

Jelusic case: "The Appeals Chamber considers that, in the Circumstances of this Case, it is not appropriate to order that the Case be remitted for further Proceedings"

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**APPEAL CHAMBER
CHAMBRE D'APPEL**

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JELISIC CASE:

· "THE APPEALS CHAMBER CONSIDERS THAT, IN THE CIRCUMSTANCES OF THIS CASE, IT IS NOT APPROPRIATE TO ORDER THAT THE CASE BE REMITTED FOR FURTHER PROCEEDINGS"

· THE APPEALS CHAMBER "AFFIRMS THE SENTENCE OF 40 YEARS OF IMPRISONMENT"

Today, Thursday 5 July 2001, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), consisting of Judges Shahabuddeen (Presiding), Vohrah, Nieto-Navia, Wald and Pocar, rendered its Judgement in the case of *The Prosecutor v. Goran Jelusic*.

The Appeals Chamber by majority considered that it was "*not appropriate to order that the case be remitted for further proceedings*", and declined "*to reverse the acquittal*." It affirmed the sentence of 40 years of imprisonment as imposed by the Trial Chamber on 14 December 1999 (see *Press Release No. 454*). At today's hearing, the Presiding Judge of the Appeals Chamber, Judge Mohamed Shahabuddeen, read out the following summary of the Appeal Judgement in court: "*The summary does not reproduce all the elements of the written judgement*", which is "*the only authoritative account of the Appeals Chamber's conclusions*", and where "*its reasons for those conclusions*" are to be found.

This Chamber is seised of two appeals, one filed by the prosecution and one filed by Mr. Jelusic. They arise in this way:

Mr. Jelusic was indicted for crimes of genocide, violations of the laws or customs of war and crimes against humanity committed in May 1992 in the municipality of Brcko in the north-eastern part of Bosnia and Herzegovina.

At the pre-trial stage, an agreement of the factual basis was reached between the parties. On 29 October 1998, Mr. Jelusic pleaded guilty to thirty-one counts, comprising violations of the laws or customs of war and crimes against humanity; he pleaded not guilty to the genocide count. The subsequent proceedings before the Trial Chamber were, therefore, limited to the genocide count.

The trial commenced on 30 November 1998 and the prosecution completed its presentation of evidence on 22 September 1999. At that stage, the Trial Chamber informed the parties that it would render a judgement pursuant to Rule 98 bis(B) of the Rules. This Rule reads: "The Trial Chamber shall order the entry of judgement of acquittal on motion of an accused or proprio motu if it finds that the evidence is insufficient to sustain a conviction on that or those charges". The prosecution filed a motion to postpone the Trial Chamber's decision until the prosecution had been given the opportunity to present arguments.

On 19 October 1999, the Trial Chamber pronounced its oral judgement. Written reasons, together with sentencing, followed on 14 December 1999. It decided that there was an "indissociable" link between the prosecution's motion to be heard and the judgement itself, and dismissed the motion.

It convicted Mr. Jelusic of the counts alleging violations of the laws or customs of war and crimes against humanity, to which he had pleaded guilty. A single sentence of 40 years' imprisonment was imposed. It acquitted him on the count of genocide pursuant to Rule 98 bis(B) of the Rules.

Both sides appealed, the prosecution against acquittal on the genocide count, Mr. Jelusic against sentence on the counts on which he pleaded guilty, together with a challenge to cumulative convictions therefor as mentioned below.

The prosecution's appeal raises three grounds. The first ground is as follows:

1) The Trial Chamber made an error of law by not giving the Prosecution an opportunity to be heard on a proprio motu decision of the Trial Chamber under Rule 98 bis of the Rules.

The second ground of appeal is this:

2) The Trial Chamber erred in law by adopting the standard of guilt beyond a reasonable doubt for the purposes of a Rule 98 bis determination of the sufficiency of the evidence to sustain a conviction.

3) The prosecution's third ground has two parts. First, the Trial Chamber erred in law in holding that the requisite mental state for genocide in Article 4 of the Statute includes the dolus specialis standard, and not the broader notion of general intent. Secondly, the Trial Chamber erred in law and fact in deciding that the evidence did not establish beyond all reasonable doubt that there existed a plan to destroy the Muslim group in Brčko or elsewhere within which the murders committed by Mr. Jelisić would allegedly fit; and the Trial Chamber erred in law and fact when it decided that the acts of Mr. Jelisić were not the physical expression of an affirmed resolve to destroy in whole or in part a group as such, but rather, were arbitrary acts of killing resulting from a disturbed personality.

The prosecution requested that the case be remitted to a differently constituted Trial Chamber for a new trial.

The cross-appellant, Mr. Jelusic, has raised the following grounds of appeal:

1) The Trial Chamber erred by imposing cumulative convictions.

2) The Trial Chamber erred in fact and in the exercise of its discretion when imposing sentence.

