the Trial Chamber considered the submissions of the Prosecution in light of the indictment in its entirety. The Trial Chamber notes that while the Defence lists the amendments proposed by the Prosecution in their Response⁹, no substantive legal arguments have been put forward.

⁹ Response, para. 6.

10214

17. For Count 1, the Trial Chamber notes that both paragraphs 13 and 19 include all forms of individual criminal responsibility under Article 7(1), namely, “planned, instigated, ordered, committed or otherwise aided and abetted the planning, preparation or execution of”. Paragraph 13 serves as an introductory paragraph to the count of persecution. It also notes that while paragraphs 15-18 do not include specific language naming each form of individual criminal responsibility, each paragraph includes the words: “the commission of the crime of persecutions *as described in paragraphs 13 and 14 above*” (emphasis added).

18. In addition, while paragraph 5 of the indictment was not specifically re-alleged and incorporated into each charge of the indictment, it constitutes a section entitled “Individual Criminal Responsibility”. It states: “Each of the above accused is individually responsible for the crimes alleged against him in this indictment, pursuant to Article 7(1) of the International Tribunal Statue [sic]. Individual criminal liability includes planning, instigating, ordering [sic] committing or otherwise aiding and abetting the planning preparation or execution of any crime referred to in Articles 2 to 5 of the Statue [sic] of the Tribunal.”¹⁰

19. While the Trial Chamber is concerned that all forms of criminal responsibility alleged against each defendant is not specified in paragraphs 15, 16, 17 and 18, and further notes with equal concern the fact that an “and” was inserted in place of an “or” in these paragraphs, creating possible confusion in the Indictment, the Trial Chamber is confident that each accused had sufficient information of all the forms of individual criminal responsibility raised against him.

20. For the reasons stated above, the Trial Chamber is of the view that no prejudice to the accused is caused by harmonising paragraphs 13 and 19 with paragraphs 15, 16, 17 and 18, through the listing all aforesaid forms of individual criminal responsibility. The Trial Chamber considers this amendment to be no more than “cleaning up” the inconsistencies of language.

C. Amendments concerning the words “acting in concert”

21. As discussed in the previous two amendments, in considering the amendments requested by the Prosecution, the Trial Chamber has examined whether the accused had sufficient information about what the Prosecution seeks to change or add, and, whether the amendments, if granted, would cause prejudice to any of the accused.

¹⁰ Corrigenda to the Third Amended Indictment, 27 Apr. 2001. The original Third Amended Indictment included the phrase “referred to in Articles 20 to 28” in paragraph 5.

22. For Count 1, Persecutions, the Trial Chamber notes that paragraph 13 of the Third Amended Indictment includes the words “acting in concert together”.¹¹ As stated above, it further notes that paragraphs 15 to 18 each include the words: “the commission of the crime of persecutions *as described in paragraphs 13 and 14 above*” (emphasis added). As paragraph 13 is an introductory paragraph to the charge of persecution, the fact that the words “acting in concert together” are in paragraph 13 serves as notice that the accused are alleged to have acted in concert together. Therefore, to add these new words to paragraphs 15 to 18, as well as paragraph 19, does not amount to adding any new forms of responsibility but amounts to no more than harmonising the language in the various paragraphs under Count 1.

23. The Trial Chamber is of the view that no prejudice to the accused is caused by “rectifying the inconsistencies in language” between paragraph 13 and paragraphs 15, 16, 17, 18 and 19 through the amendments sought in relation to “acting in concert together” for Count 1.

24. With regards to Count 2 and 3, Deportation and Transfer, respectively, however, the Trial Chamber does not see any basis upon which to find that the accused had any notice that their responsibility included the words “acting in concert together.” The Trial Chamber notes the absence of any combination of these words in paragraphs 20 to 23. The Trial Chamber views the Prosecution's request to insert this amendment into Counts 2 and 3 as improper and finds that the granting of such an amendment would prejudice the accused. Therefore, the Trial Chamber rejects the requested amendments with regards to Counts 2 and 3.

25. Finally, the Prosecution sought to amend paragraph 40 to include the words “acting in concert together”. The Trial Chamber notes that paragraph 40, the final paragraph of the Indictment, is under the section entitled “Additional Factual Allegations”. The Trial Chamber recognises that this paragraph serves, to some extent, to summarise the Prosecution's case, and includes allegations beyond persecution. As the Trial Chamber stated above, it will allow amendments including the words “acting in concert together” only when prior notice of those words was present under the respective count. “Acting in concert together” was only present in the Third Amended Indictment under Count 1, “Persecutions”. Accordingly, the Trial Chamber will only permit the inclusion of this amendment in paragraph 40 in relation to “persecution.” The Prosecution is therefore instructed to include the following sentence in paragraph 40: “Any reference to the words “acting in concert together” shall be restricted to Count 1.”

