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THE INFLATED INVOCATION OF INHERENT JURISDICTION AND POWERS BY INTERNATIONAL AND INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS: BETWEEN GAP FILLING AND THE EROSION OF CORE VALUES

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The inflated invocation of inherent jurisdiction and powers by International and internationalized Criminal Courts and Tribunals: between gap filling and the erosion of core values

Jean Paul Pierini

Abstract

Giurisdizione e poteri inerenti, ancorché la fonte degli stessi rimane oscura, sono stati frequentemente invocati in decisioni di Corti e Tribunali internazionali e internazionalizzati, al fine di rivendicare specifiche potestà a attribuzioni e anche per superare lacune, ma anche limitazioni dei regolamenti di procedura e prova. Tale invocazione rischia di interferire con principi e diritti fondamentali. L'affermazione da parte di Corti e Tribunali internazionali di giurisdizione e poteri inerenti e la scarsa o nulla reazione a tale affermazione, induce evocare il concetto di "momento Groziano", quale momento contraddistinto da un cambiamento repentino in paradigmi fino ad allora consolidati e dall'emergere con inusitata rapidità ed accettazione, di nuovi valori. Per alcuni versi, tale "momento Groziano" sembra essere ormai concluso, come nel caso dell'affermazione originale da parte dell'ICTY, nell'ambito della propria *Kompetenz Kompetenz*, del potere di riesaminare la legalità della Risoluzioni del Consiglio di Sicurezza della Nazioni Unite, che è superato dalla giurisprudenza.

Inherent jurisdiction and or inherent powers, although their true source remains unclear, have frequently been invoked in decisions by International, internationalized and mixed Tribunals and Courts in order to vindicate certain authority and prerogatives and also to overcome gaps and even limits set by statutes and rules of procedure and evidence. The invocation of inherent powers by International Courts and Tribunals may impact on core principles. Claim by International Courts and Tribunals of inherent jurisdiction and power determine the temptation to recall the concept of a "Grotian moment", a shift in paradigms and the emergence of new values with unusual rapidity and equally unusual acceptance. For some stances the "Grotian moment" seems to be over, as in the case of the vindication of the power to review United Nations Security Council Resolutions underlying the original assertion of *Kompetenz Kompetenz* by the ICTY, which has been recently overruled.

Keywords

Giurisdizione - Poteri inerenti - Tribunali internazionali - Corte penale internazionale - Corte Europea dei diritti dell'uomo - oltraggio alla corte - subpoena - arbitrato internazionale - risoluzione del consiglio di sicurezza- Nazioni Unite - impugnazione - riesame - dottrina dell'abuso del processo.

Jurisdiction - inherent powers - International Tribunals - International Criminal Court - European human rights Court - Contempt of Court - subpoena - International arbitration - United Nations Security Council Resolutions - appeal - review - abuse of process doctrine.

THE INFLATED INVOCATION OF INHERENT JURISDICTION AND POWERS BY INTERNATIONAL AND INTERNATIONALIZED CRIMINAL COURTS AND TRIBUNALS: BETWEEN GAP FILLING AND THE EROSION OF CORE VALUES*.

by Jean Paul Pierini

Summary: I. Premise. - II. Basics of the theory of inherent jurisdiction and powers. - III. Nature of inherent powers and law applied thereof. - IV. The content of inherent jurisdiction and powers invoked by International Courts and Tribunals. - a) Jurisdiction to determine its own jurisdiction; b) Interim measures and discontinuance of wrongful acts; c) Jurisdiction and powers in respect of ongoing domestic proceedings (referrals, stay of domestic proceedings); d) Stay of proceedings, abuse of process and the power to award reparations; e) Review of decisions of judicatures of last instance; f) Interlocutory Appeals and reconsideration of previous decisions; g) Jurisdiction to entertain motions for discovery by third parties; h) Power to punish contempt of Court; i) Subpoenas; j) Power to inform the UNSC; V. Conclusions.

I. Premise

The concept of "inherence" is often used in reference to certain rights belonging to the individual even if not expressively granted. The most immediate example is represented by the right of self defence, which is a natural right of the individual. Inherent jurisdiction and or inherent powers, although their true source remains unclear, have frequently been invoked in decisions by International, internationalized and mixed Tribunals and Courts in order to vindicate certain authority and prerogatives. It can also overcome legal gaps, and sometimes even limits set by statutes and rules of procedure and evidence[1].

The frequent invocation of inherent powers by International Courts and Tribunals may also impact on principles like the principles of legality to a greater extent than in a domestic legal system whereas inherent powers are shaped by Constitutions and established legal traditions. Assessing the impact of the exercise of such powers on core values is of particular importance having in mind the strong support provided by the European Union and its members to initiatives aimed at ending impunity for perpetrators of crimes of international concern[2]. Crucial issues include possible inconsistencies with values recalled by article 2 of the Treaty on the European Union, as excesses in defining interferences with a proceeding and contempt in respect of aggressive media campaign.

The aim of this paper is to question some aspects of the inherent powers and jurisdiction theory and practice in order to show that often, when international courts and tribunals refer to the existence of inherent rights in order to justify their decision in case, they are actually applying general principles of law, or otherwise their decision is the consequence of ordinary procedural rulings. This paper further questions this practice as imposing certain procedural aspects of common law over civil law.

The "inherent powers" debate has also extended to international commercial arbitration whereas the most controversial issues are represented by the power to grant dispositive relief as a remedy to party misconduct and the power to disqualify counsel; the non public nature of many arbitral awards adds further challenge to the topic[3].

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1 C. BROWN, *The Inherent Powers of International Courts and Tribunals*, in *BYIL*, vol. 66 (2005), pp. 195-244. Recently also J. LIANG, *Inherent Jurisdiction and powers of International Criminal Courts and Tribunals: An Appraisal of their application*, in *NewCLR*, Vol. 15, n. 3, 2012 p. 375 ff.

2 See *ex plurimis* Council Common Position 2003/444/CFSP of June 2003 on the International Criminal Court; Statements on behalf of the European Union in support of the ICTY, the ICTR, their completion strategy and residual mechanism; Council of the European Union Conclusions on Lebanon, adopted 10 November 2008; Sierra Leone – European Community (2007). Country Strategy Paper and National Indicative Programme for the period 2008-2013.

3 At the International Law Association's Biennial Conference in The Hague in 2010, the Committee on International Commercial Arbitration was mandated to study the topic of the inherent powers of arbitrators in international commercial arbitration. The *final Report* by the Committee was presented for the Biennial Conference in Washington, in April 2014, www.ila-hq.org/.../C3C11769-36E2-4E93-8FDA357AA1DABB2F, retrieved January 19, 2014.

The final aim of this paper is to highlight the fact that this practice has emerged also as a matter of an unjustified deference to International Courts and Tribunals in scholarly writing.

In the second section I will try to define the concept of inherent jurisdiction and powers and subsequently, in the third section the nature of inherent powers and its relationship with Statutes and Rules, whilst in the fourth section specific inherent powers invoked by International Courts and Tribunals will be highlighted.

II. Basics of the theory of inherent jurisdiction and powers

The distinction between inherent jurisdiction, inherent powers, often applied interchangeably by International Courts and Tribunals on one side and implicit powers on the other side, has become blurred and the separation between these concepts remains unsettled[4].

Inherent jurisdiction should properly refer to the authority of a Court to hear and determine a dispute, whereas inherent powers should refer to the prerogative to issue orders, compel parties, or to stay the proceeding[5]. As to the relationship between "inherent" and "implied", the former concept relates to the nature of the powers, while the later explains the manner of their exposition in the particular instrument and inherent powers may be either implied or expressly set out[6].

From a different perspective, it has been asserted that "inherent" powers (and the focus is on the adjective) have been invoked by International Courts and Tribunals, whilst "inherent powers" are usually invoked and exercised by International organizations[7]. "Inherent" powers have also been explained as an attribute of International organizations as a consequence of the devolvement of tasks to such organizations based upon a delegation model[8] and also as a consequence of the interpretation of treaties as to encompass the attribution all necessary powers[9]: The explanation has nevertheless been relied upon also by International Courts and Tribunals in parallel with a different line of reasoning based on powers belong to a judicial body as such.

The circumstance that "powers" and "jurisdiction" are used interchangeably is further reinforced by the assertion that the exercise of "inherent powers" by International Courts and Tribunals has become a principle of International law due to the acquiescence of State[10].

As pointed out in recent studies, the concepts of inherent jurisdiction and inherent powers lie almost exclusively in common law legal systems[11], even if with some statute based equivalent in civil law legal systems. In common law legal systems inherent jurisdiction is a kind of inherent substantive authority of certain superior Courts of records afforded with unlimited jurisdiction[12] under written or unwritten Constitutional rules[13].

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[4] J. LIANG, *Inherent Jurisdiction and powers of International Criminal Courts and Tribunals: An Appraisal of their application*, p. 382.

[5] At this purpose See S. CHEN, *Is the Invocation of Inherent Jurisdiction the Same as the Exercise of Inherent Powers?: Re Nalpon Zero Geraldo Mario*,) in *EvPro*, 2013, 17(4), p. 367-374.

[6] M. PAPARINSKIS, *Inherent Powers of Icsid Tribunals: Broad and Rightly so*, Investment Treaty Arbitration and International Law, Vol. 5, I. LAIRD and T. WEILER eds., *Juris Publishing*, 2011.

[7] See J. LIANG, *Inherent Jurisdiction and powers of International Criminal Courts and Tribunals: An Appraisal of their application*, p. 383, referring respectively the ICTY, *Prosecutor v. Duško Tadić*, Judgment, Case No. IT-94-I-A, Appeals Chamber, 15 July 1999, para 321; and ICJ in the *Reparations for Injuries Suffered in the Service of the United Nations* case, ICJ Rep. (1949) p.171. On the distinction between the two concepts, See P. GAETA, *Inherent powers of International Courts and Tribunals*, in L.C. VOHRAH et al. (edited by), *Man's Inhumanity to Man – Essays on International Law in Honour of Antonio Cassese* in *Kluwer Law International*, The Hague, 2003, pp. 353-372, at 362. On the issue, also, D. SAROOSHI, *The Powers of the United Nations International Criminal tribunals*, in *MPYUNL*, 1998, pp. 150-152.

[8] See S. WALLERSTEIN, *Delegation of Powers and Authority in International Criminal Law*, *University of Oxford Research Paper Series,* Paper No 3/2013, January 2013. The A. persuasively questions D. LUBAN, *Authority and Responsibility in International Criminal Law*, in J. TASIOULAS, S. BESSON (eds), *The Philosophy of International Law*, 2009, p. 569ff. and the idea of a "fairness based justification" for the jurisdiction of international criminal courts.

[9] C. BROWN, *The Inherent Powers of International Courts and Tribunals*, in *BYIL*, vol. 66 (2005), pp. 195-244; C. BROWN, *Inherent Powers in International Adjudication,* in P. R. ROMANO, K. J. ALTER, C. AVGEROU (eds.), *The Oxford Handbook of International Adjudication*, 2013, p. 185*;* D. SHELTON, *Form, Function, and the Powers of International Courts*, 9, in *Chi-JIL*, 2009, p. 537.

[10] STL, In the Matter of El Sayed, Decision on Appeal of Pre-trial Judge's Order Regarding Jurisdiction and Standing, Case No. CH/AC/2010/02, Appeals Chamber, 10 November 2010, para 47.

[11] J. LIANG, *Inherent Jurisdiction and powers of International Criminal Courts and Tribunals: An Appraisal of their application*, p. 377.

[12] J. LIANG, *Inherent Jurisdiction and powers of International Criminal Courts and Tribunals: An Appraisal of their application*, p. 378. At this purpose, see also Court of Appeal for Ontario, *Parsons v. Ontario,* 2015 ONCA 158, released March 13, 2015, para 33, on the inherent power of a

Accordingly any symmetry between the source of inherent jurisdiction in municipal and international law needs not to overlook the fact that the jurisdiction of International Courts and Tribunals derive from their constitutive instruments.

The assertion of inherent jurisdiction by International Criminal Courts and Tribunals follows, since the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber decision on jurisdiction in the *Tadić* case[14] mostly similar pattern of legal reasoning through standardized references to the jurisprudence of the International Court of Justice (ICJ).

In the *Nuclear Tests* Case[15] the ICJ observed that it possessed the "inherent jurisdiction" enabling it to take such actions as may be required, on one hand to ensure that the exercise of its jurisdiction on the merits, if and when established, shall not be frustrated, and on the other to provide for the orderly settlement of all matters in dispute, to ensure the observance of the "inherent limitations on the exercise of the judicial function" of the Court and to maintain its judicial character and also the power "to make whatever finding" may be necessary for the said purposes.

The decision shapes the original "three dimensions" of the Court's inherent jurisdiction deriving from its mere existence as a judicial body which are accordingly represented by the power to adopt interim measures, the power to preserve "the inherent limitations of the Court's judicial functions" and the consequential power to make whatever necessary finding.

As to interim measures, their binding effect as a consequence of an obligation incumbent on States is further underlined in the ICJ's judgment in the *La Grand* Case[16]. The ICJ quoted the International Permanent Court of Justice (IPCJ) decision in *Electricity Company of Sofia and Bulgaria*, whereas the Court observed that article 41 of the Statute recognize[d] the «principle universally accepted by international tribunals»[17] that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of a decision to be given[18].

The "inherent limitations of judicial functions" encompasses a specific subset of principles, usually not quoted or discussed by International Criminal Courts and Tribunals in their decisions addressing inherent jurisdiction powers, and include the *non ultra petita* principle[19], the principle that it is for the State to decide how to implement and to give effect to International obligations[20] and the principle that judges cannot legislate[21].

The *non ultra petita* principle is fundamentally relevant in inter-State litigation, but much less in *self-contained procedural systems, all shaped with slight differences, to reflect an adversarial criminal* procedure. The relevance of the second principle is similarly of minor relevance in a context in which criminal jurisdiction is exercised over individuals. The principle that judges cannot legislate is in a much closer relationship with the assertion of inherent powers and jurisdiction and its implications have not yet been considered at such, but rather in respect of other principles "externally" limiting inherent jurisdiction and powers, like the *nulle poena sine lege* principle.