Under this second ground of appeal, the cross appellant's arguments included the following:

· the sentence passed by the Trial Chamber for the counts in respect of which he pleaded guilty erroneously took into account prosecution evidence given at his trial for genocide;

· the Trial Chamber made an unauthorised double conviction on counts 16-17 (concerning the deaths of two brothers) while the indictment alleged one killing;

· the absence of a recognised tariff for sentencing;

· the Trial Chamber failed to accept the remorse shown by the cross-appellant as genuine;

· the Trial Chamber failed to consider that the cross-appellant was not a commander;

· the Trial Chamber failed adequately to consider the role of the cross-appellant in the broader context of the conflict in the former Yugoslavia;

· the Trial Chamber was obliged to, but did not, consider the general practice regarding prison sentences in all the courts of the former Yugoslavia;

· the Trial Chamber failed to give him any credit for his guilty plea;

- the Trial Chamber failed to consider his cooperation with the prosecution;
- the Trial Chamber failed to give adequate consideration to his youth.

The cross-appellant requested that his sentence be reduced. With regard to cumulative convictions, he asked that his convictions, for what he contended was the lesser crime, be quashed.

I will now briefly go through the findings of the Appeals Chamber.

I shall first deal with the Prosecution's appeal. As to the first ground of appeal, the Appeals Chamber finds that the prosecution has a right to be heard on the question of whether the evidence was sufficient to sustain a conviction. The fact that the Trial Chamber had the right to decide proprio motu pursuant to Rule 98 bis (B) does not relieve it of the normal duty of a judicial body to first hear a party whose rights can be affected by the decision to be made.

*As to the second ground of appeal, the Appeals Chamber holds that the Trial Chamber erred in applying the test for determining whether the prosecution evidence is insufficient to sustain a conviction. The correct test is whether there is evidence (if accepted) upon which a reasonable tribunal of fact **could** be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question.*

As to the first part of the prosecution's third ground of appeal, the Appeals Chamber finds that the requisite intent is one to destroy, in whole or in part, a national, ethnical, racial or religious group by one of the prohibited acts enumerated in Article 4 of the Statute. It considers that the Trial Chamber was referring to this intent when it spoke of dolus specialis. The Appeals Chamber further holds that the existence of a plan or policy is not a legal ingredient of the crime of genocide, although it may be evidentially of assistance.

As to the second part of the prosecution's third ground of appeal, the Appeals Chamber is of the opinion that the Trial Chamber's erroneous application of the standard under Rule 98 bis(B) led to an incorrect assessment of the evidence. However, in the circumstances of this case, the Appeals Chamber does not consider it appropriate to reverse the acquittal and to remit the case for further proceedings.

As to the cross-appellant's first ground of appeal, the Appeals Chamber finds that cumulative convictions under both Articles 3 and 5 are permissible.

The Appeals Chamber now comes to the cross-appellant's second ground of appeal:

As to counts 16 and 17 of the indictment, the cross-appellant pleaded guilty to the killing of only one of the brothers Huso and Smajil Zahirovic. The Trial Chamber erred in finding him guilty of murdering both of them. However, as the appellant was convicted of 12 murders, in the opinion of the Appeals Chamber the erroneous conviction does not affect sentencing.

With regard to the cross-appellant's submission that the Trial Chamber erred in the exercise of its discretion when imposing sentence, as has been noted several sub-grounds were raised. The Appeals Chamber's findings with regard to each sub-ground will not be addressed here. However, the Appeals Chamber found that Rule 101(A) of the Rules provides that "a convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life". Thus the Trial Chamber has the discretion to impose life imprisonment. The Trial Chamber also has a broad discretion as to which factors it may consider in sentencing and the weight to attribute to them. Generally, the Appeals Chamber found that the cross-appellant has failed to show an error in the exercise of the Trial Chamber's discretion.

The disposition will now be read.

DISPOSITION

(1) The Appeals Chamber unanimously allows the prosecution's first ground of appeal.

(2) The Appeals Chamber by majority (Judge Pocar dissenting) allows the prosecution's second ground of appeal.

(3) In respect of the prosecution's third ground of appeal -

(i) the Appeals Chamber unanimously dismisses the prosecution's appeal with regard to the alleged error of law by the Trial Chamber in its application of the term dolus specialis;

(ii) the Appeals Chamber by majority (Judge Pocar dissenting) allows all other aspects of the prosecution's third ground of appeal.

(4) However, the Appeals Chamber by majority (Judge Shahabuddeen and Judge Wald dissenting) considers that, in the circumstances of this case, it is not appropriate to order that the case be remitted for further proceedings, and declines to reverse the acquittal.

(5) The Appeals Chamber unanimously dismisses the cross-appellant's first ground of appeal.

(6) In respect of the cross-appellant's second ground of appeal -

(i) the Appeals Chamber unanimously finds that the Trial Chamber erred in finding the cross-appellant guilty of two murders under counts 16 and 17 of the second amended indictment when he in fact pleaded guilty to only one of the murders;

(ii) the Appeals Chamber unanimously dismisses the other aspects of the cross-appellant's second ground of appeal.

(7) The Appeals Chamber unanimously affirms the sentence of 40 years of imprisonment as imposed by the Trial Chamber.

(8) In accordance with Rule 103(C) of the Rules, the cross-appellant is to remain in the custody of the International Tribunal pending the finalisation of arrangements for his transfer to the State where his sentence will be served."

Judge Nieto-Navia appended a Separate Opinion whilst Judges Shahabuddeen, Wald and Pocar appended Partial Dissenting Opinions.

Copies of the full Judgement are available on request and on the Internet site of the Tribunal in English only. It is currently being translated and will be released as soon as possible.
