



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

ENGLISH
Original: FRENCH

APPEALS CHAMBER

Before Judges:

Claude Jorda, presiding
Lal Chand Vohrah
Mohamed Shahabuddeen
Rafael Nieto-Navia
Fausto Pocar

Registry: Adama Dieng

Judgement of: 16 November 2001

ALFRED MUSEMA
(Appellant)

v.

THE PROSECUTOR
(Respondent)

Case No. ICTR-96-13-A

JUDGEMENT

Counsel for the Appellant:

Steven Kay, QC
Michail Wladimiroff
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Office of the Prosecutor:

Carla Del Ponte
Norman Farrell
Mathias Marcussen
Sonja Boelaert-Suominen

I. INTRODUCTION

- A. Trial Proceedings
- B. Appeal

II. MUSEMA'S FIRST GROUND OF APPEAL: ALLEGATION OF ERRORS OF LAW

IV. SIXTH GROUND OF APPEAL: MULTIPLE CONVICTIONS BASED ON THE SAME SET OF FACTS

A. Arguments of the Parties

1. Musema's Arguments

346. Musema submits that the Trial Chamber erred in finding him guilty of genocide under Article 2(3)(a) of the Statute (Count 1) and of extermination under Article 3(b) of the Statute (Count 5), on the basis of the same set of facts. He requests the Appeals Chamber to quash the conviction for extermination.

347. In his Appellant's Brief, Musema considers this issue in light of the test set forth in the *Akayesu* Trial Judgement, where the Chamber concluded that "it is acceptable to convict the accused of two offences in relation to the same set of facts in the following circumstances: (1) where the offences have different elements; or (2) where the provisions creating the offences protect different interests; or (3) where it is necessary to record a conviction for both offences in order fully to describe what the accused did." [572] After examining various elements of these crimes, such as killing, discriminatory intent, specific intent, widespread and systematic attack, and civilian population, Musema concludes that although these two offences can have different elements, all of the elements of extermination are, in this case, included within the definition of genocide. [573] He adds that the protected social interests are not different, because the civilian population protected under Article 3 is "included within the general population protected under Article 2." [574] He also maintains that it is not necessary to enter a conviction for both offences in order to describe fully what the accused did. [575] He further submits that the factual circumstances of the case are such that the elements required to prove genocide and extermination are the same, and that the same evidence was utilized to prove both charges. [576] He concludes that the conviction should be for genocide only.

348. In his Brief, Musema also supports the reasoning of the Trial Chamber in the *Kayishema/Ruzindana* case on this issue. He cites the *Kupreskić* Trial Judgement, which lays down the principle that "when all the legal requirements for a lesser offence are met in the commission of a more serious one, a conviction on the more serious count fully encompasses the criminality of the conduct." [577] With respect to cumulative charging on the basis of the same acts, he concedes that it may be appropriate in certain circumstances. [578]

349. During the hearing on appeal, the Appellant again endorsed the reasoning set forth by the *Kupreskić* Trial Chamber on the issue of multiple convictions. [579] He reiterated that the criteria applied in the *Kayishema/Ruzindana* - Trial Judgement was correct, and that the additional criterion set out by the Trial Chamber in the *Akayesu* Trial Judgement - the necessity to enter convictions for concurrent offences in order to describe fully what the accused did - is not an independent requirement, but rather serves as a clarification function. [580] With respect to cumulative charges, the Appellant asserted that the Prosecution should charge in the alternative when the offences have effectively the same elements and are designed to protect the same humanitarian values. [581]

350. In general, the Appellant submits that the issue should not be examined in the abstract, but should be considered "in the context of the case at hand *in concreto*," [582] and that in this context, the crime of extermination is absorbed by the crime of genocide. [583] He also submits that "once a court has reached a finding of guilt of an accused on a charge relating to a specific set of facts, any successive judicial finding of guilt on the same set of facts would violate the principle against double jeopardy, if the successive charge would effectively cover the same elements and protect the same values." [584] He maintains that this principle does not only apply to successive prosecutions. Finally, he contends that quashing the extermination conviction would have an impact on sentencing.