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superior court of justice, acting as a supervisory judge, to sit outside their home province. The Court relied on "common law authority" of superior courts to control their own process, and on the need for a court absent a comprehensive legislation, to fill the void under their inherent power to settle the rules of practice and procedure.

13 The United States Supreme Court decision in Marbury v. Madison 5 U.S. 137 (1803) represents a landmark decision in respect of the assertion of the power of judicial review.

14 ICTY, *Prosecutor v. Duško Tadić,* Decision On The Defence Motion For Interlocutory Appeal On Jurisdiction, Case No. IT-94-01, Appeals Chamber, 2 October 1995, para 14 to 18.

15 ICJ, *Judgment Nuclear Tests Case* (New Zealand v. France), 20 December 1974, ICJ Reports, 1974, p. 463, para 22 and 23.

16 ICJ, *LaGrand* Case, I.C.J. Reports (2001), 27 June 2001, 466, ICJ Reports, 2001, p. 502 ff..

17 PCJ, *Electricity Company of Sofia and Bulgaria*, Order of 5 December 1939, P.C.I.J. Series, A.I.B., N. 79, p. 199.

18 A similar perspective was endorsed by the ICC, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the request for suspensive effect and the request to file a consolidated reply, Case No. ICC-01/11-01/11-480, Appeals Chamber, 22 November 2013, whereas the Appeals Chamber, while rejecting the request, observed that Libya was under an obligation to abstain from any initiative which would frustrate "the Court's legitimate expectations" that, should the decision on the admissibility be reversed, it would be for the case possible to be resumed in front of the Court.

19 ICJ, *Request for the Interpretation of the Judgment of November 20th, 1950*, in the Asylum Case (Colombia/Peru), Judgment, I.C.J. Reports (1950) 395, at p.402. On the issue, See I. VAN DAMME, *Inherent Powers of and for the WTO Appellate Body*, *Working Paper Centre for Trade and Economic Integration, Graduate Institute*, Geneva, p. 4.

20 ICJ, *LaGrand* Case, at p. 513-4. VAN DAMME, *ibid* p. 6.

21 VAN DAMME, *ibid,* p. 5 with reference to the ICJ, *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports (1996) 226, at 267, para 18; WTO Appellate Body Report, *US – Wool Shirts and Blouses*, at 340; WTO Appellate Body Report, *US – Upland Cotton*, at para 509; Appellate Body Report, *India – Patents (US*), at para 45.

Having briefly addressed the multifaceted implications of principles aimed describing the scope of the preservation of inherent limitations of judicial functions, the power of an International Court or Tribunal to make findings is probably the distinctive aspect of their characterizations as a judicial body within the wider concept of inherent powers of International organizations and institutions.

If International Criminal Courts and Tribunals show to have heavily relied on the ICJ decisions, the influence is reciprocal. Accordingly, the practice of inherent powers developed by the *ad hoc* Tribunals for the protection of the integrity of the proceeding and the punishment of contempt is echoed in the 2004 ICJ decision in the *legality of the use of force* case[22].

It is noteworthy that the assertion of inherent powers in the subject matter of "subpoenas" follows, since the ICTY pre-trial chamber decision in the *Blaskic* case[23], a slightly different reasoning, based upon other authorities. In that case the chamber relied upon the ICJ decision in the "*Reparations for Injuries Suffered in the Service of the United Nations* case"[24] and appears to follow a path closer to the "implicit powers" essential to the performance of duties of International organizations and institutions[25], rather than to the "inherent powers" of judicial bodies as such. Another reference in the ICTY pre-trial chamber includes the "Certain Expenses of the United Nations case"[26]. The ICTY Appeals Chamber later on underlined the inherent rather than implied character of the power[27], but the "inherence" of subpoena powers continued to be asserted on the same authorities.

The ICC Trial Chamber subpoena decision[28] also relied upon the above-referenced cases. That Court followed a similar line of reasoning while also referring to and further expanding the concept of inherent limitations due to the judicial character of the Court. The decision was later subject to a "confirmatory reversal" in that the Appeals Chamber rejected the appeal and found the powers asserted by the Trial Chamber to be well founded on the provisions of the Statute rather than "implicit"[29].

It is curious that in respect of the power to issue subpoenas, which does not pertain to all International organizations, the ICTY and subsequently the ICC nonetheless argued from generic International authorities about attributions of the International personality of International organizations.

From a different perspective, it is worth observing that the whole constructions of the inherent jurisdiction and powers of International Courts and Tribunals is grounded in decisions underlying the idea that certain powers are to be granted to a judicial body in order to preserve the "inherent limitations of its judicial function" and ends up with the definition of general limitations which are "external" to the purpose of these powers. These general limitations encompass consonance with the

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22 ICJ *Legality of Use of Force* (Serbia & Montenegro v. Belg.), 2004 I.C.J., p. 279, p. 338–39 (Dec. 15) (J. HIGGINS, separate opinion): The Court's inherent jurisdiction derives from its judicial character and the need for powers to regulate matters connected with the administration of justice, not every aspect of which may have been foreseen in the [constitutive instrument of the tribunal]. It was on such a basis that the Permanent Court had admitted the filing of preliminary objections to jurisdiction even before this possibility was regulated by the Rules of Court. . . . [The Court has] inherent power to protect the integrity of the judicial process. In similar terms, A. ORAKHELASHVILI, *Questions of International Judicial Jurisdiction in the LaGrand Case*, 15, in *LJIL*, 2002, p. 105, p. 115, and A. D. MITCHELL, D. HEATON, *The Inherent Jurisdiction*.

23 ICTY, *Prosecutor v. Blaskic*, Decision on the Objection of the Republic of Croatia to the Issuance of *Subpoena Duces Tecum*, Case No. IT-95-14, Pre Trial Chamber II, 18 July 1997.

24 ICJ in the *Reparations for Injuries Suffered in the Service of the United Nations* case, ICJ Rep. (1949) p.171. In the decision the Court found, *inter alia*, that the United Nations has the capacity to bring an international claim against a government responsible for causing injury to an agent of that Organization

25 The ICJ in the Reparations case referred to IPCJ, had applied the same principle of powers by necessary implication to the International Labour Organization, in its Advisory Opinion Number 13, of 23 July 1926 (Ser. B,. No. 13, p. 18)

26 ICJ, *Certain Expenses of the United Nations* case, ICJ Rep. (1962), p. 151.

27 ICTY, *Prosecutor v. Blaskic*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case No. IT-95-14, Appeals Chamber, 29 October 1997, paras 58, 59.

28 ICC, *Prosecutor v. Ruto*, Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, Case No. ICC-01/09-01/11-1274, Trial Chamber V, 17 April 2014, para 68, quoting ICJ, *Northern Cameroons* (Cameroon v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports (1963) 15, at p. 30. On inherent powers of the ICC, See G.M. PIKIS, *The Rome Statute for the International Criminal Court*, Nijhoff, 2010, pp. 21 – 26.

29 ICC, *Prosecutor v. Ruto*, Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", Case No. ICC-01/09-01/11-1598, Appeals Chamber, 2 October 2014, para 105 ff..

principles of fair administration of justice, full respect for human rights and, in the field of judicial settlement of interstate disputes, with the consent or will of the States concerned[30].

In an attempt to circumscribe the exercise of inherent powers by International Criminal Courts and Tribunals, besides stressing the importance of judicial restraint, limitations are[31] necessarily found in the constitutive instruments (to include the so called *clause contraire* and inconsistencies with the character of the Statute), State sovereignty (the expansion of inherent powers must not impliedly give rise to additional state obligations), functions (inherent powers must fulfill the judicial functions of the judicial body) and constraints deriving from human rights and fair administration of justice.

III. Nature of inherent powers and law applied thereof

Any investigation on the nature of the law applied in the exercise of their inherent jurisdiction by International Courts and Tribunals is difficult due to the fact that the jurisprudence used by the Court is often unrelated to the underlying legal issues as well as "hyperbolic".

International law applied by International Courts in the exercise of inherent jurisdiction represents a subset of applicable law. Under inherent jurisdiction, principles or rules of International law are applied directly to resolve a dispute, and not as an interpretive tool pursuant to Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT)[32].

It is worth questioning whether principles on inherent jurisdiction of International Courts and Tribunals should be assessed having in mind a rule of International law or rather "general principles of law" recognized by civilized nations, or as spelled under the ICC Statute, a «general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime» (art. 21, para 1(c)).

The ICTY Appeals Chamber when considering subpoenas and general contempt powers conducted an analysis of common law and civil law legal systems. However, it did not conclude that in the end, what was claimed to be as an inherent power, reflected a principle of law short of general acceptance. Nevertheless, the focus of the said decisions was the existence of inherent powers as such, and not the specific underlying power invoked and ultimately exercised in the circumstance.

The ICC trial chamber in its subpoena decision seems to focus on the specific powers asserted as inherent, when affirming that «customary international criminal procedural law has now firmly recognized and settled the idea of compellability of a witness for purposes of a criminal trial before an international criminal court»[33]. This is similar to the reasoning of the ICTY Trial Chamber judgment in the *Kupreskic et al* case and the sources of law listed therein[34]. As mentioned previously, the Appeals Chamber deemed it not necessary to address and deepen the issue of "implicit" character of the power, even if departing from the idea if its "inherence", and held the powers at issue to be supported by the Statute[35].

At the opposite, the Special Tribunal for Lebanon (STL) Appeals Chamber[36], held that «the extensive practice of International Courts and Tribunals to make use of their inherent powers and the lack of any objection by States, non-state actors or other interested parties evidence the existence of a general rule of International law granting such inherent jurisdiction» and that the «combination of a string of decisions in this field, coupled with the implicit acceptance or acquiescence of all the

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30 STL, *In the case against New TV S.A.L. Karma Mohamed Tahsin Al Khayat*, *Decision on Interlocutory Appeal concerning Personal Jurisdiction in Contempt Proceedings*, Appeals Chamber, 2 October 2014, para 59. On the limits, see also STL, *In the Matter of El Sayed*, Decision on Appeal of Pre-trial Judge's Order Regarding Jurisdiction and Standing, Case No. CH/AC/2010/02, Appeals Chamber, 10 November 2010, para 49.

31 J. LIANG, *Inherent Jurisdiction and powers of International Criminal Courts and Tribunals: An Appraisal of their application*, respectively p. 413, 407, 409, 411, and 412.

32 H. THIRLWAY, *The Law and Procedure of the International Court of Justice 1960–89: Part Nine*, 1998, in *BYIL* 1, 6.

33 ICC, *Prosecutor v. Ruto*, Case No. ICC-01/09-01/11-1274, para 65.

34 ICTY, *Prosecutor v. Kupreskic et al.*, Judgment, Case No. IT-95-16-T, Trial Chamber, 14 January 2000, para 591. On the decision in the context of inherent powers, See J. LIANG, *Inherent Jurisdiction and powers of International Criminal Courts and Tribunals: An Appraisal of their application*, p. 385 and 389.

35 ICC, *Prosecutor v. Ruto*, Case No. ICC-01/09-01/11-1598, para 105.

36 STL, In the Matter of El Sayed, Decision on Appeal of Pre-trial Judge's Order Regarding Jurisdiction and Standing, para 47.

international subjects concerned, clearly indicates the existence of the practice and *opinio juris* necessary for holding that a customary rule of international law has evolved». The focus is clearly shifted from the single power to be exercised by the Court to the power to apply a one rule on the inherent powers as such.

The assertion is further questionable[37] because the lack of an objection does not necessarily equate to *opinio juris* in self-contained system because remedies are procedural in extent and confined to parties. The International Law Commission (ILC) in its "Second Report on Identification of Customary International Law", held that «inaction by States may be central to the development and ascertainment of rules of customary international law, in particular when it qualifies (or is perceived) as acquiescence»[38]. According to the report, decisions of International Courts and Tribunals may not be regarded as "practice"[39].

The STL appeals panel moved a further step in its first decision on contempt jurisdiction against legal persons, when asserting that «when operating within the realm of our inherent power, our jurisdiction remains undefined, only to be determined upon the crystallization of circumstances that call for a judicial pronouncement»[40]. The unusual epic tones may divert the attention from the alarming assertion of the "fluidity" of inherent jurisdiction.

As to the relationship with international law, the STL appeals panel concluded that if International law has not yet evolved as to make criminal liability for a corporate person imperative on States, this does not hinder the inherent jurisdiction of the Court which is incidental to its primary jurisdiction, as long as its limitations are respected[41].

In its second decision in the contempt jurisdiction against legal persons[42], the appeals panel, despite maintaining a single reference to the "inherent" powers of the Court, apparently turned towards the Lebanese legal order to inform the meaning of the term "person", marking a departure from its previous jurisprudence.

Inherent jurisdiction has been emphasized in decisions by International Courts and Tribunals as having «the general goal of remedying possible gaps in the legal regulation of proceedings»[43]. Under the ICC Statute[44] lacunas are to be filled by referring to the sources listed in article 21. On the other side, the ICC "State drafted" Rules are comprehensive in nature, unease judges made rules and circumscribes the role for inherent jurisdiction and powers[45].

However it is still open how far gaps may be filled by inherent jurisdiction and powers and also what is really a gap or lacuna: what is needed to perform the task and has been omitted in the founding documents or also what is perceived as an undue legal constraint?

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[37] J. LIANG, *Inherent Jurisdiction and powers of International Criminal Courts and Tribunals: An Appraisal of their application*, p. 387 ff..

[38] International Law Commission Sixty-sixth session Geneva, 5 May-6 June and 7 July-8 August 2014, *Second report on identification of customary international law*, by Michael Wood, Special Rapporteur, A/CN.4/672, p. 27.

[39] International Law Commission, *Second report on identification of customary international law*, p. 31.