¹¹ At the commencement of the present proceedings, on 11 September 2001, all four defendants were asked to plead to the Third Amended Indictment in the presence of their counsel. The Chamber noted that the “Third Amended Indictment which was filed and approved by the pre-trial Chamber is the one which these proceedings are based”. (T.1018-1019)

D. Amendments concerning the inclusion of the words “wanton and extensive” 10212

26. The amendments proposed by the Prosecution on this matter affect the particulars pleaded under Count 1 of the Third Amended Indictment in relation to Miroslav Tadić (paragraph 17(e)) and Simo Zarić (paragraph 18 (e)).

27. The Trial Chamber notes that under Count 1, paragraph 14, like paragraph 13, serves as an introductory paragraph to the means through which the persecutions were perpetrated by the accused. Sub-paragraph 14(e) includes specific reference to the words “wanton and extensive” and this reference is repeated in paragraph 15 (f), with regard to Blagoje Simić.

28. The Trial Chamber finds that the inclusion of the words “wanton and extensive” in paragraphs 17(e) and 18(e) will serve to harmonise the language of the Third Amended Indictment in relation to paragraphs 14 and 15 on the one hand, and paragraphs 17 and 18 on the other hand. The Trial Chamber does not foresee any prejudice to the defence of Miroslav Tadić or Simo Zarić. Both accused have been put on notice of the Prosecution’s case through paragraph 14(e), which forms part of the particulars of Count 1 and contains such wording. For the foregoing reasons, the Trial Chamber rules that the Prosecution’s request for the amendments concerning the inclusion of the words “wanton and extensive” is granted.

29. In conclusion, in issuing this Decision on the Prosecution's motion for leave to amend the Third Amended Indictment, the Trial Chamber finds that many of the issues raised are due to lack of diligence on the part of the Prosecution.

E. Defence Request for Adjournment

30. With regard to the Defence request that if the amendments are granted the Trial Chamber should grant an adjournment of at least three months to ensure that the Defence has adequate time to prepare the defence case, the Trial Chamber repeats that the amendments granted do not constitute new charges, but rather, particulars for Count 1. The Defence is not entitled to an adjournment. The court recess provides adequate time for the Defence to prepare their case to meet the amendments. The request is denied.

F. Disposition

31. For the forgoing reasons, the Trial Chamber determines as follows:

- i. The amendments concerning destruction or wilful damage of institutions dedicated to religion are allowed subject to the Prosecution deleting the words “including but not limited to” in the

proposed paragraphs 14(f), 15(g), 17(f) and 18(g); deleting the words “the Catholic Churches and/or Mosques in Bosanski Šamac, Odžak, Donji Hasići and Hrvatska Tišina” in paragraphs 14(f), 15(g), 17(f) and 18(g) and substituting them with words, “two Catholic churches, one in the town of Bosanski Šamac and the other in the village of Hrvatska Tišina, and two mosques, one in the town of Bosanski Šamac and the other in the town of Odžak”; and further inserting the date or approximate time period, where the exact date is unavailable, when the alleged destruction or wilful damage to each religious institution occurred.

- ii. The amendments concerning the forms of individual responsibility under Article 7(1) of the Statute are allowed in that the words, “committed and aided and abetted the commission of the” in paragraphs 15, 16, 17 and 18 shall be deleted and substituted with the words “planned, instigated, ordered, committed, or otherwise aided and abetted the planning, preparation, or execution of the”.
- iii. The amendments concerning the words “acting in concert” are granted in regards to Count 1, and specifically paragraphs 15, 16, 17, 18 and 19, including the additional words “together and” in paragraph 19; granted in regards to paragraph 40, conditional upon the Prosecution including a sentence stating therein: “Any reference to the words “acting in concert together” shall be restricted to Count 1.”; and rejected in regards to Counts 2 and 3, and, specifically, in paragraphs 20, 21, 22 and 23.
- iv. The amendments concerning the inclusion of the words “wanton and extensive” before the word “destruction” are granted in sub-paragraphs 17(e) and 18(f).
- v. Accordingly, the Trial Chamber instructs the Prosecution to file the Fourth Amended Indictment forthwith.

Done in both English and French, the English text being authoritative.



Judge Florence Ndepele Mwachande Mumba
Presiding

Dated this 20th day of December 2001
At The Hague,
The Netherlands.

[Seal of the Tribunal]