2. Prosecution's Arguments

351. In its Respondent's Brief, the Prosecution submits that an accused may be charged and convicted of genocide under Article 2(3)(a) of the Statute and of extermination under Article 3(b), on the basis of the same conduct. It discusses the issue in the context of national approaches and of the practice of this Tribunal and ICTY, and submits that the crime of genocide by killing and the crime of extermination are dissimilar.[585] The Prosecution concludes that the law permits charging an accused with, and convicting him of these crimes with respect to the same conduct.[586]

352. During the hearing on appeal, the Prosecution stated that some portions of its Respondent's Brief had become redundant following the rendering of the *Celebici* Appeal Judgement.[587] It argued that the guidance given by ICTY Appeals Chamber should be accepted by this Tribunal.[588] With respect to cumulative charges, the Prosecution noted that Musema, in his Appeal Brief, had accepted this practice, and that his position therefore coincided with the approach adopted by ICTY Appeals Chamber in *Celebici*. [589] Thus, in the view of the Prosecution, the question of cumulative charges was not in issue in this case.[590] The Prosecution further stated that "it may be desirable for the Appeals Chamber in this case to make a general pronouncement on the matter stating that ... in the Rwanda Tribunal the practice of cumulative charges should, in general, be allowed." [591]

353. With respect to the issue of multiple convictions, the Prosecution stated during the hearing that it disagreed with the Appellant's position.[592] It pointed out in its Respondent's Brief that the Appellant was relying primarily on the *Kayishema/Ruzindana* Trial Judgement, but that this judgement was the only one which had dismissed the possibility of multiple convictions for genocide and extermination.[593] It stated that in five ICTR cases, namely *Musema*, *Rutaganda*, *Akayesu*, *Kambanda*, and *Serushago*, multiple convictions have been allowed for this pair of crimes.[594] The Prosecution submitted that the Appellant's position - that extermination must be considered as a lesser included offence of genocide because the two offences were charged in relation to the same set of facts and the same evidence was used - is incorrect, particularly in light of the *Celebici* Appeal Judgement.[595] It further stated that this question is a legal question, and that the conclusion of the Trial Chamber in *Musema*, that multiple convictions for genocide and extermination on the basis of the same facts are permissible, is correct.[596]

354. The Prosecution then discussed the reasoning of the Trial Chamber in *Musema*. It observed that the Chamber found that genocide and extermination constitute two different crimes, and that the Chamber rejected the majority opinion in *Kayishema/Ruzindana*. [597] In the *Musema* case, the Trial Chamber endorsed the dissenting opinion of Judge Khan in *Kayishema/Ruzindana* and found that "a person can be convicted on a count of genocide and a count of extermination based on the same set of facts." [598] The Prosecution also concurred with the Chamber's finding that a person could always be convicted for "a count of genocide, a count of crimes against humanity, and any war crime" under the Statute of the International Criminal Tribunal for Rwanda.[599] In the opinion of the Prosecution, this finding is correct in light of the *Celebici* Appeal Judgement. The Prosecution then went on to discuss the test laid down in *Celebici*. It further noted the Trial Chamber's discussion of the issue in *Kunarac* and pointed out that, in making a comparison of the elements provided for in the Statute, the facts of the instant case have no role to play.[600] It viewed as erroneous the Appellant's argument that the use of the same evidence to convict under multiple provisions amounted to impermissible multiple convictions.[601]

355. The Prosecution then isolated the materially distinct element present in each offence, but not present in the other. The distinct element of genocide that must be proven is the intent to destroy in whole or in part the targeted group.[602] That is not an element of the offence of extermination as a crime against humanity.[603] The distinct element of extermination as a crime against humanity that must be proven is that the act forms part of a widespread or systematic attack against a civilian population.[604] This element, the Prosecution contends, is not required for the offence of genocide

or war crimes.[605] The Prosecution further submitted that extermination as crime against humanity requires proof of another distinct element that is not required by genocide-namely, proof of a mass killing.[606] For genocide, the Prosecution submitted, it is "sufficient to prove that the perpetrator killed one person.[607]

356. For these reasons, the Prosecution concluded that double conviction for genocide and extermination as a crime against humanity is permissible.[608] It further submitted that the Appeals Chamber could also make a pronouncement on a more general issue, namely whether multiple convictions under each of the provisions of the Statute are always permissible.[609]

357. In summary, the Prosecution requests the Appeals Chamber to confirm that cumulative charges are permitted in the legal regime in force at ICTR; to dismiss the Appellant's ground of appeal on multiple convictions; to confirm that multiple convictions for genocide and extermination as a crime against humanity are permitted before ICTR; and to confirm that multiple convictions under the different provisions of the Statute are always permitted,[610] or, in the alternative, to rule that multiple convictions for genocide and crimes against humanity are always permitted.