[40] STL, *In the case against New TV S.A.L. Karma Mohamed Tahsin Al Khayat*, Decision on interlocutory Appeal concerning Personal Jurisdiction in Contempt Proceedings, para 42. As pointed out by R. HOPKINS, *Exploring issues around allegations of corporate complicity in human rights violations,* 16 April 2015 http://corporatewarcrimes.com, retrieved April 20, 2015, the corporate defendant is "Al Jadeed SAL" and the indictment has been amended correspondingly in October 2014, but the STL's website does not seem to have caught up.

[41] STL, *In the case against New TV S.A.L. Karma Mohamed Tahsin Al Khayat*, Decision on interlocutory Appeal concerning Personal Jurisdiction in Contempt Proceedings, para 59. On the limits, see also STL, *In the Matter of El Sayed*, Decision on Appeal of Pre-trial Judge's Order Regarding Jurisdiction and Standing, para 49: "Inherent jurisdiction is, however, subject to limitations. It must be consonant with the principles of fair administration of justice and full respect for human rights and, in the field of judicial settlement of interstate disputes, with the consent or will of the States concerned".

[42] STL, *In the case against Akhbar Beirut S.A.L. - Ibrahim Mohamed Ali Al Amin*, Case n. STL-14-06/PT/AP/AR126.1, Decision on interlocutory Appeal concerning Personal Jurisdiction in Contempt Proceedings, Appeals Panel, 23 January 2015, para 57 - 58.

[43] STL, *In the Matter of El Sayed*, Decision on Appeal of Pre-trial Judge's Order Regarding Jurisdiction and Standing, para 48. In a similar fashion, SCSL, *Prosecutor v. Norman et al.*, Decision on Prosecution Appeal Against the Trial Chamber's Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal, Case No. SCSL-04-14-T-319, Appeals Chamber, 17 January 2005, at para. 32.

[44] ICC, *Prosecutor v. Ruto*, Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", para 105 ff..

[45] J. LIANG, *Inherent Jurisdiction and powers of International Criminal Courts and Tribunals: An Appraisal of their application*, p. 391.

The Special Court for Sierra Leone (SCSL) Appeals Chamber ruled that inherent jurisdiction may not be used to circumvent an express rule[46]. An opposite view was embraced by the STL appeals panel, holding that «the tribunal's inherent jurisdiction over contempt is unconstrained by the Statute ... force with respect to its material, temporal, territorial and personal jurisdiction»[47].

The underlying issue obviously matters and quotes should be carefully assessed in the light of the question calling for a decision. The SCSL was dealing with a procedural issue about the Appeals Chamber's jurisdiction to grant leave to appeal or to entertain appeals if the Trial Chamber has previously refused leave to appeal. The answer in the positive would have subverted Rule 73(B) requiring leave by the Chamber which had issued the decision. The STL appeals panel faced a different dilemma about the extension of the provisions of the Statute on contempt to legal persons and the possibility to claim inherent jurisdiction to extend personal jurisdiction. As mentioned previously, the rationale for contempt jurisdiction was subsequently justified by relying Lebanese domestic law rather than on inherent powers.

From a different perspective, the contempt issue seems to inspire asymmetric domestic comparisons with powers granted to Courts by the respective Constitution and unconstrained by statutes, a situation in which the term "inherent" has a specific and different meaning.

As observed previously, the inherent powers doctrine derives ultimately from the powers exercised in common law systems by superior Courts of unlimited or general jurisdiction. Since the ICTY Appeals Chamber decision in the *Tadic* case, it became clear that International Courts and Tribunals - while still referring to those decisions in which the ICJ defined its inherent powers as functional to the preservation of the inherent limitation of judicial functions basically as a matter of "self-restraint" - followed a Common Law legal model, despite not being superior Courts of unlimited jurisdiction.

Whilst the source of inherent jurisdiction and powers of domestic superior Courts is represented by written and not written constitutional rules (or positive and non-positive rules), in the case of International Tribunals … the source is apparently a combination of what was perceived as necessary and/or appropriate based upon the task assigned to the judicial body.

As to the degree to which inherent powers are exercised, the STL Appeals Chamber in the *El Sayed* case[48] asserted that «international judicial bodies may have to exercise inherent jurisdiction to an extent larger than any domestic court». Some years later the STL contempt judge in a decision later reversed[49], expanded the rationale holding that «while the doctrine of inherent judicial powers originated in common law jurisdictions, it makes eminent sense for international criminal tribunals to adopt it ... as [they] enjoy scant statutory provisions on procedural matters, as opposed to criminal procedural codes in civil law countries" and also that "their statutes do not (and could not be expected to) elaborate exhaustively on all of the powers and competences these tribunals may require to effectively carry out their mandates».

The STL contempt judge further linked inherent powers to fragmentation suggesting that reliance on inherent powers may be determined by a «lack of the development so far of an integrated and coherent international judiciary» and the separate and self-contained nature of each International criminal jurisdiction[50].

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[46] SCSL, *Prosecutor v. Norman et al.*, Decision on Prosecution Appeal Against the Trial Chamber's Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal, Case No. SCSL-04-14-T-319, Appeals Chamber, 17 January 2005, at para. 32: "The Appeals Chamber may have recourse to its inherent jurisdiction, in respect of proceedings of which it is properly seized, when the Rules are silent and such recourse is necessary in order to do justice" and further "the inherent jurisdiction cannot be invoked to circumvent an express Rule"(para 32). In a case usually quoted in respect of *Kompetenz – Kompetenz,* the SCSL, *The Prosecutor v. Morris Kallon and Brima Buzzy Kamara,* Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Case No. SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Appeals Chamber, 13 March 2004, para 61, held that it is not vested with powers to declare statutory provisions of its own constitution unlawful.

[47] STL, *In the case against New TV S.A.L. Karma Mohamed Tahsin Al Khayat*, Decision on Interlocutory Appeal concerning Personal Jurisdiction in Contempt Proceedings, para 76.

[48] STL, In the Matter of El Sayed, Decision on Appeal of Pre-trial Judge's Order Regarding Jurisdiction and Standing, para 44.

[49] STL, *In the case against New TV S.A.L. Karma Mohamed Tahsin al Khayat*, Decision on Motion Challenging Jurisdiction and on Request for Leave to Amend Order in Lieu of an Indictment, Case No. STL-14-05, Contempt Judge, 24 July 2014, para 29.

[50] *Ibid*, para 29.

IV. The content of inherent jurisdiction and powers invoked by International Courts and Tribunals

The assertion of inherent jurisdiction and powers as such follows ordinarily a standardized string of references to decisions of International Courts and suggests the idea that inherent jurisdiction and powers are a "toolbox" which allow International Court and Tribunals to pick up at their convenience the necessary tool, without the need to assess whether such tool reflects a principle of International law.

Focusing on the box rather than on its contents is misleading. With respect to the invocation of such inherent jurisdiction and powers, the contents permit to assess the comparative references to domestic Courts as well as references to the jurisprudence of International Courts.

In this paragraph I will focus on specific situations and on the content of inherent jurisdictional powers in order to show how and to what extent such powers are consistent with invoked legal principles.

a) Jurisdiction to determine its own jurisdiction

The question of the jurisdiction to determine its own jurisdiction represented the first case in which the ICTY[51] claimed its inherent jurisdiction. It happened also to be the first appeals decision on the issue in the *Tadić* case to be characterized by the overruling of the restriction of interlocutory appeals at the relevant time provided for in Rule 72(B)[52] of the ICTY RPEs; an overruling then not addressed as a matter of inherent jurisdiction, which concurred in the shaping of the later practice, statutes and regulations of International Criminal Courts and Tribunals.

The first clarification of the ambit of the jurisdiction to determine its own jurisdiction is also characterized by the significant conflation between jurisdiction and legality and the Appeals Chamber set a questionable precedent as to the right of an International Tribunal or Court to review its "right to exist" and founding United Nation Security Council Resolutions[53]. The decision preceded the debate about human rights and alleged violations deriving from the implementation of UNSC Resolutions which gained the attention of legal scholarship later on.

The ICTY Appeals Chamber decision in the *Tadić* case[54], asserted its jurisdiction based upon "the principle of "*Kompetenz-Kompetenz*" in German or "*la compétence de la compétence*" in French, [which] is part, and indeed a major part, of the incidental or inherent jurisdiction of any judicial or arbitral Tribunal, consisting of its «jurisdiction to determine its own jurisdiction … [and] a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents of those tribunals, although this is often done» as under article 36(6) of the ICJ Statute.

The ICTY Appeals Chamber referred to the ICJ decision in the *Nottebohm* Case[55] where it read that «[T]his principle, which is accepted by the general international law in the matter of arbitration, assumes particular force when the international tribunal is no longer an arbitral tribunal [. . .] but is an institution which has been pre-established by an international instrument defining its jurisdiction and regulating its operation». In that case the ICJ availed itself of the powers expressively conferred upon it by articles 48 and 36(6) of the Statute in order to ascertain whether the parties had reached a settlement

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[51] ICTY, *The Prosecutor v. Duško Tadić*, Decision on The Defence Motion For Interlocutory Appeal on Jurisdiction, Case No. IT-94-01, Appeals Chamber, 2 October 1995, para 14 to 18.

[52] Rule 72(B) at the time read: "The Trial Chamber shall dispose of preliminary motions in *limine litis* and without interlocutory appeal, save in the case of dismissal of an objection based on lack of jurisdiction."

[53] The distinction between jurisdiction and legality was clear in the mind of the Chamber of first instance, *The Prosecutor v. Duško Tadić*, Decision On The Defence Motion on Jurisdiction, Case No. IT-94-01, Trial Chamber, 10 August 1995, para 4 where it reads that "there are, clearly enough, matters of jurisdiction which are open to determination by the International Tribunal, questions of time, place and nature of an offence charged … [t]hese are properly described as jurisdictional, whereas the validity of the creation of the International Tribunal is not truly a matter of jurisdiction but rather of the lawfulness of its creation, involving scrutiny of the powers of the Security Council and of the manner of their exercise; perhaps, too, of the appropriateness of its response to the situation in the former Yugoslavia".

[54] ICTY, *The Prosecutor v. Duško Tadić*, Decision on The Defence Motion For Interlocutory Appeal on Jurisdiction, Appeals Chamber, para 18.

[55] ICJ, *Nottebohm Case* (Liechtenstein. v. Guatemala), 1953 I.C.J. Reports, III, 7, p. 119.

of the dispute. This obviously does not detract anything from the assertion that the exercise of jurisdiction calls for an incidental determination of the existence of jurisdiction. Nevertheless, the ICJ specified that the principle … is accepted by general international law in the matter of arbitration because a determination on jurisdiction is coessential to International dispute resolution mechanisms[56].

The ICTY appeals chambers in the *Tadić* case stated that the power to determine its own jurisdiction «is not merely a power in the hands of the tribunal … in international law, where there is no integrated judicial system and where every judicial or arbitral organ needs a specific constitutive instrument defining its jurisdiction, "the first obligation of the Court - as of any other judicial body - is to ascertain its own competence"». The later phrasing is a quote from a dissenting opinion to the ICJ advisory opinion on judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O.[57], stressing in subsequent parts (not quoted in the ICTY judgment), the need for the ICJ to define its position in connection «with the attempt to transform it into a Court of Appeal in cases tried by the Administrative Tribunal of the International Labour Organization and by that of the United Nations». The context of both the references, if adequately assessed, would have perhaps mandated a more cautious approach to the matter of *Kompetenz – Kompetenz*.

The decision in the *Tadić* case was politely rejected and tactfully overruled by other decisions of *ad hoc* Tribunals of lesser impact[58] showing a departure from its rationale and the ICTY Rule 72(D) was amended in year 2000 to prevent challenges to the legality of the Tribunal vested as challenges to jurisdiction[59].

The *Tadić* decision was not deemed a relevant authority in the SCSL Appeals Chamber ruling on the issue of the conflicting obligations of Sierra Leone respectively under the Agreement with the United Nations and the amnesty provisions of the *Lomé* Agreement[60]. The Chamber held itself not to be vested with the powers to declare statutory provisions unlawful and that such a measure could have been adopted only if it could be established that the relevant provisions, in terms of articles 53 or 64 of the VCLT or under customary International law, were void[61]. This is consistent with other observations that where a Tribunal is established by treaty, the inherent power to review the legality of the Tribunals establishment should not extend to confirming that States have complied with domestic or constitutional requirements[62].

Nevertheless, amnesty issues primarily invest substantive Criminal law issues with procedural implications and only indirectly the subject matter of the Court's jurisdiction. The issue of a Court's power to review its own legality was raised some years later recently at the STL in the *Ayyash* case when the Tribunal was confronted with the question of the legality of UNSCR 1757[63]. The Trial Chamber decision reproduced some wording of the ICTY trial chamber decision in the *Tadić* case about the fact

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[56] WTO Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, 6 March 2006 which reads: «Notably, panels have the right to determine whether they have jurisdiction in a given case, as well as to determine the scope of their jurisdiction. In this regard, the Appellate Body has previously stated that "it is a widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it"».

[57] ICJ, advisory opinion on Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O., 1956 I.C.J. Reports, 77, 163 (Advisory Opinion of 23 October)(Cordova, J., dissenting).

[58] ICTR, *Prosecutor v. Kanyabashi*, Decision on Defence Motion on Jurisdiction, Case No. ICTR-96-15-T, *Trial Chamber,* 18 June 1997, para 22, asserted that "the question of whether or not the Security Council was justified in taking actions under Chapter VII when it did, is a matter to be determined by the Security Council itself". In similar terms, ICTR, *Prosecutor v. Karemera*, Decision on the Defence Motion, Pursuant to Rule 72 of Rules of Procedure and Evidence, Case No. ICTR-98-44-T, Trial Chamber, 25 April 2001, para 25.

[59] G. ABI-SAAB, *Fragmentation or Unification: Some Concluding Remarks*, 31, in *NYUJILP*, 1999, pp. 919, 928, observed that the ICTY should have requested the UNSC to ask the ICJ for an advisory opinion. L. CONDORELLI, *Jurisdictio et (dés)ordre judiciaire en droit international: Quelques remarques au sujet de l'arrêt du 2 octobre 1995 de la Chambre d'appel du TPIY dans l'affaire Tadić*, in *Mélanges en l'honneur de Nicolas Valticos: Droit et Justice* (Paris: Pedone, 1999), at p. 285 where Condorelli states that international tribunals are «des sortes de ' monades' repliées sur elles-mêmes».

