

SEPARATE OPINION OF JUDGE WALD DISSENTING FROM THE FINDING OF JURISDICTION

I fully agree with my colleagues that the International Criminal Tribunal for the Former Yugoslavia (hereafter "Tribunal") has, as all courts must have, the power to punish contempt, and that the Appeals Chamber decision¹ finding contempt under the circumstances of this case is entirely supportable. I am, however, unable to agree that the Appeals Chamber has jurisdiction under the ICTY Statute (hereafter "Statute") or the Rules of Procedure and Evidence adopted thereunder (hereafter "Rules")² to entertain an appeal from one of its own decisions.

Like my colleagues, I am concerned to ensure that proceedings before the Tribunal are conducted in accordance with fundamental human rights guarantees. However, I do not agree that human rights considerations require the creation of a two-tiered system of appeal in cases such as the one before us, where a finding of contempt has been initially made by the Appeals Chamber. Such an interpretation goes against the plain language of the Statute and Rules, and I do not believe that we can reasonably construe our governing documents to permit such an appeal. The laudable aim of allowing someone cited for contempt by the Appeals Chamber to obtain a review of any subsequent conviction in the same way as if the conviction had been rendered by a trial chamber can only be accomplished by an amendment to the Statute, or perhaps to the Rules.

However, in the present case the Tribunal, as a court of law, must abide by its existing Statute and the Rules it has adopted to govern the exercise of its lawful powers. I must therefore dissent from the finding of jurisdiction for this appeal. My reasons in brief are set out below.

First, the Statute lays down the organization and jurisdiction of the Tribunal. In Article 12 it specifies the number of judges who shall serve in each Trial Chamber and in the Appeals Chamber.³ Article 25 states "(t)he Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor..." and "...may affirm, reverse or revise the decisions taken by the Trial Chambers". It nowhere states that an appeal may be taken from one duly constituted

¹ *Prosecutor v Tadic*, Case No. IT-94-1-A-R77, 'Judgement on Allegations of Contempt against Prior Counsel Milan Vujin', (31 Jan. 2000) (hereafter *Contempt Judgement*).

² Art. 15 ICTY Statute (specifying that the judges shall adopt rules of procedure and evidence to govern proceedings before it).

³ I note that a specific amendment to the Statute was required to accommodate the authorization by the U.N. Security Council of *ad litem* judges to assist the Tribunal with its workload, and to specify the assignment and duties of these judges. The *ad litem* judges will sit in "sections" of Chamber. See Article 12 (2) of the Statute, as amended by S/RES/1329 (30 Nov. 2000). Appropriate rule changes are also in progress.

Appeals Chamber to another duly constituted Appeals Chamber, and I do not think we have the power to create such a two-level process in that Chamber on our own.⁴

It is true that Rule 73 allows an interlocutory appeal only with leave of an appointed bench of three judges of the Appeals Chamber. However, this provides merely a gate-keeping provision for early appeal of what can later be appealed as a matter of right at the time of final judgement and is not a decision on the merits. Thus it falls securely within the authority of Article 15 of the Statute governing the adoption of rules of procedure for appeals. That is a very different thing to creating a full right of appeal on the merits from one Appeals Chamber bench to another.⁵

Second, the Tribunal has never attempted in its Rules to create the two-tiered appeal system accepted by the majority in this case. Rule 77 regulating contempt authorizes any Chamber, including the Appeals Chamber, to find a person in contempt and prescribes the applicable penalties. Rule 77 (J) states that "(a)ny decision rendered by a Trial Chamber under this Rule shall be subject to appeal..."⁶. At the 1998 Plenary Session in conjunction with the amendment of Rule 77 specifically to include contempt actions by the Appeals Chamber, no action was taken as to any right to appeal therefrom. The Appeals Chamber judgement now before us acknowledges that at the December 1998 Plenary Session "the right to appeal was limited to decisions made by a Trial Chamber."⁷

Thus I can find no basis in our Rules any more than in our Statute for an appeal from one Appeals Chamber bench to another. Nor do I believe this fatal omission can be rectified by declaring that the Judgement of the Appeals Chamber was a ruling "in the first instance". The Judgement is clearly labeled as one "In the Appeals Chamber". The Statute has established that Chamber as an

⁴ Let us assume that the Appeals Chamber consisted of the same members at all times, as indeed was undoubtedly intended by the drafters. Could these same persons hear an appeal from their own judgement? Or would the President have to appoint all Trial Chamber members as temporary Appeals Chamber judges to hear the appeal? I note that three of the five members of the instant Appeals Chamber are assigned from the Trial Chamber.