B. Discussion

358. The issue as to whether multiple convictions based on the same set of facts are permissible has arisen in many cases before ICTR, and raises complex questions regarding fairness to the accused and the pursuit of the Tribunal's objectives. ICTR Appeals Chamber has yet to make a definitive pronouncement on the issue. It notes, however, that ICTY Appeals Chamber, in the *Celebici* Appeal Judgement rendered on 20 February 2001, laid down the test to be applied in determining when multiple convictions based on the same set of facts may be entered or affirmed. The *Celebici* test concerning multiple convictions was subsequently applied by ICTY Appeals Chamber in the *Jelisić* Appeal Judgement, rendered on 5 July 2001. ICTY Trial Chambers have also applied this test.[611] In *Celebici*, ICTY Appeals Chamber also made a general pronouncement on the issue of cumulative charges.

359. The Appeals Chamber considers that an examination of the *Celebici* test is necessary and may also provide guidance for ICTR on these issue.

360. On the issue of multiple convictions, ICTY Appeals Chamber in *Celebici* discussed previous approaches of the Appeals Chamber, and observed that multiple convictions based on the same acts had sometimes been upheld.[612] It also noted that any overlapping at the factual level had been adjusted in sentencing.[613] It then discussed the various national approaches to the issue, and found that these approaches vary; for instance, it noted that while some countries allow such convictions in order to capture the full extent of the accused's culpable conduct, others reserve them for the more severe crimes, and still, others require differing statutory elements before multiple convictions may be imposed.[614]

361. The Appeals Chamber in *Celebici* then stated:

Having considered the different approaches expressed on this issue both within this Tribunal and other jurisdictions, this Appeals Chamber holds that reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.

Where this test is not met, the Chamber must decide in relation to which offence it will enter a conviction. This should be done on the basis of the principle that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional materially distinct element, then a conviction should be entered only under that provision.[615]

Applying this test, the Appeals Chamber in *Celebici* found that as between the Article 2 offences and Article 3 (common Article 3) offences of ICTY Statute at issue in the case,[616] the multiple convictions entered by the Trial Chamber could not be affirmed, because while the Article 2 offences contained a materially distinct element not contained in Article 3 (common Article 3) offences, the reverse was not the case. Following the approach set out in the second paragraph of the cited statement from *Celebici*, *supra*, convictions under Article 2 were upheld, but those entered under Article 3 (common Article 3) were quashed by the Appeals Chamber.

362. In the *Jelisić* Appeal Judgement, ICTY Appeals Chamber adopted the reasoning it had followed in the *Celebici* case, and held that the multiple convictions entered under Article 3 and Article 5 of ICTY Statute are permissible because each Article contained a distinct element requiring proof of a fact not required by the other Article.[617]

363. In the view of the Appeals Chamber, the above test concerning multiple convictions reflects general, objective criteria enabling a Chamber to determine when it may enter or affirm multiple convictions based on the same acts. The Appeals Chamber confirms that this is the test to be applied with respect to multiple convictions arising under ICTR Statute. The Appeals Chamber further endorses the approach of the *Celebici* Appeal Judgement, with regard to the elements of the offences to be taken into consideration in the application of this test.[618] In applying this test, *all* the legal elements of the offences, including those contained in the provisions' introductory paragraph, must be taken into account.

364. In the case at bar, the Trial Chamber found Musema guilty of genocide (Count 1) and of extermination as a crime against humanity (Count 5) on the basis of the same set of facts. Musema requests the reversal of the conviction for extermination. The issue is whether such double conviction is permissible.

365. Applying the provisions of the test articulated above, the first issue is whether a given statutory provision has a materially distinct element not contained in the other provision, an element being regarded as materially distinct from another if it requires proof of a fact not required by the other.

366. Genocide requires proof of an intent to destroy, in whole or in part, a national, ethnical, racial or religious group; this is not required by extermination as a crime against humanity. Extermination as a crime against humanity requires proof that the crime was committed as a part of a widespread or systematic attack against a civilian population, which proof is not required in the case of genocide.

367. As a result, the applicable test with respect to double convictions for genocide and extermination as a crime against humanity is satisfied; these convictions are permissible. Accordingly, Musema's ground of appeal on this point is dismissed.

368. The Appeals Chamber notes that the Prosecution has also requested it to confirm that multiple convictions under different Articles of the Statute are always permitted. The Appeals Chamber, however, declines to give its opinion on this issue, and limits its findings to the issues raised in the appeal.