[60] S.M. MEISENBERG, *Legality of amnesties in international humanitarian law The Lomé Amnesty Decision of the Special Court for Sierra Leone*, in *RRC*, December 2004 Vol. 86, pp. 841ff..

[61] SCSL, *The Prosecutor v. Morris Kallon and Brima Buzzy Kamara,* Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, Case No. SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Appeals Chamber, 13 March 2004, para 61.

[62] S. WILLIAMS, *Hybrid and Internationalized Criminal Tribunals: Selected Jurisdictional Issues*, New York, 2012, p. 280.

[63] STL, *The Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi, Assad Hassan Sabra*, Decision on the Defence Appeals Against The Trial Chamber's "Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal", Case No. STL-11-01IPT/AC/AR90.1, Appeals Chamber, 24 October 2012.

that no analogy can be drawn between the inherent authority of a chamber to control its own proceedings and any suggested power to review the authority of the Security Council. The decision also recalled the distinction between a judicial body's power or right to adjudicate a matter and the legality of the judicial body itself[64]. Both the STL trial Chamber and the Appeals Chamber relied on the ICJ Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia [65] in which the Court asserted not to «possess powers of judicial review or appeal in respect of decisions taken by the United Nations organs concerned» and on the «questions on the interpretation and Application of the 1971 Montreal Convention» case[66]. Both STL Chambers reached the conclusion that no UN Organ has such power under the UN Charter. The practical modalities and effects of even an incidental review by the International Court of Justice (ICJ) remained unclear. Being the STL an independent Tribunal existing "outside the UN system", its authority, should in principle be more limited than that of the ICJ.

The STL Appeals Chamber further asserted not to be «persuaded by the reasoning of the ICTY appeals chamber» in the *Tadić* case and that «the majority's reliance on two cases from the ICJ does not withstand closer scrutiny»[67]. Unfortunately the STL Appeals Chamber did not perform such a scrutiny and simply referred to the advisory nature of the cases and the not binding character of the decisions.

The STL Appeals Chamber underlined also the fact that «the ICTY was not requested by the Security Council to examine the legality or the effects of the resolution establishing it» [68].

Nevertheless, the STL Appeals Chamber decision in the *Ayyash* case provided an opportunity to compare the inherent jurisdiction and the *Kompetenz – Kompetenz* as asserted by the ICTY in the *Tadić* case, with the more recent jurisprudence of the European Court of Justice (ECJ) in *Kadi*[69] and that of the European Human Rights Court (ECtHR) in the *Nada v. Switzerland* case[70]; both decisions deal as known with human rights obligations and their scrutiny on one side, and the obligation to implement UN sanctions on the other.

In the former decision, the ECJ reviewed the measures implementing Security Council Resolutions and held it was not for European judicature to review the resolution «even if that review were to be limited to [the] examination of the compatibility of the Resolution with *jus cogens*»[71]. The ECtHR in *Nada v. Switzerland*, while finding that the review of UNSC Resolution was beyond its jurisdiction, also found that the resolution did not prevent the State from introducing such mechanisms to verify that the implementation didn't entail a breach of its treaty obligations. At this purpose it is worth observing that the ECtHR in its decision in the *Al Jedda* v. the United Kingdom case[72], related with detention of individuals abroad under alleged UNSC authorization, concluded that «in interpreting ... resolutions, there must be a presumption that the Security Council does not intend to impose any obligation on Member States to breach fundamental principles of human rights» and that «in the event of any ambiguity in the terms of a Security Council Resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids

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64 On the decision, See M. NIKOLOVA, M. J. VENTURA, *The Special Tribunal for Lebanon Declines to Review UN Security Council Action: Retreating from Tadić's Legacy in the Ayyash Jurisdiction and Legality Decisions*, in *JICJ*, (2013) 11(3), pp. 615-641.

65 ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276* (1970), Advisory Opinion, I.C.J. Reports [1972] 16 at 33, para 89.

66 ICJ, *Questions on the interpretation and Application of the 1971 Montreal Convention arising from the Aerial incident at Lockerbie* (Libyan Arab Jamahiriya v. United Kingdom), *provisional Measures*, *Order of 14 April 1992,* I.C.J. Reports 3 [1992], Dissenting Opinion of Judge Weeramantry, p. 66. On the case, See B. MANTENCZUK, *The Security Council, the International Court and Judicial Review: What lessons from Lockerbie?* in *EJIL,* 1999, 10, vol. 3, p. 517 ff.

67 STL, *The Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi, Assad Hassan Sabra*, Decision on the Defence Appeals Against The Trial Chamber's "Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal", para. 41 and 44.

68 STL, *The Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi, Assad Hassan Sabra*, Decision on the Defence Appeals Against The Trial Chamber's "Decision on the Defence Challenges to the Jurisdiction and Legality of the Tribunal", para. 42 and 43.

69 ECJ, Grand Chamber, *Kadi and Al Barakaat International Foundation v. Council of Europe*, Case No. C-402/05 P and C-415/05 P, 3 September 2008. At this purpose, See P. DE SENA, M.C. VITUCCI, *The European Courts and the Security Council: Between Dédoublement Fonctionnel and Balancing of Values*, in *EJIL,* Vol. 20 no. 1, pp. 193 - 228.

70 ECtHR, Grand Chamber, *Nada v. Switzerland*, Appl. n. 10593/08, 12 September 2012.

71 ECJ, *Kadi and Al Barakaat International Foundation v. Council of Europe*, para 287.

72 ECtHR, Grand Chamber, *Al Jedda v. The United Kingdom*, Appl. n. 27021/08, 7 July 2011, para 102.

any conflict of obligations»[73]. The decision was curiously not quoted in the majority opinion of the STL Appeals Chamber decision in the *Ayyash* case. President Baragwanath delivered a partially dissenting opinion to the judgment affirming that «in principle, an inconsistency between a resolution of the Security Council and the Charter should receive the same legal analysis as in *Kadi*: the Charter must prevail» and that as «the *raison d'être* of the Tribunal is to respond to alleged breaches of the rule of law … it would be a singular paradox if it were itself to infringe that rule - usurping a jurisdiction it does not possess by sitting when it has no jurisdiction»[74]. The partially dissenting opinion doesn't seem to correctly reflect the dualistic scheme of the ECJ and the ECtHR decisions.

Despite attempts, as the above partially dissenting opinion to preserve the rationale of the ICTY Appeals Chamber decision in the *Tadić* case, the legacy of the decision doesn't seem to be any longer either justified or maintainable. The power to make determination as to the jurisdiction may derive from the mere existence as an arbitral or judicial body. This is particularly true when the applicable rules do not specifically or sufficiently address the issue which is often the case of arbitral bodies.

Statutes and rules of International Criminal Court's and Tribunals address comprehensively the subject matter of jurisdiction. The *Kompetenz – Kompetenz* as asserted in the Tadić case and encompassing the right to exist of a judicial body and the review of the Security Council Resolutions establishing it, needs to be assessed having in mind the historical context. Perhaps the underlying aim was to provide the ad hoc Tribunal with a judicially certified legitimacy beyond positivist reliance on UNSCR 827, even at the cost of significant inconsistencies in its legal reasoning. In any case, from a philosophical perspective it would be a paradox if an illegally constituted Court could legally make a finding on its illegality. Accordingly, a determination denying the right to exist of a Court by one of its Chamber should be regarded rather as an determination by the judges acting in their private capacity. Nevertheless, the ICTY Appeals Chamber decision in *Tadić* will probably continue to open any "inherent jurisdiction mantra".

b) Interim measures and discontinuance of wrongful acts

As observed in the second paragraph, one of the original "three dimensions" of the Court's inherent jurisdiction is represented by the power to adopt interim measures. Such measures are justified by the aim to resolve disputes avoiding the rights of the parties to be eroded pending the decision.

Statutes and rules of International Criminal Courts and tribunals are currently detailed as to define and articulate the jurisdiction to adopt the "equivalent" of interim measures within the provisions on provisional arrest and detention of individuals, seizure of evidence and proceeds, all those powers ordinarily exercised by the judge in domestic criminal proceedings.

Nonetheless, references by International criminal bodies to established practice of mostly arbitral bodies have become quite common when they intend to assert "other" inherent jurisdiction or powers.

Accordingly the STL Appeals Chamber while claiming the existence of «extensive practice of international courts and tribunals to make use of their inherent powers … [and] existence of a general rule of international law»[75] quoted the "*Veerman* case"[76] and the assertion by the Arbitral Commission of the «inherent power to issue such orders as may be necessary to conserve the respective rights of the parties, including their freedom from interference in the prosecution of their claims».

Such references are *ictu oculi* not relevant nor effectively supportive of general assertion of inherent powers of international criminal bodies.

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[73] The purpose of the reference to conflicting obligations which does not entail the jurisdiction to review is further explained by the observation that «in the light of the United Nations' important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law».

[74] STL, *The Prosecutor v. Salim Jamil Ayyash, Mustafa Amine Badreddine, Hussein Hassan Oneissi, Assad Hassan Sabra*, Appeals Chamber, Partially dissenting Opinion of Judge *Baragwanath*, para 61.

[75] STL, *In the Matter of El Sayed*, Decision on Appeal of Pre-trial Judge's Order Regarding Jurisdiction and Standing, Case No. CH/AC/2010/02, Appeals Chamber, 10 November 2010.

[76] Order of 28 October 1957, in *Decisions of the Arbitral Commission on Property, Rights and Interests in Germany*, Vol. I (Koblenz, 1958), at (p. 120.

Not less irrelevant for the assertion of general inherent jurisdiction of International Criminal Courts and Tribunals appears the reference to «inherent powers of a competent [Arbitral] Tribunal which is confronted with the continuous breach of an international obligation which is in force and continues to be in force to order the discontinuance of such acts[77]». The alleged powers are strictly related to the perspective of International dispute resolution. Furthermore the quotes from the France-New Zealand Arbitral Tribunal appear to have been surgically extrapolated from the wider context of the decision in which the Arbitral Tribunal finally stated that «It would be not only unjustified, but above all illogical to issue the order requested by New Zealand, which is really an order for the cessation or discontinuance of a certain French conduct, rather than a restitution». Additional STL appeals Chamber's quotes in its 2010 decision in the *El Sayed* case, included the ECtHR Grand Chamber decision in *Mamakutlov and Askarov* v. Turkey in which the Court made use of its explicit power to issue interim measures under Rule 39 of the Rules of Courts and found for the first time a violation because of a State's failure to comply with such interim measures as undermining the right of individual application granted by article 34 of the ECHR[78]. In the said circumstance the STL emphasized the "binding character" of such measures on States. The ECtHR decision doesn't seem to be relevant at all in the context of inherent jurisdiction of International Criminal Court's and Tribunals.

c) Jurisdiction and powers in respect of ongoing domestic judicial proceedings (referrals, stay of domestic proceedings).

Jurisdiction of International Courts and Tribunals in respect of domestic proceeding is the expression of the relationship of such bodies with States and their domestic jurisdiction.

The primacy of the *ad hoc* tribunals entails the power, reflected in the relevant statutes to issue arrest warrant and request the transfer of individuals despite ongoing national proceedings as well as the power to order the discontinuance of domestic proceedings in violation of the *ne bis in idem* principle. The "complementarity relationship" of the ICC's jurisdiction with domestic jurisdiction is reflected in the provisions of the Statute and the RPEs.

The differences in the jurisdiction of the various International Courts and Tribunals does not seem to leave much room for a "common featured" inherent jurisdiction. Accordingly what is inherent or solely implicit in the subject matter is to be assessed based on the rules and principle applicable to each self-contained system.

The ICTY Appeals Chamber in the case of *Radovan Stankovic*, nevertheless asserted[79] that «judged, whether a Referral Bench, a Trial Chamber, or the Appeals Chamber… have the inherent authority to render orders that are reasonably related to the task before them and that «derive automatically from the exercise of the judicial function"…that is no less true under the Rule 11-bis» on referral of cases to domestic jurisdictions. In the said case the Appeals Chamber held that it was proper for the Referral Bench as part of the monitoring and revocation mechanism, to have satisfied itself that the Appellant would receive a fair trial.

The STL Appeals Chamber in its notorious 2010 decision in the *El Sayed* case relied on the practice of the Iran - United States Claims Tribunal, in order to argue the inherence of the powers of International Courts and Tribunals to stay proceedings pending in front of domestic Courts[80].

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[77] STL, *In the Matter of El Sayed*, Decision on Appeal of Pre-trial Judge's Order Regarding Jurisdiction and Standing, Appeals Chamber, 10 November 2010, quoting France-New Zealand Arbitral Tribunal, *Case Concerning the Difference between New Zealand and France concerning the Interpretation or Application of two Agreements, concluded on 9 July 1986 between the two States and which Related to the Problems Arising from the Rainbow Warrior Affair* (New Zealand v. France), Decision of 30 April 1990, in Reports of International Arbitral Awards, Vol. XX, 217, at 270, para 114. The Arbitral Tribunal in the decision further relied and quoted the ICJ, *The United States Diplomatic and Consular Staff in Teheran Case*, *I.C.J. Reports*, 1979, p. 21, para 38 to 41, and 1980, para 95, No. 1; and also *The Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, I.C.J. Reports*, 1984*, p. 187, and 1986, para 292, p. 149.

[78] ECtHR, Grand Chamber *Mamakutlov and Askarov v. Turkey*, Application Nos. 46827/99, 46951/99, Judgment of 4 February 2005, Reports of Judgments and Decisions 2005-I, paras 123-124.

[79] ICTY, *The Prosecutor v. Radovan Stankovic*, Decision, Case No. IT-96-23/2-AR11bis.1, Appeals Chamber, 1 September 2005, para 51.

