EDITORIAL

The State of International Law in The Hague:

Much Activity at Courts and Tribunals but Concern about the ICC

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This issue of the *Hague Justice Journal–Journal judiciaire de La Haye* pays attention to proceedings and historic developments at no less than six courts and tribunals both in The Hague and further afield. To begin with, the Judgment of the International Court of Justice (ICJ) in the Malaysia/Singapore case merits analysis if only because it raises fundamental questions of legal stability and certainty. Two important Appeals Judgements, the first one ever of the Appeals Chamber of the Special Court for Sierra Leone (SCSL) and the Appeals Chamber Judgement of the International Criminal Tribunal for Rwanda (ICTR) in the notorious *Seromba* case, are examined. The much-anticipated judgement of The Hague District Court in one of the cases brought by victims in the Srebrenica atrocity is assessed. The major event for The Hague in international criminal law in recent months was undoubtedly the capture, transfer and then appearance of Radovan Karadžić before the International Criminal Tribunal for the former Yugoslavia (ICTY). This event has also raised some delicate legal questions. Finally, this issue of the *Hague Justice Journal* is concluded by an essay of even greater delicacy on the state of affairs at the International Criminal Court (ICC) entitled: "The Controversial Actions of the Prosecutor of the International Criminal Court: a 'Crisis of Maturity'?"

The judgment of the ICJ in the *Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* between Singapore and Malaysia concerns the sovereignty over three maritime features in the Straits of Singapore, a very busy and strategic maritime passage. Interestingly, the Court only had to assess the law of the sea for *South Ledge*, one of the minor features at stake. Its judgment focuses rather on the law regarding acquisition of territory. In past jurisprudence the ICJ has not been too eager to assess the general state of this part of international law, and was even less inclined to explain the relevance of its traditional origins which date back to Roman law. In this judgment the Court addresses in some detail the roots of the territorial title involved. On that basis it

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decides that the title to the other minor feature, *Middle Rocks,* belongs to Malaysia. However the judgment (other than the dissenting opinions) does not discuss the merits of classic 'acquisitive prescription', a doctrine that seems of relevance here. Dr *Yoshifumi Tanaka* shows in his contribution that the ICJ (again) prefers to develop the law along the lines it has set out in previous decisions. The Court eventually founds its decision on the Parties' 'effective' behaviour at important moments in time. On that ground it decides that the title to the most important of the three features, *Pedra Branca/Pulau Batu Puteh,* although originally Malaysian, has now passed to Singapore. However, did Malaysia's conduct amount to a (tacit) 'agreement' to lose its original title to Singapore? *Tanaka* believes that there is reason for further debate on this fundamental question of law.

The case brought by the 'Mothers of Srebrenica *et al.*' against both the United Nations and the Netherlands, has drawn a lot of attention. The case recalls a dark page in recent Dutch history: the massacre of thousands of men and boys from the East-Bosnian town and the role of the UN Battalion 'Dutchbat' in defending Srebrenica against the Bosnian Serb army commanded by General Mladić. In his discussion of the Hague District Court's judgement, *Guido Den Dekker* focuses on the decision not to give leave to the plaintiffs, on the issue of immunity of the United Nations before Dutch (and other national) courts. The District Court grants 'absolute functional' immunity to the United Nations (in accordance with Article 105 (1) UN Charter and the Convention on the Privileges and Immunities of the UN) and then carries on to examine whether there may nevertheless be exceptions to this absolute immunity. Even for *jus cogens* prohibitions of genocide and torture and for fundamental rights of access to court as enshrined in international human rights, the District Court sees no scope hierarchically to prevail over the UN's immunity in the case of Peacekeeping operations. The Court does not examine whether there is an alternative remedy available for Plaintiffs within the UN system. While *Den Dekker* agrees here with the Court he is less convinced by the arguments it presents and then provides and discusses some alternative reasons. The Netherlands in the end successfully maintained its legal position that responsibility for the atrocity at Srebrenica lies solely with the Bosnian Serbs and not with the peacekeeping State nor with the UN. The Mothers of Srebrenica *et al.* have appealed the decision.

On 22 February this year, the Appeals Chamber dismissed all the Defence appeals in the AFRC case and confirmed the sentences which the SCSL Trial Chamber had imposed in 2007. Alex Brima and Santigie Kanu both received 50 years' imprisonment whereas Brima Kamara has to serve a sentence of 45 years. All three are relatively young officers who also played key roles in the Sierra Leonean Government, which in 1997 by way of a military coup assumed power and was subsequently ousted by the forces of the Economic Community of West African States. The accused were convicted for a multitude of heinous war crimes (including acts of terrorism, collective punishments and using children under 15 years of age in battle) and for crimes against humanity (extermination, murder and enslavement). Kanu was also found guilty, on the basis of superior criminal responsibility, of rape as a crime against humanity. *Roland Adjovi* critically

analyses some of the intricacies of the Appeals Chambers Judgement such as its detailed consideration of forced marriage as an 'other inhumane act' (as distinct from 'sexual slavery'). He also points out that the Chamber seems to reject the expression in the sentence of cumulative convictions.

