

DISSENTING OPINION OF JUDGE SHAHABUDDEEN

1. I appreciate the view of the Appeals Chamber that the appellant has no right of appeal under Rule 72(D)(i) of the Rules of Procedure and Evidence of the Tribunal ("Rules") and that his recourse is to Rule 73, but I am unfortunately not persuaded and respectfully offer this explanation of my difficulty.

A. Preliminary

2. On 17 May 2001, the accused filed a motion before Trial Chamber II challenging his arrest on the ground that it followed from an unlawful act of kidnapping. After discussions between the parties, on 29 October 2001 he filed a second motion to the same effect but setting out more precisely the issues involved. On 9 October 2002 this motion was dismissed by the Trial Chamber.

3. The decision of the Trial Chamber was given a year after the second motion was filed; it was reasoned and was a substantial one, extending to 40 pages. In paragraph 2 of the decision, the Trial Chamber stated that in "these proceedings Nikolic challenges the jurisdiction of the Tribunal to hear the allegations against him pursuant to Rule 72(A)(i) of the Rules". Both parties took the same position, namely, that they were acting under that Rule; no reference was made to Rule 73. There is no basis for a view that the Trial Chamber thought that it was acting under Rule 73; the only reasonable inference is that it thought that it was acting under Rule 72. One may think that it *should* have acted under a different Rule; but that is a different matter from what Rule it thought it was acting under.

4. On 7 November 2002, the accused filed a notice of appeal. The notice of appeal purported to fall under the provisions of Rule 108 of the Rules relating to appeals from final judgements. At a status conference held later on that day, Judge Agius raised the question whether the appeal should be under Rule 72. On 8 November 2002, the accused then filed another motion intituled, *inter alia*, "Motion Under Rule 127 Contemplating Rules 72 and 108" ("Rule 127 motion").

5. In his Rule 127 motion the accused asked the Appeals Chamber for an extension of time to enable him to make an interlocutory appeal under Rule 72. The Appeals Chamber is now dismissing the appellant's notice of appeal and his Rule 127 motion on the ground that the appellant does not have a right of interlocutory appeal under Rule 72; in the view of the Appeals Chamber, the appellant can make an interlocutory appeal, but only under Rule 73 if he gets certification thereunder.

6. On the approach taken by the Appeals Chamber, the question is whether the appellant has a right of interlocutory appeal, with certification, under Rule 73; if not, whether he has a right of interlocutory appeal under Rule 72; and whether the parties should be heard before the Appeals Chamber decides these questions. These matters are sought to be dealt with below.

B. Applicable provisions

Rule 72 Preliminary Motions

(A) Preliminary motions, being motions which

- i. challenge jurisdiction;
- ii. allege defects in the form of the indictment;
- iii. seek the severance of counts joined in one indictment under Rule 49 or seek separate trials under Rule 89(B); or
- iv. raise objections based on the refusal of a request for assignment of counsel made under Rule 45(C)

shall be in writing and be brought not later than thirty days after disclosure by the Prosecutor

to the defence of all material and statements referred to in Rule 66 (A)(i) and shall be disposed of not later than sixty days after they were filed and before the commencement of the opening statements provided for in Rule 84.

(B) Decisions on preliminary motions are without interlocutory appeal save

- i. in the case of motions challenging jurisdiction;
- ii. in other cases where certification has been granted by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

(C) ...

(D) For the purpose of paragraphs (A)(i) and (B)(i), a motion challenging jurisdiction refers exclusively to a motion which challenges an indictment on the ground that it does not relate to:

- i. any of the persons indicated in Articles 1, 6, 7 and 9 of the Statute;
- ii. the territories indicated in Articles 1, 8 and 9 of the Statute;
- iii. the period indicated in Articles 1, 8 and 9 of the Statute
- iv. any of the violations indicated in Articles 2, 3, 4, 5 and 7 of the Statute.

(E) An appeal brought under paragraph (B)(i) may not be proceeded with if a bench of three Judges, assigned by the President, decides that the appeal is not capable of satisfying the requirement of paragraph (D), in which case the appeal shall be dismissed.

Rule 73 Other Motions

(A) After a case is assigned to a Trial Chamber, either party may at any time move before the Chamber by way of motion, not being a preliminary motion, for appropriate ruling or relief. Such motions may be written or oral, at the discretion of the Trial Chamber.

(B) Decisions on all motions are without interlocutory appeal save with certification by the Trial Chamber, which may grant such certification if the decision involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

(C) ...

C. Rule 73 does not confer a right of interlocutory appeal in the instant case

7. In my respectful opinion, there are three reasons for this view: First, Rule 73 provides for the bringing of "Other Motions". Under paragraph (A) of the Rule, an "Other Motion" can be brought "at any time". Thus, subject to the judgement of the Trial Chamber, an accused can wait until the last moment of a long trial to bring his "Other Motion". In a case of this kind, in which the trial is sought to be stopped from commencing, one would expect a requirement to act during the preliminary stages of the proceedings. Such a requirement is to be found in Rule 72. Without prescribing a limiting opening date, the Rule provides that preliminary motions "shall ... be brought not later than thirty days after disclosure by the Prosecutor to the defence of all material and statements referred to in Rule 66(A)(i) and shall be disposed of not later than sixty days after they were filed and before the commencement of the opening statements

provided for in Rule 84". Whether or not that requirement was complied with in this case is a different matter.