[80] Iran - United States Claims Tribunal, Feb. 4, 1983 Interim Award in Case No. 338, *E-Systems, Inc. v. Iran*, 2 Iran-U.S. Cl. Trib. Rep. 51, 57 (1983) in reference to the request to Iran to Stay its domestic proceedings. On the decision See also L. LÉVY, *Anti-Suit Injunctions Issued by Arbitrators*, Reprinted from IAI International Arbitration Series No. 2, *Anti-Suit Injunctions in International Arbitration*, pp. 115-129, copyright 2005 © *Juris Publishing*, Inc. www.jurispub.com. On the claims Tribunals, F. WEISS, *Inherent Powers of National and International*

Nevertheless the "Claims Settlement Declaration", art. VII (2), 1 IRAN-U.S. C.T.R. at 11 reads as follows: «Claims referred to the arbitration Tribunal shall, as of the date of filing of such claims with the Tribunal, be considered excluded from the jurisdiction of the courts of Iran, or of the United States, or of any other court». Accordingly the invoked powers are from being even implicit and despite the fact that the said provision may remind those contained in art. 9(2) of the ICTY Statute and art. 4(2)-(3) of the STL Statute (*ne bis in idem*), the quote appears out of focus.

In the "*Erlinder Affaire*", following the arrest in Rwanda of Peter Erlinder (who was the lead defence counsel of one of the accused), for having denied the genocide, the ICTR had to address the issue of interferences with its proceedings due to ongoing domestic criminal proceedings[81]. The accused filed a motion requesting the Appeals Chamber to order the Registrar to take immediate action to secure the release of his lead counsel and order the Government of Rwanda to stop all proceedings against him. The Appeals Chamber while emphasizing that it «will not lightly intervene in the domestic jurisdiction of a state ... as the Chamber seized of *Ntabakuze*'s appeal, however, it has the duty to ensure the fairness of the proceedings in this case»[82]. The Appeals Chamber found the domestic proceeding against Mr. *Erlinder* in the part motivated by submissions made in the course of Ntabakuze's closing arguments before the Tribunal to violate his functional immunity from legal process under Section 22(a) of Article VI of the Convention on the privileges and Immunities of the United Nations[83] for words spoken or written in the course of his functions before the Tribunal. The Appeals Chamber considered this an interference with the proper functioning of the Tribunal, which requires that defence counsel be free to advance arguments without fear of prosecution[84]. The Motion was accordingly allowed in part and the Republic of Rwanda was requested to desist from proceeding against *Erlinder* in relation to words spoken or written in the course of his representation of *Ntabakuze* before the Tribunal. Interestingly in the decision there is no mention of inherent powers and jurisdiction. The approach of the *ad hoc* tribunal in the *Erlinder* case is significantly more assertive and effective than that of the reluctant ICC in the case of the detention of ICC Staff[85] and the seizure of privileged material in Libya.

d) Stay of proceedings, abuse of process and the power to award reparations.

The inherence of the power to stay in proceedings which represent an abuse of process[86] has been asserted by International Criminal Courts and Tribunals since the ICTY *Bobetko* case. In the said case the principle was invoked in the context of the dismissal of the challenge of an indictment by a State[87].

Courts: The Practice of the Iran-US Claims Tribunal, in C. BINDER,. et al. (eds.), *International Investment Law for the 21st Century: Essays in Honor of Christoph Schreuer*, 2009, pp. 185-199 at 193-194.

81 ICTR, *Théoneste Bagosora et al. v. The Prosecutor*, Decision on Aloys Ntabakuze'a Motion for Injunctions against the Government of Rwands regarding the arrest and investigation of Lead Counsel Peter Erlinder, Case No. ICTR-98-41-A, Appeals Chamber, 6 October 2010.

82 ICTR, *Théoneste Bagosora et al. v. The Prosecutor*, Decision on Aloys Ntabakuze'a Motion for Injunctions against the Government of Rwanda regarding the arrest and investigation of Lead Counsel Peter Erlinder, para 18 and 26.

83 Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946. .

84 ICTR, *Théoneste Bagosora et al. v. The Prosecutor*, Decision on Aloys Ntabakuze'a Motion for Injunctions against the Government of Rwands regarding the arrest and investigation of Lead Counsel Peter Erlinder, para 29.

85 Press release ICC-CPI-20120622-PR815.

86 On the abuse of process doctrine in domestic courts: Court of Appeal R. v. Bow Street Magistrates, *ex parte Mackeson,* [1981] 75 Cr App R 24; House of Lords, *Reg v. Horseferry, Road Magistrates' Court, Ex parte Bennett*, [1994] 1 A.C. 42. Privy Council, *Liangsiriprasert v. US*, [1991] 1 A.C. 225; House of Lords, *In re Schmidt*, [1995] 1 A.C. 339; House of Lords, *Reg v. Latif* and *Shazad v. Reg.*; Court of Appeal, Criminal Division, *Reg v. Mullen*, [1999] EWCA Crim 27; Court of Appeal, Criminal Division, *Reg v. Burns*, [2002] EWCA Crim 1324; Privy Council, *Warren and others v. Her Majesty's Attorney General of the Bailiwick of Jersey*, [2011] UKPC 10; High Court of Justice, QBD, Administrative Court, *Khurts Bat v. Investigating Judge federal republic of Germany*, [2011] EWHC 2029; Recently also High Court of Australia, *Moti v The Queen*, [2011] HCA 50. On the abuse of process principle A. CHOO, *Abuse of Process and Judicial Stays of Criminal Proceedings*, Oxford, 1993, p. 17. C. RYNGAERT, *The Doctrine of Abuse of Process: A Comment on the Cambodia Tribunal's Decisions in the Case against Duch,* in *LJIL*, 2008, p. 717.

87 ICTY, *Prosecutor v. Bobetko*, Decision on Challenge of Croatia to Decision and Orders of Confirming Judge, Case No. IT-02-62-AR54*bis,* IT-02-62-AR108*bis*, 29 November 2002, para. 15. The decision reads: «The Tribunal has an inherent power to stay proceedings which are an abuse of process, such a power arising from the need for the Tribunal to be able to exercise effectively the jurisdiction which it has to dispose of the proceedings». Croatia had sought review of the single judge's decision confirming the indictment upon prior issuance of an arrest warrant. Questions at issue were the possibility to review the decision and the *locus standi* of Croatia in the proceeding.

The arguments surrounding the debate about the inherent power to stay a proceedings reflected in the different decisions range from the reliance on domestic decisions whose relevance is at least doubtful, to the juxtaposition between the abuse of process and the so called "*male captus bene detentus*" rule.

Accordingly, the STL appeals chamber, in the *El Sayed* case, its *Wunderkammer* of inherent powers, argued the Tribunal's power to stay proceedings quoting[88] the words of the eminent U.S. jurist Benjamin Cardozo «the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its dockets»[89]. The quote was surgically extrapolated from a decision about «suits brought in the District of Columbia ... to restrain the Securities & Exchange Commission and other officials from enforcing the Holding Company Act ... stayed to await decision of a like suit brought by the Commission and still pending in another District Court». It is worth questioning if the quote about domestic *lis pendens* adds any value to the argument of inherent powers of international Courts and Tribunals.

The ICC Appeals Chamber considered the availability of a stay of proceedings in a December 2006 decision in the *Lubanga* case[90]. The Chamber concluded that a stay was not available under the Statute for an abuse of process as such. However as the jurisdiction of the Court could only be exercised and its statutory provisions interpreted in accordance with internationally recognized human rights norms, and breaches of the fundamental rights of an accused would make a fair trial impossible.

Accordingly in such cases «it would be a contradiction in terms to put the person on trial» and the process must be stopped[91]. The Appeals Chamber felt it necessary to develop a comparison between different legal systems and to rely in respect of Roman-Germanic legal systems on the "*Argoud* case" and the *male captus bene detentus* principle[92] and to unquoted case law of the German Constitutional Court «having endorses like principles as those applied in *Argoud*»[93] as juxtaposed to the abuse of process principle. The "*male captus*" principle is non prescriptive in essence and rather descriptive of an attitude of domestic jurisdictions[94] and the reference to the principle is clearly misleading in the context of alleged lack of fair trial and violation of statutory provision whereas no abduction by State officials is disputed. The argument appears careless and neglects the circumstance that German Court's too have definitively stayed proceedings for violations of fundamental rights[95].

The availability of the stay of the proceeding was newly affirmed by the trial Chamber in its decision on the consequences of non disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008[96]. Subsequently the Appeals Chamber clarified that «if the unfairness to the accused person is of such nature that - at least theoretically - a fair trial might become possible at a later stage because of a change in the situation that led to the stay, a

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88 STL, *In the Matter of El Sayed*, Decision on Appeal of Pre-trial Judge's Order Regarding Jurisdiction and Standing, footnote n. 77, reads «As the eminent U.S. jurist Benjamin Cardozo put it, "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its dockets[.]"», Landis v. North American Co., 299 U.S. 248, 254 (1936).

89 United States Supreme Court, *Landis v. North American Co.*, 299 U.S. 248, 254 (1936).

90 ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, Case No. ICC-01/04-01/06-772 (0A4), Appeals Chamber, 14 December 2006.

91 ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, paras 37 and 39.

92 *Ibid*, para. 161.

93 The unquoted quote is probably referred to The *Stocké* Case and to BVerfG, 17 July 1985 in *NJW*, 1986, 22, p. 1428.

94 On the *male captus* principle, *inter alia*, Court of Kings Bench *ex parte Susannah Scott*, in *Br. International Law Cases*, 1829, n. 3, p. 1 ff.; High Court of Justiciary in *Re Sinclair v. H.M. Avocate*, (1890) 17 R. (J.) 38; Court of Kings Bench *R. v. Officer Commanding Depot Battalion*, R.A.S.C., *Colchester ex parte Elliot*, [1949] 1 All ER 373; Jerusalem District Court, *Attorney General of the Government of Israel v. Adolf Eichmann*, in *ILR*, n. 36, p. 18 ff.. Recently on the principle, See J. CAZALA, *L'Adage male captus bene detentus face au droit international*, in *JDI*, 2007, p. 838. P. SCHARF, *The Prosecutor v. Slavko Dokmanovic: irregular rendition and the ICTY*, in *LJIL*, 1998, p. 369.

95 U. SCHEFFLER, *Rechtstaatswidrigkeit und Einstellung von Strafverfahren*, in *Juristische Rundschau*, 1992, n. 3, p. 131 ss. on the "Schücker Prozess", definitvely archiviated (stayed) LG di Berlin (518) 2 P KLs 8/75 (35/89) – in *Strafverteidiger* 1991, pp. 371-397. See also BVerfG in *Neue Juristische Wichenschrift*, 1984, p. 967.

96 ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, Case No. ICC-01/04-01/06-1401, Trial Chamber I, 13 June 2008.

conditional stay of the proceeding may be the appropriate remedy»[97]. The conditional stay according to the Appeals Chamber was «not entirely irreversible: if the obstacles that led to the stay of the proceedings fall away, the chamber that imposed the stay of the proceedings may decide to lift the stay of the proceedings in appropriate circumstances and if this would not occasion unfairness to the accused person»[98].

In its further decision of 10 October 2010, the Appeals Chamber reversed the trial Chamber's imposition of a second stay of proceeding, due to the prosecution's failure to abide by an order of the Court, and held that the Chamber should first have had recourse to sanctions against the prosecution prior to imposing a stay[99].

In its decision on the defence motion for a "permanent stay" in the *Lubanga* case, the Chamber defined the stay as a particular form of inherent jurisdiction[100].

The duality between termination and stay in case of violations of the rights of the accused surfaced also in the *Kenyatta* case[101] whereas the chamber observed that article 85(3) of the Statute on compensations referred to the termination of proceedings for «grave and manifest miscarriage of justice» thereby implying availability of termination. The decision marks a shift from inherent powers towards Statute based powers.

Situations of prosecutorial delay at the ICC have recently been addressed as a matter of provisional release under article 60(2) and (4) of the Statute. The Appeals Chamber held that the later provision establishing that the Pre-Trial Chamber shall ensure that a person is not detained for an unreasonable period prior to trial due to an excusable delay by the prosecutor, must be interpreted and applied consistently with «internationally recognized human rights», pursuant to article 21(3) of the Statute[102] and requires a proper assessment under article 60 (2) of the Statute, which entails a determination of whether the conditions under article 58 (1) (a) and (b) are met, and a proper risk assessment[103].

The ECCC appears to acknowledge a traditional notion of the abuse of process doctrine under its internal rules[104] and the subject matter is not regarded as pertaining to the inherent jurisdiction of the Chambers.

The related topic of reparation and remedies has been addressed by the ICTR which has asserted the power to give to the right to an effective remedy for violations of the right of the accused[105] as «essential for the carrying out of judicial functions, including the fair and proper administration of

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97 ICC, *Prosecutor v. Thomas Lubanga*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", Case No. ICC-01/04-01/06-1486, Appeals Chamber, 21 October 2008, para. 80.

98 *Ibid*, para. 80

99 ICC, *Prosecutor v. Thomas Lubanga*, Decision reversing Trial Chamber I's imposition of a second stay of proceedings in the Lubanga case for failure by the prosecution to follow orders of the Court, Case No. ICC-01/04-01/06-2582, Appeals Chamber, 10 October 2010, para. 55.

100 ICC, *Prosecutor v. Thomas Lubanga*, Redacted Decision on the Defence Motion for the Permanent Stay of the Proceeding, Case No. ICC-01/04-01/06-2690 Red_2, Trial Chamber I, 7 March 2011, para 55, para 161.

101 ICC, *Prosecutor v. Uhuru Muigai Kenyatta*, Redacted on Defence application pursuant to Article 64(4), Case No. ICC-01/09-02/11-728, Trial Chamber V, 26 April 2013, para 74 ff.

102 ICC, *Prosecutor v. Jean Pierre Bemba Gombo et al,* Judgment on the appeals against Pre-Trial Chamber II's decisions regarding *interim* release in relation to Aimé Kilolo Musamba, Jean-Jacques Mangenda, Fidèle Babala Wandu, and Narcisse Arido and order for reclassification, Case No. ICC-01/05-01/13-969 (OA 5) (OA 6) (OA 7) (OA 8) (OA 9), Appeals Chamber, 29 May 2015, para 45, footnotes 79 and 80. The decision, despite formal references to human rights instruments, is missing an analysis of the purpose of the remedies against unreasonable delay.