⁵ Article 14 of the Statute also states that a judge may only serve in the Chambers to which he or she was assigned and that a Presiding Judge shall conduct all of the proceedings of the Trial Chamber as a whole. Because of the necessities of maximizing judicial resources and taking account of disqualifications, trial chamber judges are often assigned to particular appeals and, in some cases, the function of Presiding Judge will be assigned to another judge in that chamber. In both instances the Statute may be reasonably interpreted to allow for those variations, *i.e.* the President of the Tribunal may make such special assignments of trial chamber judges to the Appeals Chamber and a Trial Chamber may select a Presiding Judge for a particular trial who is not the usual Presiding Judge of the Chamber. See Rules 15 and 27. Similarly, Rule 108 *bis* allows a State affected by an interlocutory decision of a Trial Chamber to file a request for review by the Appeals Chamber. Again a liberal reading of Article 25 brings this under the Article's grant of authority to the Appeals Chamber to "affirm, reverse or revise the decisions taken by the Trial Chamber".

⁶ This wording was an amendment to Rule 77 adopted in 1998 after the case had commenced.

⁷ *Contempt Judgement*, para 22. Moreover there are many other instances in which it can be said that the Appeals Chamber rules "in the first instance" as for example when it hears and evaluates additional evidence on Appeal under Rule 115, but no appeal from these types of decisions are allowed. That is because such first instance decisions are auxiliary to the exercise of its principle appellate jurisdiction, as indeed is contempt.

Appeals Chamber and defined its jurisdiction; we have no power to add or to subtract from that definition. As Judge Sidhwa recognized in his separate opinion in *Prosecutor v. Tadic*:⁸

The courts have no inherent powers to create appellate provisions or acquire jurisdiction where none is granted ... It is thus clear that a tribunal or court cannot assume appellate powers under any concept of inherent jurisdiction or by expanding its jurisdiction through any amendment to its rule.⁹

Lastly my colleagues justify their ruling because to deny someone convicted of contempt by the Appeals Chamber any further appeal would violate human rights norms such as those contained in Article 14 (5) of the International Covenant on Civil and Political Rights (ICCPR) which declares that "(e)veryone convicted of a crime shall have the right to have his conviction and sentence reviewed by a higher tribunal according to law".

In my view, the failure to provide a right of appeal for convictions that originate in the highest tribunal is not a fundamental violation of this right. Indeed, a number of Western European States have submitted reservations to Article 14 (5) to make it clear that an appellate court may impose an aggravated sentence, without giving rise to a further right of appeal, although there was no consensus that such a reservation was strictly necessary.¹⁰ Admittedly, one commentator has expressed the view that, pursuant to Article 14 (5), where a conviction arises for the first time at the appellate level a further right of appeal must be provided.¹¹ However, various states recognise exceptions to this principle. For example, in some countries the criminal responsibility of supreme organs of state can be determined by a constitutional court, or other supreme court, from which there is no appeal. Reservations to Article 14 (5) have been made to accommodate this.¹² If such reservations were considered to be "incompatible with the object and purpose of the treaty", they would be impermissible.¹³ Furthermore, Article 2 to the Seventh Protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms specifically provides an exception to the right of appeal to a higher tribunal in "cases in which the person concerned was

⁸ *Prosecutor v Tadic*, Case No. IT-94-1-AR72 'Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction', (2 Oct. 1995), Separate Opinion of Judge Sidhwa, para 6.

⁹ The power to hear and decide a contempt that occurs in the course of its proceedings is the necessary exception to the otherwise exclusive appellate jurisdiction of the Appeals Chamber, an exception dictated by universal custom and tradition. However, the division of the Appeals Chamber into a trial and appellate level is not so dictated and has, to my knowledge, no precedent in such widescale custom or practice. It appears to be purely a judicial creature, however meaningfully motivated, and one I think unwarranted without specific statutory authorization.