8. Second, paragraph (B) of Rule 73 speaks of "an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings"; by implication, an interlocutory appeal is to be limited to such issues. That language, like that of Rule 72(B)(ii), assumes that an *ab initio* requirement for the existence or exercise of jurisdiction to hold a trial is not in issue. The focus is on other matters: it is "the fair and expeditious *conduct* of the proceedings or the *outcome* of the trial" which is in question. That could conceivably involve the termination of the case in favour of the accused by reason of something affecting the fairness and expeditiousness of the conduct of the proceedings. But the object is not to determine whether the proceedings should have been instituted in the first place: the original foundation of the case is not under attack. This is also clear from Rule 72(B)(ii), which is applicable only to Rule 72(A)(ii), (iii) and (iv); these, as set out above, concern defects in the form of the indictment, severance of counts, and assignment of counsel, respectively. They do not concern matters which can affect the existence of jurisdiction *ab initio* or the exercise of that jurisdiction.

9. Third, preliminary motions are required by Rule 72(A) to be "in writing", whereas, under Rule 73(A), "Other Motions" may be "written or oral, at the discretion of the Trial Chamber". Obviously, a motion which could stop the trial from commencing should be sufficiently important to be in writing. The discretion given by Rule 73(A) to a Trial Chamber to allow an "Other Motion" to be made either in writing or orally is inapplicable where a motion which could stop the trial from commencing is concerned: it is not a question of the exercise of the discretion but a question whether the discretion has in the first instance been given. Consequently, a motion seeking to stop the trial from commencing cannot sustain an interlocutory appeal under Rule 73.

D. Rule 72 confers a right of interlocutory appeal in the instant case

10. It may be that Rule 72(D)(i) is not as well crafted as it could have been. But what is clear is that, although the provision was obviously intended to restrict the right of interlocutory appeal, it was not designed to abolish such an appeal altogether. An appeal is possible under Rule 72(D)(ii), (iii) and (iv); it should be equally possible under subparagraph (i) of the Rule. However, whatever right of appeal subparagraph (i) was intended to permit is illusory if it does not include a case of this kind: an intending appellant will in all practical cases be a person within the meaning of the provision and thus disentitled from appealing, unless it is the case that a person is not a person within the meaning of the provision if, for any reason, the Tribunal *ab initio* lacks or cannot exercise jurisdiction over him. If not, an interlocutory appeal will be possible under subparagraphs (ii), (iii) and (iv) of Rule 72(D), but not under subparagraph (i).

11. A person wrongfully deprived of his liberty before the filing of an indictment may bring a motion in the nature of *habeas corpus* before an indictment is filed and may do so outside of the Rules of Procedure and Evidence, for there can be no dispute that there is jurisdiction to hear and determine a motion raising so fundamental a question. However, it is a reasonable assumption that, if such a person seeks such a remedy after the filing of an indictment, he would do so by way of a preliminary motion under those Rules, it being logical that, where, as in this case, an indictment has been filed, the attack on jurisdiction should be related to the indictment through which the power of the Tribunal is sought to be exerted.

12. Thus, after the filing of an indictment a remedy for kidnapping is available under the Rules of Procedure and Evidence. The Appeals Chamber agrees because it is of the view that, subject to certification, an appeal lies under Rule 73. However, if, for the reasons given above, Rule 73 of the Rules is inapplicable, this strengthens the argument that the applicable Rule is Rule 72, this being the only remaining provision of possible applicability. This in turn is a reason for interpreting Rule 72 as also permitting an interlocutory appeal to be brought in such a case. Otherwise, Rule 72(D)(i), in *ex facie*

permitting an interlocutory appeal but in not actually allowing it, is *brutum fulmen*.

13. I have considered an argument that an appeal as in *Barayagwiza* and *Semanza* would now be shut out by a provision such as that of Rule 72(D)(i) and that the present case is like those so far as the legality of certain acts was concerned. I am not persuaded that there is a material similarity.

14. Those cases, like *Rwamakuba* and *Kajelijeli*, did not involve an allegation of kidnapping. It is true that the situations in the cited cases as well as in this case involved an allegation of illegal arrest and an associated breach of human rights. But, in the cited cases, the alleged illegality arose out of the manner in which the Tribunal carried out acts which it was authorized to carry out. In this case, the appellant's argument is that, on one basis or another, the Tribunal stands to be imputed with responsibility for the alleged kidnapping. The Tribunal was never authorized to engage in kidnapping, and so there could never be an argument that kidnapping would be lawful if done properly. It is difficult to appreciate why a person kidnapped should be precluded from arguing that he is not a person "indicated in articles 1, 6, 7 and 9 of the Statute" within the meaning of Rule 72(D)(i), that for this reason he is not a person over whom the Tribunal has jurisdiction, and that accordingly he is entitled to appeal under Rule 72(B)(i).