103 ICC, *Prosecutor v. Jean-Jacques Mangenda et al,* Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II of 23 January 2015 entitled "Decision on 'Mr Bemba's Request for provisional release'", Case No. ICC-01/05-01/13-970, Appeals Chamber, 29 May 2015, para 20.

104 See ECCC, Decision on Request by Defence for Khieu Samphan for Immediate Stay of Proceedings, Case No. 002/19-09-2007-ECCC-TC/SC(27), Supreme Courts Chamber, 13 October 2013. Para 7 of the decision reads: «While the termination of proceedings is a possible remedy for demonstrable abuse of process, the Supreme Court Chamber is not persuaded that the alleged violations to Khieu Samphan's fair trial rights would prima facie justify such a radical remedy under Rule 21 of the Internal Rules. The Defence does not demonstrate that the refusal to admit the Request at this stage of the proceedings would infringe Khieu Samphan's fundamental rights, or cause him prejudice of such nature or degree that would require such an extraordinary intervention».

105 ICTR, *The Prosecutor v. Rwamakuba*, Decision on Appeal against Decision on Appropriate Remedy, Case No. ICTR-98-44C-A, Appeals Chamber, 13 September 2007, para 26.

justice». The exercise of the said power, in a context in which there was no allocations of funds, has been stigmatized based on the consideration that the Tribunal should have limited itself to the making of a judicial finding[106].

e) Review and reconsideration of decisions of judicatures of last instance

The question how a Court of last instance should react when complaint is made that its previous decision is flawed to the point of making that body incapable of acting as a Court of justice, arose upon the decision of the appellate committee of the House of Lords in the *Pinochet* case[107], also in front of International Courts and Tribunals[108]. In its decision the House of Lords held that «In principle it must be that your Lordships, as the ultimate court of appeal, have power to correct any injustice caused by an earlier order of this House» and further that «there is no relevant statutory limitation on the jurisdiction of the House in this regard and therefore its inherent jurisdiction remains unfettered»[109].

The power to review own judgments has been affirmed by arbitration bodies in circumstances in which a decision was based upon false evidence and forged documents[110].

The reasoning of the House of Lords is echoed in decisions by other domestic judicatures of last instance[111] and in the ICTR decision of 31 March 2000 in the case of *Jean Bosco Barayagwiza v. The Prosecutor*[112], where the prosecutor sought reconsideration of decisions other than final. In its separate opinion to the decision, Judge Shahabuddeen clarified that procedural errors need to result in a "disadvantage" for reconsideration to be warranted.

Subsequently the ICTY appeals chamber, in the *Mucić* case hold that reconsideration was fundamentally an exercise of a Tribunal's «inherent discretion to prevent injustice» and also that reconsideration required an impugned decision be wrong and also have led to an injustice[113]. The decision extended the previous jurisprudence of the Tribunal from the review of judgments on appeals of interlocutory decisions (*See* below) to final judgments of the appeals chamber. The Appeals Chamber defined the threshold for the review, requiring a clear error of reasoning, eventually demonstrated by a decision of another appeals Chamber, the ICJ or the ECtHR or a senior Court within a domestic jurisdiction. The decision to reconsider had also to be given *per incuriam* ... and had to lead to injustice[114].

Issues of law had been previously excluded from review under article 26 of the Statute and Rule 120 (about review of final judgment upon discovery of new facts)[115] which left outstanding a significant prospect of justice.

In a subsequent decision the ICTY, further held that it had the «inherent power» to remit those issues to be determined by another Chamber to ensure that justice was done to the parties in relation to the issues raised by the Appeals Chamber judgment[116].

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106 J. LIANG, *Inherent Jurisdiction and powers of International Criminal Courts and Tribunals: An Appraisal of their application*, p. 406.

107 House of Lords HL 17.12.1998 R. *v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet* [1999] UKHL 52.

108 See M. SHAHABUDDEEN, *Teething Phase of the ECCC* in *CJIL,* 2011, para. 10, p. 494.

109 The House of Lords in R. *v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet* quoted its previous jurisprudence in In *Cassell & Co Ltd v. Broome* (No.2) [1972] 2 All ER 849, [1972] AC 1136, in which an order for costs already made by the House in circumstances where the parties had not had a fair opportunity to address argument on the point, was varied.

110 On the Reopening of a case due to false evidence, Mixed Claims Commission, *United States ex rel. Lehigh Valley R.R. Co. v. Germany*, 22 March 1930.

111 The Supreme Court of India in *Rupa Ashok Hurra vs Ashok Hurra & Anr* on 10 April, 2002, held that a curative petition «has to be first circulated to a Bench of the three senior-most Judges and the Judges who passed the judgment complained of, if available. It is only when a majority of the learned Judges on this Bench conclude that the matter needs hearing that it should be listed before the same Bench (as far as possible) which may pass appropriate orders. It shall be open to the Bench at any stage of consideration of the curative petition to ask a senior counsel to assist it as *amicus curiae*».

112 ICTR, *Jean Bosco Barayagwiza v. The Prosecutor*, Decision, Case No. ICTR-97-19-AR72, Appeals Chamber, 31 March 2000. The decision is quoted in STL CH/AC/2010/02, 10 November 2010, para 54 on inherent jurisdiction to hear interlocutory appeals.

113 ICTY, *Prosecutor v. Mucić et al.*, Decision on Appeal against Decision on Appropriate Remedy, Case No. IT-96-21-A-*bis,* Appeals Chamber, 8 April 2003.

114 *Ibid*, paras 49-52.

115 ICTY *Prosecutor v Jelisić*, Decision on Motion for Review, case n. IT-95-10-R, Appeals Chamber, 2 May 2002, para 3; *Prosecutor v Tadić*, Decision on Motion for Review, case n. IT-94-1-R, Appeals Chamber, 30 July 2002, para 25.

116 At this purpose, See also ICTY, *Prosecutor v Kupreškić et al*, Judgment, Case No. IT-95-16-A, Appeal Chamber, 23 October 2001 ("Kupreškić Appeal Judgment"), paras 463, 465.

The trend set by the *Mucić* case was subsequently reversed since the decision of the Appeals Chamber in the *Žigić* case[117] (Judge *Shahabuddeen* dissenting). In the said decision the Chamber hold that existing appeal and review proceedings established under the Statute provided sufficient guarantees to the person. Subsequent decision confirmed the jurisprudence, excluding the Courts inherent jurisdiction to review final judgments, when standards for the "reopening" of the case under article 26 of the Statute, requiring the discovery of new facts non known at the time of the proceeding, are not meet, final judgments[118].

The balance between the need for reconsideration due to the application of erroneous legal standard and the need for legal certainty for both the accused and victims, led the ICTY Appeals Chamber in the *Perisic* case to dismiss the prosecution's motion for reconsideration of a final judgment.

As known upon the acquittals of the accused, another panel of the Appeals Chamber found in a different case, that elements of the relevant reasoning on the «specific direction» requirement for aiding and abetting «were based on a clearly erroneous legal standard which misconstrued the prevailing law».

The Prosecutor sought for reconsideration of the judgment. While rejecting the motion, the Appeals Chamber recalled the «inherent responsibility to administer justice» and affirmed that «existing appeal and review proceedings under the Statute provide for sufficient guarantees of due process»[119].

In a different context of contempt charges the ICTY Appeals Chamber entertained, in a different composition, an appeal against the judgment in first instance of the appeals chambers[120].

Avoidance of injustice on one side and certainty of decision represent a constant matter of tension in Romano-Germanic systems rather than in Common Law systems. The approach adopted by International Tribunals seems to depart from the inherent power to review final judgments beyond statutory provisions and subsequently shifts towards statutory provisions.

f) Interlocutory Appeals and reconsideration of previous decisions

As observed previously the first opportunity for International Criminal Tribunals to define the ambits of their inherent jurisdiction, in the *Tadić* case[121], was also characterized by the departure by the Appeals Chamber from the restriction on interlocutory appeals. The RPEs permitted (Rule 72(B)) limited interlocutory appeals when a chamber had declined its jurisdiction and excluded the possibility to appeal when jurisdiction was asserted by a Chamber. The "overruling" of the limitations on interlocutory appeals, not justified with reference to inherent powers.

Inherent jurisdiction has been invoked, without success in order to overcome the denial of leave to appeal a decision by the Chamber that has issued it[122]. The ICC Appeals Chamber held, with reference to art. 82(1)(d) on interlocutory appeals and departing from the inherent powers paradigm,

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117 ICTY, *Prosecutor v Zoran Žigić a/k/a/ as "Ziga"*, Decision on Zoran Žigić's "Motion for Reconsideration of Appeals Chamber Judgment IT-98-30/1-A delivered on 28 February 2005, Case No. IT-98-30/1-A, Appeal Chamber, 26 June 2006, para 9.

118 See ICTY *Prosecutor v. Milan Lukić and Sredoje Lukić*, Decision on Sredoje Lukić's Motion Seeking Reconsideration of the Appeal Judgement and on the Application for Leave to Submit an *Amicus Curiae* Brief Case No. IT-98-3211 -A, Appeals Chamber, 30 August 2013, p. 3; ICTY *Prosecutor v. Mile Mrkšić and Veselin Šljivančanin*, Decision on Motion on Behalf of Veselin Šljivančanin Seeking Reconsideration of the Judgement Rendered by the Appeals Chamberon 5 May 2009 - or an Alternative Remedy, Case No. IT-95-13/l-A, Appeals Chamber, 8 December 2009, paras 2-3; ICTY *Prosecutor v. Pavle Strugar*, Decision on Strugar's Request to Reopen Appeal Proceedings, Case No. IT-01 -42-A, Appeals Chamber, 7 June 2007, para 23; ICTY *Prosecutor v. Tihomir Blaškić*, Decision on Prosecutor's Request for Review or Reconsideration, Case No. IT-95-14-R, Appeals Chamber, 23 November 2006, paras 79-80.

119 ICTY, *Prosecutor v. Perisic*, Decision on Appeal against Decision on Appropriate Remedy, Case No. IT-04-S1-A, Appeals Chamber, 20 March 2014, p. 2.

120 ICTY, *Prosecutor v. Tadic*, Appeal Judgment on Allegations of Contempt by Prior Counsel, Case No. IT-94-1-A-AR77, Appeals Chamber, 27 February 2001. The Appeals Chamberobserved that "Rules must be interpreted in conformity with the International Tribunal's Statute which, ... must respect the "internationally recognized the rights of the accused" and that "Article 14(5) of the International Covenant on Civil and Political Rights guarantees 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".

121 ICTY, *The Prosecutor v. Duško Tadić*, Decision on The Defence Motion For Interlocutory Appeal on Jurisdiction, Appeals Chamber, para 3.

122 SCSL, *Prosecutor v. Samuel Hinga Norman, Moinina Fofana, Allieu Kondewa*, Decision on Prosecution Appeal against Chamber's Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal, Case No. SCSL-04-14-T, Appeals Chamber, 17 January 2005.

that the Statute defined exhaustively the right to appeal against decisions of first instance Courts and that no gap was noticeable in the Statute[123]. Accordingly 21(3) did not apply as there was no lacuna[124].

As to the alleged need to introduce a remedy similar to the writ of mandamus with reference to England and Wales, the chamber observed that the pre-trial Chamber and the trial Chamber could not be qualified as «inferior courts».

Rule 73(B) of the ICTY Rules, as amended April 23, 2002, no longer required the grant of leave for appeal by a bench of three judges of the Appeals Chamber(former Rule 73(D)), and required instead the certification to be granted by the concerned chamber. The amendment aligned the discipline of interlocutory appeals of "decisions on motions" with the general discipline set out in Rule 72 for "preliminary motions" and their appeal.

By contrast, "reconsideration" of previous decisions in exceptional cases has been asserted to be the expression of «inherent discretionary power»[125]. The issue been addressed in more narrow terms by the ICC[126].

g) Jurisdiction to entertain motions for discovery by third parties

Requests for disclosure by an individual of documents detained by an International Court or Tribunal for purposes other than proceedings of the said Court or Tribunal, have been dealt by the STL in the *El Sayed* case, as a matter of jurisdiction to entertain the request and also as a matter of the right to appeal by the requestor. The applicant, formerly detained by Lebanese authorities and then transferred to the Tribunal, upon release applied for the disclosure of documents in possession of the Tribunal in order to be enabled to pursue domestic remedies.

The request was addressed to the President and assigned to the pre-trial judge in order to determine if the Tribunal had jurisdiction to entertain the application and eventually address the merits.

The pre-trial judge ruled the Tribunal to have jurisdiction as the application was closely related to Tribunal's original jurisdiction and therefore within its "implicit" jurisdiction. The judge further held that the individual had standing in front of the Tribunal and that his claim was related to a general, but not unrestricted, right to such disclosure[127]. The ruling was appealed by the prosecutor and subsequently upheld by the appeals chamber, relying on the "inherent" jurisdiction of International judicatures[128]. The case led to several interlocutory decisions and appeals as to the limits the application should be granted.

The question of the Jurisdiction to entertain the appeal emerged again following the partial appeal by Mr. *El Sayed* of the pre-trial judge's decision of 12 May 2011[129]. Besides reiterating the "inherent jurisdiction mantra" of the previous decision, the Appeals Chamber qualifies its inherent and ancillary jurisdiction in the subject matter as "civil" in nature, quoting a decision of Supreme Court of New Zealand in a case related to a request of disclosure by a television company of documents about the

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123 ICC, *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, Case No. ICC-01/04-168, Appeals Chamber, 13 July 2006, para 39. Note the prosecutor had submitted that the absence in art. 82(1)(d) of a negative decision for the statement of appealability was not conclusive.

124 *Ibid*, paras 24-38.

125 ICTY, *Prosecutor v. Milan Milutinovic et al.*, Decision on Prosecution Motion for Reconsideration of Decision on Prosecution Motion For Additional Trial-Related Protective Measure for Witness K56,Case No. IT-05-87-T, Trial Chamber, 9 November 2006.

