The inherent powers of the ICTY and ICTR

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On 13 November 2001, Dragan Kolundzija was convicted of a crime against humanity by the ICTY. He had entered a guilty plea, and was sentenced to three years’ imprisonment. He was given credit for the time that he had already been in custody, so he would be due for release on 6 June 2002. But he filed a request for immediate release, which was granted on 5 December 2001. This decision was not based on any power in the ICTY Statute; the only statutory provision for early release is Article 28, which did not apply to Kolundzija because he was not yet imprisoned in one of the states signatory to the ICTY’s agreement on enforcement of sentences (he was still in the UN Detention Unit). Although the ICTY Statute clearly did not contemplate this situation, the President released Kolundzija, invoking as a basis for his decision the ICTY’s inherent powers. Interestingly, the decision was phrased negatively:

“No provision of the Statute or the Rules precludes the Tribunal from ruling on the basis of its inherent powers on a request for early release by a convicted person who is not serving his sentence in a State signatory to the agreement with the Tribunal on the enforcement of sentences”.

This decision may seem surprising to a practitioner of domestic criminal law. Domestic systems have detailed provisions governing sentencing, including

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1 Prosecutor v. Sikirica and Ors (Sentencing Judgment), Case No. IT-95-8-S, 13 November 2001, Trial Chamber.

2 Rule 101(E), RPE.

3 Prosecutor v. Sikirica and Ors (Order of the President on the early release of Dragan Kolundzija), Case No. IT-95-8-S, 5 December 2001 (Order for Early Release of Kolundzija).

4 “If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal accordingly. The President of the International Tribunal, in consultation with the judges, shall decide the matter on the basis of the interests of justice and the general principles of law”.

early release, so would have no need to resort to any inherent power. What other inherent powers might the ICTY be ‘not precluded’ from exercising? What other gaps in the ICTY’s Statute might inherent powers be used to plug? In other words, what precisely is the nature and extent of the inherent jurisdiction of the ICTY and its companion tribunal, the ICTR?5

One domestic law commentator has pointed out that because the concept of inherent jurisdiction defies precise definition, in order to understand its nature and extent in a particular court it is necessary to consider the decided cases of that particular court.6 This article will attempt to do that in relation to the ICTY and ICTR, by analysing the cases in which the Tribunals have purported to invoke an inherent jurisdiction, and commenting upon them.

In order to provide a context for such an exposition of cases, the article begins by considering the jurisprudence relating to inherent jurisdiction in international law generally, and the creation and powers of the Tribunals. It then considers the doctrine of inherent jurisdiction in domestic common law systems, because it will be argued that the ICTY and ICTR are drawing strongly on principles of the common law in their consideration of their own inherent jurisdiction.7 Then it discusses, in chronological order, the cases in which the ICTY and ICTR have claimed an inherent jurisdiction, and attempt to analyse them against the established jurisprudence. It concludes that most of the cases fit comfortably into the framework of the doctrine of inherent jurisdiction, but two cases — Order for Early Release of Kolundzija and Tadic (Sentencing Appeals) — appear to exceed the limits of that doctrine. Finally, the article briefly considers the issue of post-appellate correction of wrongful convictions. Although the issue never arose at Nuremberg, arguably if it had the Control Council would have had the power to overturn a wrongful convic-

5 It should be noted that both the international and the domestic jurisprudence use the terms “inherent jurisdiction” and “inherent powers” interchangeably (J. Taït, The Inherent Jurisdiction of the Supreme Court (Cape Town: Juta & Co., Ltd.) (1985), Foreword; J. Pinsler, The Inherent Powers of the Court [1997] Singapore Journal of Legal Studies, 1–49, 1). The terms are synonymous and no distinction is intended.