¹⁰ See M. Nowak, *UN Covenant on Civil and Political Rights : CCPR Commentary*, (1993), at 268.

¹¹ *Ibid.*

¹² *Ibid.* (referring to reservations of this nature submitted by Belgium, Italy and the Netherlands).

¹³ *Vienna Convention on the Law of Treaties*, 1969, Article 19 (c) (although there are many problems associated with the application of the test of 'compatibility'. See I. Brownlie, *Principles of Public International Law* (4th ed, 1990), 608-611).

tried in the first instance by the highest tribunal..."¹⁴ Accordingly, I am unable to conclude that there yet exists a universal principle that a right of appeal must be afforded even when a conviction first arises in the highest tribunal, as is the case here. The absence of such a right in Article 21 of the Statute setting out the rights of an accused person thus does not present an unacceptable departure from agreed human rights principles.

Moreover, the right in Article 14 (5) of the ICCPR relates to persons who have been convicted of "crimes". Although contempt is a crime in the sense that it is potentially punishable by imprisonment, it is a *sui generis* offence. This is reflected in the fact that various procedural safeguards that apply in relation other criminal offences do not apply in the case of contempt. For example, contempt proceedings may be conducted by the very court that is alleged to have been the victim of the contempt. Various national judicial systems, including the United Kingdom and the United States, recognise convictions for contempt before the highest tribunal without any appeal therefrom. Thus, I cannot conclude that the creation of a new right to appeal an Appeals Chamber judgement is necessary so as to avoid a flagrant violation of accepted human rights norms.

Nonetheless the goal of providing an appeal from all convictions for criminal contempt is an eminently worthy one. However, it must be accomplished without wrenching all meaning from the constraints on the jurisdiction of the Appeals Chamber as set out in the Statute and Rules. There are acceptable ways to do this. Summary punishment by the Chamber in the form of removal from the court room or fines could be limited to those extreme violations that challenge the ability of the court to conduct its business, *i.e.* willful disobedience of an order, or insults to the dignity of the court.¹⁵ Where convictions are sought for more distant offenses such as interfering with witnesses, or inciting misleading testimony, the matter could be referred to the Prosecutor who would bring charges in the Trial Chamber as is done under Rule 91 false testimony. Conviction could then be appealed in the ordinary fashion.¹⁶

If that kind of compromise does not prove adequate, the Statute might be amended to address the unique demands of contempt. However, I do not think the right solution is to transform the Appeals

¹⁴ The exception also covers cases (as can happen in this Tribunal) where an acquittal is reversed on appeal.

¹⁵ See, *e.g.* 18 US Code, Section 401 (misbehaviour in its presence or so near thereto as to obstruct the administration of justice may be punished summarily by the court). See also US Fed. Rules of Criminal Procedure 42; (summary punishment for contempt committed in the presence of the court). In that situation an amendment to the Statute would be required to permit an appeal from one appeal panel judgement to another.

¹⁶ Such a procedure has been devised for contempt proceedings before the International Criminal Court (ICC). See Articles 70 and 71 of the Rome Statute of the ICC, and Rules 162-171, of the Finalized Draft Text of the Rules of Procedure and Evidence, Report of the Preparatory Commission for the International Criminal Court, UN Doc. PCNICC/2000/1/Add.1 (2 Nov. 2000).

Chamber into a two-level entity for contempt only, or even for this case only. As the learned judges of the Appeals Chamber in this very case put it:

The rule of law, which lies at the heart of society, is necessary to ensure peace and good order, and that rule is directly dependent upon the ability of courts to enforce their process and to maintain their dignity and respect.¹⁷

That is why we must recognize the Tribunal's inherent power to punish contempt or its proceeds. But the rule of law also requires that courts acknowledge the statutes and rules that bind them in the exercise of their powers, even when those restraints interfere with understandable aspirations to maximize human rights norms. Courts must lead the way in following the law if there is to be a rule of law. That is why I dissent only from the jurisdictional aspect of the judgement.

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

Patricia Wald

Dated this 27th day of February 2001

At the Hague

The Netherlands

(Seal of the Tribunal)

¹⁷ *Contempt Judgement*, para 16.