126 ICC, Decision on a Request for Reconsideration or Leave to Appeal the "Decision on the 'Request for review of the Prosecutor's decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar's Decision of 25 April 2014, Case No. ICC-RoC46(3)-01/14-5, Pre-Trial Chamber II, 22 September 2014, para 5. Some opening for reconsideration ca be found in ICC, *Prosecutor v. Kenyatta*, Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial, Case No. ICC-01/09-02/11-863, Trial Chamber, 26 November 2013, para 11; *Prosecutor v. Ruto et al.*, Decision on the request to present views and concerns of victims on their legal representation at the trial phase, Case No. ICC-01/09-01/11-511, Trial Chamber I, 13 December 2012, para 6.

127 STL, *In re: Application of El Sayed*, , Order Relating to the Jurisdiction of the Tribunal to Rule on the Application by Mr El Sayed dated 17 March 2010 and whether Mr El Sayed has Standing Before the Tribunal, Case No. CH/PTJ/2010/05, Pre Trial Judge 9 September 2010, para 32.

128 STL, *In re: Application of El Sayed,* Decision on Appeal of Pre-trial Judge's Order Regarding Jurisdiction and Standing, paras 60 ff..

129 STL, *In re: Application of El Sayed,* Decision on Partial Appeal by Mr. El Sayed of Pre-Trial Judge's Decision of 12 May 2011, Case No. CH/AC/2011/01, Appeals Chamber, 19 July 2011.

bombing of the Rainbow Warrior[130]. The said case was not characterized by the same close link between the application and the criminal proceeding as the case of Mr. *El Sayed.* Had the case not been "civil", then the Supreme Court of New Zealand could not hear the appeal under section 66 of the Judicature Act 1908. Apparently it would have been more convenient, for the STL, in order to assert inherent jurisdiction to qualify the case as criminal, because the STL is not afforded with general civil rights jurisdiction. It is further worth questioning if an application for disclosure in the context other than that of a case pending in front of a Court mandates in any case a Court decision or could be properly be dealt also as an administrative matter[131].

h) Power to punish contempt of Court

The power to punish interferences and contempt has been asserted by the ICTY appeals Chamber, as a consequence of the fact that the Tribunal was vested with judicial functions, since the *Tadić* case and the contempt decision against *Vujin*[132]. In its decision the Appeals Chamber quoted the practice of U.S. Courts in the descending Nuremberg Trials[133] based upon the power to deal with "any contumacy"[134].

In its original text Rule 77 of the ICTY Rules, allowed in a similar shape for the punishment and the imposition of a term of imprisonment of witness who refused of failed contumaciously to answer a question relevant to the issue before a Chamber. The Rule was amended the 12th of November 1997, to clarify that nothing in it affected the "inherent power" of the Tribunal to hold in contempt those who knowingly and willfully interfered with its administration of justice. The ICTR rules of procedure and evidence were correspondingly amended. The amendment led to decision of the *ad hoc* and special Tribunals[135] asserting that inherent powers to punish contempt were not limited by the Rules and culminated with the decision of the Appeals Panel of the STL, asserting that «the Tribunal's inherent jurisdiction over contempt is unconstrained by the Statute should apply with equal force with respect to its material, temporal, territorial and personal jurisdiction»[136].

The allegedly unconstrained or unlimited nature of contempt powers of International Courts and Tribunals is sometimes compared with power belonging to certain Courts under constitutional charters which are deemed in domestic systems not to be affected or otherwise limited by statutory

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130 *Ibid,* footnote 61, which reads: «We endorse the New Zealand Supreme Court's classification as civil of a similar application made by a television company, to search the criminal record of the trial of French accused who had been convicted of bombing the Rainbow Warrior in Auckland Harbour. See, *Mafart and Prieur v. Television New Zealand Ltd*, [2006] NZSC 33, [2006] 3 NZLR 18, paras 28-40»

131 Recently, in a similar shape, the STL President's Order Assigning Matter to Pre-Trial Judge, dated January 30th 2015, upon by the Counsel for Mr. *El Hajj* seeking a copy of investigative records held by the Tribunal and by the UNIIC relating to protected and not protected witnesses, in order to bring a civil action.

132 ICTY, *Prosecutor v. Tadić*, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, Case No. IT-94-1-A-R77, Appeals Chamber, 31 January 2000, paras 18, 24-26, 28. In similar terms also, ICTY, *Prosecutor v. Simić et al.*, Judgment in the Matter of Contempt Allegations Against an Accused and his Counsel, Case No. IT-95-9-R77, Trial Chamber, 30 June 2000, para 91, suggesting that power to deal with contempt derive from judicial function; and ICTY, *in the Case against Florence Hartman*, Judgment on allegation of contempt, Case No. IT-02-54-R77.5, Special Appointed Chamber, 14 September 2009. At this purpose, See also G. STAMPER, *Note: Infusing Due Process and the Principle of Legality into Contempt Proceedings before the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda*, 109, in *MichLR,* 2010-2011, p. 1561.

133 References are to the following cases, reported in the *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law n. 10*, Vol. XV, Procedure, *Practice and Administration*, Washington, 1950: *US v. Karl Brandt*, 27 June 1947, at p. 968-970 (where a prosecution witness assaulted one of the accused in court); *US v. Joseph Altstoetter*, 17 July 1947, at pp. 974-975, 978, 992 (where defence counsel and a private individual attempted improperly to influence an expert medical witness by making false representations, and mutilated an expert report); and *US v. Alfried Krupp von Bohlen and Halbach*, 21 January 1948, at p. 1003, 1005-1006, 1088, 1011 (where defence counsel staged a walk out, and then failed to appear, in protest of a ruling against their clients, but which conduct was ultimately dealt with on a disciplinary basis). The IMT stated that "certainly, when confronted with a situation tantamount to surrendering its authority to counsel, the Tribunal therefore has the full power to take appropriate action to meet the challenge" (Krupp case, p. 1011).

134 Legal base for contempt proceedings was art. 18 of Charter of the International Military Tribunal, annexed to the Four Power Agreement made in London on 8 August 1945 *(The Tribunal ... shall deal summarily with any contumacy imposing appropriate punishment, including exclusion of any defendant or his counsel from some or all further proceedings, but without prejudice to the determination of the charges*) and Military Government - Germany, United States Zone, Ordinance n. 7, 18 October 1946, Art. VI, c).

135 SCSL, *Independant Counsel v. Brima Samura*, Judgment in Contempt Proceedings, Case No. SCSL-2005-01, Trial Chamber I, 26 October 2005, para 16, suggesting that Rule 77 does not, not was intended to limit the Courts inherent power to punish contempt.

136 STL, *In the case against New TV S.A.L. Karma Mohamed Tahsin Al Khayat*, Decision on Interlocutory Appeal concerning Personal Jurisdiction in Contempt Proceedings, para 76.

provisions[137]. As mentioned previously when dealing with the Relationship between inherent powers and Statutes and Rules, in its subsequent second decision in the contempt jurisdiction against legal persons issue[138], the Appeals Panel, shifted towards the Lebanese legal order to inform the meaning of the term "person", apparently departing from the previous strong reliance on inherence of such powers. Noteworthy the first STL contempt case against legal persons due to alleged interference with the proceedings was not for having violated a specific Court order issued for the protection of witnesses[139], but for having undermined the trust in the Tribunal's protective measures[140].

The question of the *ad hoc* Tribunal's power to create new offenses was addressed by the Appeals Chamber in the contempt decision against *Vujin*[141]. The Chamber observed that article 15 of the Statute does not «permit rules to be adopted which constitute new offences, but it does permit the judges to adopt rules of procedure and evidence for the conduct of matters falling within the inherent jurisdiction of the Tribunal as well as matters within its statutory jurisdiction».

The decision was criticized because even if the Tribunals' power to promulgate procedural rules governing the prosecution of contempt may grounded in the inherent powers of the Courts, the principle of legality requires that the judges codify these rules so that potential contempt defendants have prospective notice of forbidden conduct, while «punishment of conduct not explicitly classified as prohibited would violate fundamental human rights and the due process principle of legality»[142]. Further critique to the decision was argued based upon the overt choice for a common law approach to the contempt of Court[143]. Significantly the ICTR jurisprudence has shown to consider contempt charges "by its very nature criminal" and accordingly shows to be more incline to justify the punishment of contempt under statutory powers rather than on inherent powers[144].

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137 G. STAMPER, *Note: Infusing Due Process and the Principle of Legality into Contempt Proceedings before the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda,* p. 1564*,* refers to *ex parte Robinson* 86 U.S. (6 Wall.) p. 505, p. 510 (1873). According to the A. the judgment read as to make any attempt to diminish inherent powers ineffective. However the judgement reads as follows: «The power to punish for contempt is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice ... the moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power ... But the power has been limited and defined by the Act of Congress of March 2, 1831 ... the act in terms applies to all courts; whether it can be held to limit the authority of the Supreme Court, which derives its existence and powers from the Constitution, may perhaps be a matter of doubt ... but that it applies to the circuit and district courts there can be no question ... these courts were created by act of Congress».

138 The indictment alleges that the corporation was served a "cease and desist" notice of the Registrar demanding the immediate cessation of broadcasting of interviews with purported confidential witnesses. A confidential *ex parte* order of the PTJ, was allegedly served to Al Jadeed TV and the accused, by email without receipt confirmation by Lebanese authorities once the broadcasts were over (but the interviews were still accessible on YouTube). See transcript of the hearing of April, 20, 2015, 20150420_STL-14-05_T_T8_OFF_PRV_EN, p. 9 ff..

139 According to R. HOPKINS, *Exploring issues around allegations of corporate complicity in human rights violations,* 16 April 2015, cit., the corporate liability was primarily asserted in the indictment based upon the conduct of Ms. Khayat, charged jointly with the corporation.

140 STL, *In the case against Akhbar Beirut S.A.L. - Ibrahim Mohamed Ali Al Amin*, Case n. STL-14-06/PT/AP/AR126.1, Decision on interlocutory Appeal concerning Personal Jurisdiction in Contempt Proceedings, Appeals Panel*,* 23 January 2015, paras 57-58. Interestingly in its Separate Opinion, Judge Afif Chamseddine argues that the Contempt judge, whose decision was overturned, should «have given more consideration to a possible referral of part of the case to the Lebanese authorities, especially after he had decided that the Tribunal had no jurisdiction to prosecute *Akhbar Beirut* S.A.L., a legal person».

141 ICTY, *Prosecutor v. Tadić*, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, Case No. IT-94-1-A-R77, Appeals Chamber, 31 January 2000, para 24. At this purpose, See also ICTY, *Prosecutor v. Beqa Beqaj*, Judgment on contempt allegations, Case No. IT-03-66-T-R77, Trial Chamber, 27 May 2005, para 7, in which the Trial Chamber addressed the issue of the different reach of art. 309 of the Provisional Criminal Code for Kosovo, if compared with the Charges brought under rule 77.

142 G. STAMPER, *Note: Infusing Due Process and the Principle of Legality into Contempt Proceedings before the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda*, cit. p. 1562.

143 G. SLUITER, *The ICTY and Offences against the Administration of Justice,* 2 *Journal of International Criminal Justice* (2004), p. 631, 637. According to the A. «the Tribunal's law on contempt is not one of the most opportune and meritorious of its achievements over the past 10 years». On the ICTY contempt jurisprudence, See also D. SHANE, J. POWDERLY, *Judicial Creativity at the International Criminal Tribunals*, 2010, p. 53 ff.; and H. FARTHOFER, *Contempt of Court*, in C. SAFFERLING (eds.) *International Criminal Procedure*, 2012, p. 560 ff..

144 G. STAMPER, *Note: Infusing Due Process and the Principle of Legality into Contempt Proceedings before the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda*, cit., p. 1565. The A. quotes ICTR, *Prosecutor v. Nyiramasuhuko*, Decision on the Prosecutor's Allegations of Contempt, the Harmonization of the Witness Protection Measures and Warning to the Prosecutor's Counsel, Case No. ICTR-97-21-T, Trial Chamber II, 10 July 2001. The decision addresses the issue of *prima facie* proof of allegations of contempt and does not rely on inherent powers. At this purpose See also D. SHAHRAM, Commentary, *The Law of Contempt before the UN ICTR*, in A. KLIP, G. SLUITER (edited by), *10 Annotated Leading Cases of International Criminal Tribunals: The International Criminal Tribunal for Rwanda* 2001–2002, 2006, pp. 278, 283.

However the nature of contempt charges, whether criminal of civil, is far from being settled even in domestic legal systems. Usually criminal contempt occurs when there is interference with a civil or criminal proceeding, whilst civil contempt when there is disobedience with Court orders[145]. From a different perspective contempt is civil when it injuries a private rights of a litigant[146]. According to the U.S. Supreme Court, in civil contempt the contemnor must be in a position to purge himself[147]. The Caribbean Court of Justice offered recently an interesting perspective to view at the ICTY jurisprudence in contempt matters and deemed civil contempt and disobedience with a "final" Court orders to be "implicitly" excluded from the ... inherent powers of the Tribunal[148].

In its early subpoenas decision in the *Blaskic* case, the ICTY Appeals Chamber questioned whether the order to exhibit documents should be enforced under the Tribunal's contempt powers[149]. Failure to comply with an order to attend before or produce documents before a Chamber, is currently dealt by under sub-rule 77A(iii).

The ICC Statute, as known, abandoned the inherent powers paradigm and defined offences against the Administration of International justice in article 70. Those offences do not include disobedience with an order by the Court and the circumstance is relevant in respect of the legality principle and the ICC subpoena decision which will be examined in the following paragraph.

The jurisprudence of the *ad hoc* and special Tribunals[150] and Courts doesn't clarify why only Criminal Tribunals has shown the need to punish contempt, as contempt (either criminal or civil) is not confines to criminal cases[151]. Other International judicial bodies have shown to reluctant to develop a practice for taking evidence[152] or more simply expressed judicial restraint. The sole fact that International Criminal Courts and Tribunals exercise jurisdiction "over individuals" does not seem conclusive at this purpose at least looking at the reasoning supporting the power, nor does the fact that criminal courts are more equipped as they have mostly an established framework for State cooperation and available prison facilities.