369. On the issue of cumulative charges, ICTY Appeals Chamber in *Celebici* held:

[c]umulative charging is to be allowed in light of the fact that, prior to the presentation of all of the evidence, it is not possible to determine to a certainty which of the charges brought against an accused will be proven. The Trial Chamber is better poised, after the parties' presentation of the evidence, to evaluate which of the charges may be retained, based upon the sufficiency of the evidence. In addition, cumulative charging constitutes the usual practice of both this Tribunal and ICTR.[619]

The Appeals Chamber finds that the above holding on cumulative charges reflects a general principle

and is equally applicable to ICTR. As a result, the Appeals Chamber confirms that cumulative charging is generally permitted.

C. Conclusion

370. For the reasons given above, the Appeals Chamber holds that convictions for genocide and extermination as a crime against humanity, based on the same set of facts, are permissible. Musema's ground of appeal is thus dismissed. The Appeals Chamber further holds that cumulative charging is generally permitted.

[572] *Akayesu* Judgement, para. 468.

[573] Appellant's Brief, paras. 481 to 487.

[574] *Ibid.*, at para. 487.

[575] *Ibid.*

[576] *Ibid.*

[577] *Ibid.*, at para. 494.

[578] Appellant's Brief, para. 496. He further states that "[t]he Prosecutor does not know in advance exactly how the evidence will come out at trial, and it may be acceptable to plead two different offences to cover different possibilities."

[579] T(A), 28 May 2001, p. 123.

[580] *Ibid.*, p. 123 and 124.

[581] *Ibid.*, p. 125.

[582] *Ibid.*, p. 126.

[583] *Ibid.*

[584] *Ibid.*, p. 127.

[585] Prosecution's Response, para. 7. 119.

[586] *Ibid.*, at para. 7. 121.

[587] The *Celebici* Appeal Judgement was rendered on 20 February 2001. The Prosecution stated that other sections of its Respondent's Brief-namely, the introduction, the practice of this Tribunal, the different societal interests protected, and the conclusion-are still relevant. T(A), p. 211.

[588] T(A), p.209.

[589] *Ibid.*, p.211.

[590] *Ibid.*, p.212.

[591] *Ibid.*

[592] *Ibid.*

[593] *Ibid.*

[594] *Ibid.*, p.213.

[595] *Ibid.*, p.213 and 214.

[596] *Ibid.*, p.214.

[597] *Ibid.*

[598] *Ibid.*, p.215.

[599] *Ibid.*

[600] *Ibid.*, p.218 and 219.

[601] *Ibid.*, p.219.

[602] *Ibid.*, p.221.

[603] *Ibid.*

[604] *Ibid.* The Prosecution noted: "By contrast, the category of crimes against humanity ... does not focus on the rights of groups to exist. It focuses on a broad spectrum of inhumane acts, but they need to be directed at any civilian population on a widespread and systematic basis," *Ibid.*

[605] *Ibid.*, p.222.

[606] *Ibid.*

[607] *Ibid.*

[608] *Ibid.*, p.223.

[609] *Ibid.*, p.224.

[610] That is, convictions under Articles 2 and 3, 3 and 4, 2 and 4, and 2, 3 and 4 of the Statute.

[611] See *Kunarac, Kordic, and Krstić* Trial Judgements.

[612] *Celebici* Appeal Judgement, para.405.

[613] *Celebici* Appeal Judgement, para. 428.

[614] *Ibid.*, para.406.

[615] *Celebici* Appeal Judgement, paras. 412 and 413.

[616] The pairs of crimes at issue in the case under ICTY Statute were: (1) willful killings under Article 2 and murders under Article 3 (common Article 3); (2) willfully causing great suffering or serious injury to body or health under Article 2 and cruel treatment under Article 3 (common Article 3); (3) torture under Article 2 and torture under Article 3 (common Article 3); (4) inhuman treatment under Article 2 and cruel treatment under Article 3 (common Article 3). See *Celebici* Appeal Judgement, para. 414.

[617] The Chamber stated: "... Article 3 requires a close link between the acts of the accused and the armed conflict; this element is not required by Article 5. On the other hand, Article 5 requires proof that the act occurred as part of a widespread or systematic attack against a civilian population; that element is not required by Article 3. Thus each Article has an element requiring proof of a fact not required by the other. As a result, cumulative convictions under both Article 3 and 5 are permissible." *Jelisić* Appeal Judgement, para. 82.

[618] This refers to the approach of the majority of the Appeals Chamber in *Celebici*.

[619] *Celebici* Appeal Judgement, para. 400.