15. It should be remembered that, in the ICTR, no appeal is possible under the provisions corresponding to ICTY Rule 73. So, if a kidnapped accused is precluded from appealing under the ICTR equivalent of ICTY Rule 72(D)(i), he has no right of appeal at all – and notwithstanding that the case involves an allegation of kidnapping. The compensating argument of the Appeals Chamber that an appeal is possible in this case with certification under ICTY Rule 73 would not be available in the case of the ICTR.

16. It remains to deal with an argument, alluded to in today's decision, that the appellant's case was based on "the alleged illegality of his arrest, and did not challenge the indictment on any of" the grounds listed in Rule 72(D). This suggests that the appellant was challenging the legality of the arrest but not challenging the indictment on any of the listed grounds. So, the question is what was he saying to the Trial Chamber.

17. It is reasonably clear that the Trial Chamber understood, and correctly understood, that the appellant was challenging the validity of the indictment on the ground that it was vitiated by the alleged kidnapping; if he was challenging the validity of the indictment, he could only have been doing so under Rule 72(D)(i). That this was the posture adopted by the appellant is apparent from paragraph 1 of his motion before the Trial Chamber of 17 May 2001, in which he submitted that the ruling for which he prayed "would go to jurisdiction as contemplated by Rule 72(A)(i) of the Rules of Evidence and Procedure ... in that, by the exercise of its discretion the Honourable Trial Chamber would be determining not to exercise or adopt further jurisdiction over the indictment and/or the Defendant". The appellant's reference to Rule 72(A)(i) fell to be understood as limited by Rule 72(D) and, in particular, by subparagraph (i) of that provision.

18. It will be for the Appeals Chamber, eventually, to say whether any modern qualifications of the maxim *male captus bene detentus* have in turn to be qualified by the requirement resulting from article 29 of the Statute for the concerned state immediately to return the accused to the Tribunal if the latter has to release the accused within the territory of that state - more particularly as at the relevant time judicial notice could be taken of the fact that that state was in breach of the obligation to cooperate with the Tribunal as imposed by that article of the Statute. It would also be for the Appeals Chamber, eventually, to say whether the reference in Rule 72(B)(i) to a motion "challenging jurisdiction" includes a case in which there is jurisdiction, but in which the integrity of the judicial process requires that the exercise of the jurisdiction be permanently stayed in the exercise of the discretion of the Trial Chamber. But these matters can be dealt with later; they need not affect the consideration of the question whether the appeal is competent under Rule 72 or whether it can only be made under Rule 73 with certification.

E. The need to hear the parties

19. As a matter of general legal principle, it does not appear to be right for the Appeals Chamber, without affording to the parties an opportunity to be heard on the point, to decide that the appellant has no right of appeal under Rule 72 but that, with certification, he could appeal under Rule 73.

20. There is a small but material difference between the two Rules. Rule 73(B) expressly states that decisions are "without interlocutory appeal save with certification by the Trial Chamber". One may think it likely that certification (together with any necessary extension of time) would be granted by the Trial Chamber; but whether it would or would not be granted is a matter for decision by the Trial Chamber. If the Trial Chamber refuses certification, that is the end of the case: there is no right to make an interlocutory appeal. By contrast, under Rule 72(B)(i) and (D)(i), as I read them, there is a right to make an interlocutory appeal. I take this view despite the deletion from the former in April 2002 of the terminal words "where an appeal by either party lies as of right": these words went to the manner of the exercise of the right and not to the existence of the right itself. It is true that, under Rule 72(E), the appeal can be dismissed by a gatekeeping bench of three Judges (invariably and in practice members of the Appeals Chamber) if they decide that the appeal is not capable of satisfying the requirement of paragraph (D); but that power of dismissal does not affect the fact that an "appeal" will have been "brought" or that what is dismissed is an "appeal". Thus, the appellant has a right to go to the Appeals Chamber acting through an important element.

21. It follows that whether Rule 72 or Rule 73 is the applicable provision is a matter of substance. Since both parties as well as the Trial Chamber acted under the former and not under the latter, it does not appear right for the Appeals Chamber to proceed on the basis that Rule 73 was the applicable Rule without at least first affording an opportunity to the parties to be heard.

F. Conclusion

22. The Appeals Chamber is dismissing the appellant's notice of appeal and his Rule 127 motion. It is doing so for the reason that it considers that an appeal lies, with certification, under Rule 73, but that no appeal lies under Rule 72. For the foregoing reasons, I regret that I am not able to support the decision of the Appeals Chamber or to agree that it should have been made without first affording an opportunity to the parties to be heard on the particular point on which the decision turned.

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

Mohamed Shahabuddeen

Dated this 9th day of January 2003
At The Hague
The Netherlands