Further, the whole legal construction, deriving contempt powers from the mere existence of International Courts and Tribunals as judicial bodies, ignores that the power to punish contempt is as well recognized as an attribute of certain legislative bodies[153]. However International organizations and institutions provided with regulatory powers has not shown to invoke such powers.

4.9 Subpoenas

The subpoenas debate precedes and in a certain sense anticipates the debate about the power to punish contempt to International Courts and Tribunals. The jurisprudence on subpoenas despite being

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145 A. KLIP, G. SLUITER, *The International Criminal Tribunal for the Former Yugoslavia 2000 - 2001*, p. 225; N. L. GRAY, *Criminal and Civil Contempt: Some Sense of a Hodgepodge*, 72 St.John's L.Rev., 1998, p. 337. M. BOHLANDER *International Criminal Justice: a Critical Analysis of Institutions and Procedures*, London, Cameron, 2007, p. 500.

146 *Home office v. Hariette Harman* (1983) 1 AC 280.

147 United States Supreme Court, *Maggio v. Zeitz*, 333 US 56, 92.

148 Caribbean Court of Justice, *TLC v. Guyana*, [2010] CCJ 1(OJ), Judgment 29 March 2010. Para 38 reads: «Neither the Tadic contempt case nor Beqaj (which applied that case) dealt with disobedience of a final court order. The Nuclear Tests case (Australia v France), a non-criminal case, was relied on in the Tadic contempt judgment, but no issue of contempt arose in that case».

149 ICTY, *Prosecutor v. Blaskic*, Decision on the Prosecutor's Allegations of Contempt, the Harmonization of the Witness Protection Measures and Warning to the Prosecutor'a Counsel, Case No. IT-95-14, Appeals Chamber, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para 59. On the issue, See also impugned the Pre-Trial Chamber decision, AT Para 61.

150 Nevertheless, See ICTY, *Prosecutor v. Zlatko Aleksovski*, Judgment On Appeal By Anto Nobilo Against Finding Of Contempt, Case No. IT-95-14/1-AR77, Appeals Chamber, 30 May 2001, in which contempt is expressively linked to international "criminal" tribunals.

151 For some thoughtful considerations, See, ITLOS, *The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain*, Judgment of 28 May 2013, Separate Opinion of Judge Cot, para 43 ff.. At this purpose, See also S. SCHWEBEL, *Celebrating a Fraud on the Court*, in *AJIL,* vol. 106 (2012), pp. 102-105.

152 At this purpose, See K. HIGHET, *Evidence, the Court and the Nicaragua case*, 81, in *AJIL*, 1987, p. 10.

153 Lord Denman, C.J. in *Sheriff of Middlesex* (1840) 11 A&E 273: «there is something in the nature of the Houses themselves which carries with it the authority that has been claimed (…) The Crown has no rights which can exercise otherwise than by process of law and through amenable officers: but representative bodies must necessarily vindicate their authority by means of their own; and those means lie in the process of committal of contempt (…) This applies not to the House of Parliament only, but (as observed in *Burdell v. Abbot* (1811) 14 East 138) to the Courts of Justice, which as well as the Houses, must be liable to continual obstruction and insult if they were not entrusted with such power».

based upon a parallel and different string of authorities, share the jurisprudence on the power to punish contempt clear choice for an approach closer to that of common law legal systems rather than that of so called civil law systems. Subpoenas were already from the origin mentioned if not detailed, in rule 54 of the ICTY Rules.

In the *Blaskic* case the Prosecutor sought the issuance of a subpoena for the Croatian Defence Minister, a State Official, and to the State of Croatia, as a viable alternative to judicial cooperation to be addressed to the concerned State[154]. The trial Chamber found that the absence of an express grant of power did not negate the existence of such power if it can be considered to be "implied" and relied upon the ICJ and IPCJ jurisprudence discussed above (paragraph 2).

The trial Chamber also quoted *United States v. Nixon* case in order, on subpoena issued under U.S. Federal Rule of Criminal Procedure 17(c), perhaps in order to justify why the power to issue subpoenas was a "must", as the decision is not otherwise relevant for the inherence or implied character of the power and presidential privileges did not matter in the *Blaskic* case[155].

The trial chamber considered that the word "subpoena" was to be given the neutral meaning of a "binding order" and left it open whether or not a penalty could be imposed for non-compliance with such an order[156]. Croatia sought review of the decision and the appeals chamber[157], held that «it would be contrary to the general principle of effectiveness (*principe de l'effet utile*), to make redundant the word "subpoena" in the English text of Rule 54 by giving it the neutral meaning of "binding order"» and that since the International Tribunal «is not empowered to issue binding orders under threat of penalty to States or to State officials, it is consonant with the spirit of the Statute and the Rules to place a narrow interpretation on the term of art at issue and construe it as referring only and exclusively to binding orders addressed by the International Tribunal, under threat of penalty, to individuals acting in their private capacity»

The appeals Chamber[158] also asserted that, normally, the International Tribunal should turn to the relevant national authorities to seek remedies or sanctions for non-compliance by an individual with a subpoena or order issued by a judge or a trial chamber and that legal remedies or sanctions put in place by the national authorities themselves are more likely to work effectively and expeditiously.

Nevertheless, where such domestic remedies or sanctions prove not to be workable and from the outset, the tribunal decides to enter into direct contact with individuals, then the remedies available to the tribunal range from a general inherent power to hold individuals in contempt to the specific contempt power provided for in Rule 77. The Appeals Chamber further added that, if the subpoenaed individual who fails to deliver documents or appear in Court also fails to attend contempt proceedings, *in absentia* proceedings should not be ruled out[159].

The ICC, whose Statute and Rules of Procedure and Evidence do not mention subpoenas[160], considered the power to issue subpoenas in order to compel the attendance of witnesses and not for the production of documents[161].

The trial Chamber first seized with the matter, relied on the usual arguments already exposed above (paragraph 2) about the «inherent limitations on the exercise of the judicial function» of the Court, and the need to «maintain its judicial character»[162]. A novelty is represented by the trial Chamber's attempt to found its "implied" powers theory also on the ECtHR jurisprudence.

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154 The ICTY, *Prosecutor v. Blaskic*, Decision on the Objection of the Republic of Croatia to the Issuance of Subpoena Duces Tecum, Case No. IT-95-14, Trial Chamber II, 18 July 1997, paras 24 ff.

155 United States Supreme Court, *United States v. Nixon*, 418 U.S. 683, at p. 709 (Supreme Ct. 1974).

156 The ICTY, *Prosecutor v. Blaskic*, Decision on the Objection of the Republic of Croatia to the Issuance of Subpoena Duces Tecum, para 61 which reads: "it would be incorrect to infer that a penalty was envisaged, just as it would be incorrect to infer that a penalty was excluded from consideration".

157 ICTY, *Prosecutor v. Blaskic*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, Case No. IT-95-14, Appeals Chamber, 29 October 1997, para 20.

158 *Ibid,* paras 58, 59.

159 *Ibid*, para 59.

160 At this purpose, See G. SLUITER, *"I Beg You, Please come Testify" – The Problematic Absence of Subpoena Powers at the ICC*, *NewCLR*, 12, n. 4, 2009, p. 590 ff.

161 ICC, *Prosecutor v. Ruto*, Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, Case No. ICC-01/09-01/11-1274, Trial Chamber V, 17 April 2014.

162 ICJ, Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports (1963), 15, at 30.

Accordingly the Chamber asserted[163] that the operation of the principle of implied powers could not have been put in terms any stronger than those put by the ECtHR in its *Djokaba Lambi Longa* v The Netherlands decision[164] and quoted the following paragraph: «it would, in the Court's view, be unthinkable for any criminal tribunal, domestic or international, not to be vested with powers to secure the attendance of witnesses, for the prosecution or the defence as the case may be ... the power to keep them in custody, either because they are unwilling to testify or because they are detained in a different connection, is a necessary corollary»

The quote appears misleading as the ECtHR was dealing with the powers of judicial bodies sitting in the territory of other States and incidentally held the above power "implied" in the NATO Sofa, whereas the powers of Tribunals of the sending State are necessarily based on the relevant domestic law. As to the powers exercised by the ICC in the underlying case of *Djokaba Lambi Longa*, the ECtHR deemed the detention of the applicant based on the arrangement entered into by Congo and the ICC under article 93(7) of the Statute[165] and did not label the corresponding powers as "implicit" or "inherent".

The Trial Chamber further relied on article 4(1) of the Rome Statute, which provides that the Court shall have international legal personality and such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes. The power to subpoena witnesses was according to the Trial Chamber, clearly first among the powers necessary for the performance of ICC functions[166].

In the chamber's view, when article 64(6)(b) provides that the chamber may «require the attendance of witnesses», this includes compulsory measures as orders or subpoenas for the appearance of witnesses[167]. The trial Chamber further asserted that Kenya was obligated to employ compulsory measures against the witness in order to perform the demands of the request and assessed such measures for the assistance of the Court's subpoenas to be allowed under Kenya's International Crimes Act (2008), which is far from being evident. In second instance, the ICC Appeals Chamber deemed it not necessary to address the issue of "implicit" (not "inherent") powers and held the evoked powers to be supported by the Statute[168]. The Appeals Chamber found that «article 64(6)(b) of the Statute indicates that the trial Chambers have the power to compel the appearance of witnesses before the Court, in the sense of creating a legal obligation for the individual concerned» and that «that the term 'require' denotes something more than a voluntary action expected from someone else»[169].

The applicants had suggested that «the principle of legality would be contravened if the court had the power to compel witnesses to appear before the Court because the penalties in case of noncompliance are not set out in the Court's legal texts». The Appeals Chamber after having held the references to article 22 of the Statute misplaced as the conduct of the witness not appearing before the Court would represent a "misconduct" within the meaning of art. 71, concluded that «the argument disregards that it would be for the State enforcing a request to stipulate such sanctions in its domestic law» and further that «any sanction would be provided for in domestic law, which would give sufficient notice to the individual concerned»[170]. Once «a witness is brought before the Court in accordance with the relevant provisions under domestic law, the Court would take over the exercise of jurisdiction and therefore rules 65 and 171 of the Rules of Procedure and Evidence would become applicable»[171].

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163 ICC, *Prosecutor v. Ruto*, Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, Trial Chamber V, 17 April 2014, para 84.

164 ECtHR, Third section, *Djokaba Lambi Longa v. The Netherlands*, decision, 9 October 2012, para 72.

165 *Ibid*, para 75.

166 ICC, *Prosecutor v. Ruto*, Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, para 98.

167 ICC, *Prosecutor v. Ruto*, Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation, para 100.

168 ICC, *Prosecutor v. Ruto*, Judgment on the appeals of William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2014 entitled "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", Case No. ICC-01/09-01/11-1598, Appeals Chamber, 9 October 2014, para 105.

169 *Ibid*, para 107.

170 *Ibid,* para 110.

171 *Ibid*, para 111.

The Chamber's approach the legality implication of a subpoena order is disappointing and neglect any inquiry into domestic law in order to establish if such sanctions are established under domestic law, affects the State's competence to enforce the Statute and doesn't explain why the witness should be punished following the takeover of jurisdiction for misconduct prior his appearance before the Court and how such takeover should operate if the witness had already been sanctioned under domestic law.

j) The ICC's inherent power to inform the UNSC about failure to cooperate

The allegedly "inherent" power claimed by ICC Chambers to inform the United Nations Security Council about failure of States to cooperate in the context of the investigation of situations referred to the Court under Chapter VII of the United Nations Charter, is already outlined in article 87(7) in the form of a Court's finding for the purpose of a referral of the matter[172]. Practice has shown the attitude to overrule the corresponding provisions of the Regulations.

V. Conclusions

Claim by International Courts and Tribunals of inherent jurisdiction and power determine the temptation to recall the concept of a "Grotian moment"[173], a shift in paradigms and the emergence of new values with unusual rapidity and equally unusual acceptance.

An alternative explanation for this "moment" can be found in the filling of the booming international institutions in the mid '90, by international lawyers rather than by International Criminal Law professionals. Identified "areas of myopia" in international criminal law[174] should accordingly include also the excessive reliance on inherent jurisdiction and powers as such, unbound from the nature of the jurisdiction and the powers asserted to be inherent.

At the cost of irreverence towards international jurisdictions it may be observed that there seems to be a reverse link between the solemnity by which inherent jurisdiction is asserted and the relevance of the underlying case. This appears to be particularly true for the STL whereas inherent jurisdiction may have contributed to the attempts to show an acceptable workload, justifying the budget of the Tribunal.

For some stances the "Grotian moment" seems to be over, as in the case of the vindication of the power to review United Nations Security Council Resolutions underlying the original assertion of *Kompetenz Kompetenz* by the ICTY.

The traditional and orthodox assertion of inherent powers by the ICJ shows to have been distorted if not abused by the various International or internationalized Courts and Tribunals for their own purposes, but will survive in the accruals and convincing jurisprudence of other arbitral and (non criminal) International Tribunals.

Perhaps powers to punish contempt are not as inherent as asserted, by international judicial bodies afforded with criminal jurisdiction, but the choice for common law paradigms seems to have consolidated, whilst the reach of contempt proceedings appear to have followed autonomous patterns.

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172 ICC, *The Prosecutor v. Ahmad Muhammad Harun ("Ahmadharun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, Decision Public Document informing the United Nations Security Council about the lack of cooperation by the Republic of the Sudan, Case No. ICC-02/05-01/07-57, Pre Trial Chamber I, 25 May 2010. In the decision the Chamber stated that «by virtue of Security Council Resolution 1593 (2005), when the Republic of the Sudan fails to cooperate with the Court, thereby preventing the Court from executing the task entrusted to it by the Security Council, the Court has the inherent power to inform the Security Council of such a failure.» It is worth observing that the Chamber was seized under article 87(7).

173 At this purpose, See also, M. THALER, *Neo-Grotian predicaments: On Larry May's theory of international criminal law*, in *JIPT,* 2014, p. 345.

174 See D. ROBINSON, *The Identity Crisis of International Criminal Law*, in *LJIL*, 2008, 21, p. 928.