In perhaps one of the most dramatic Appeals judgements in recent international criminal law, the Appeals Chamber of the ICTR in *Prosecutor v. Seromba* overturned the Trial Chamber's verdict substantially. The Judgement found that Abbé Seromba had not merely 'aided and abbetted' genocide in the bulldozing of the church in Nyange which led to the death of over 1,500 displaced ethnic Tutsi. Instead, the Roman-Catholic priest was found guilty of 'committing' genocide and of extermination as a crime against humanity. The Chamber increased his sentence from 15 years' imprisonment to prison "for the remainder of Athanase Seromba's life." In his detailed analysis of the Judgement, *Gregory Townsend* shows that in doing so the Appeals Chamber expanded the legal definition of 'committing' genocide – as a form of participation – and also set a precedent by additionally applying this expanded definition to the crime of extermination. The author examines several other features of this remarkable judgement, including that the testimony of only one witness can apparently suffice to establish a fact beyond reasonable doubt, and that an accused's relatively young age when committing a crime (Seromba was 31 years old) does not always constitute a mitigating circumstance. On the central issue of 'committing' genocide as opposed to 'aiding and abetting', *Townsend* is critical. He finds in particular debatable the Chamber's distinctions between 'ordering' and 'committing' and its assessment of the 'superior-subordinate' relationship involved. He ends his commentary by reminding that the convicted 'génocidaire' is still wearing his collar and that he could not find notice that the church has started to defrock him under canon law.

The most spectacular news in the last half year from The Hague was undoubtedly the apprehension of Radovan Karadžić and his appearance before the ICTY's Pre-trial judge. In his reflection at the time of that event, *Göran Sluiter* warns of two problems the Tribunal faces in this case. He submits that in such a high-profile trial as this one in particular, the accused should have complete guarantees of being presumed innocent and must have the right to a completely impartial tribunal. He points to the fact that previous ICTY cases are connected to the *Karadžić* case, primarily the case of *Momčilo Krajišnik* who was a member of the Bosnian Serb leadership, together with Karadžić. In the Trial Chamber's *Krajišnik* judgement one can read highly incriminating findings concerning Karadžić. The presiding pre-trial judge in the *Karadžić* case, Judge Orie, was also a presiding judge in the case against Krajišnik. *Sluiter* tries to answer the question of whether there might be a problem here, and he convincingly arrives at an affirmative answer. Since the publication of *Sluiter's* article on the Hague Justice Portal in the days immediately following the accused's initial appearance, the ICTY Presidency has referred the *Karadžić* case to another Trial Chamber.

The other – potentially much more serious – problem in the *Karadžić* case is caused by the accused's plan to represent himself. *Sluiter* argues that a previous Appeals Chamber decision in the *Šešelj* case has set a very unfortunate precedent here. In a detailed and highly critical assessment of that decision ("serious errors

of judgement"), he explains its potentially negative effects on the *Karadžić* case. His solution is that the "Prosecutor and the Judges clearly denounce the Appeals Chamber ruling in *Šešelj* as being bad law and inappropriate guidance" and, subsequently, restore a reasonable interpretation of the right to self-representation.

We conclude this second issue of the third volume of the *Hague Justice Journal–Journal judiciaire de La Haye* with an assessment of the state of affairs at the International Criminal Court (ICC). The author, whose name unfortunately has to be withheld, submits that the ICC is currently experiencing a 'Crisis of Maturity'. In a careful analysis the author provides several strong arguments, the starting-point being the 13 June 2008 decision by the ICC Trial Chamber in *Prosecutor v. Lubanga.* On that date the judges issued a stay of proceedings in that case after concluding that it was impossible to ensure a fair trial following the actions of the Prosecutor. The judges decided on 2 July 2008 to order the release of the accused (pending review by the Appeals Chamber). The Chamber was led to this decision by the Prosecutor's refusal to disclose over 200 documents of evidence (even potentially exculpatory evidence) to the Defence and to the Trial Chamber. The author points out that the Prosecutor, in obtaining and using such evidence, committed both a legal and a strategic error. If the Appeals Chamber confirms the decision of the Trial Chamber, there is the danger that other pending cases, with situations identical to *Prosecutor v. Lubanga,* could ultimately be stopped.

The article also expresses concerns about other steps the Prosecutor has taken, notably the pre-trial proceedings initiated against President Omar al-Bashir of Sudan. Added to this are personal allegations against him as a result of accusations of inappropriate behaviour. Regarding the latter in particular the suggestion of poor staff management is rather strong in the decision of the Administrative Tribunal of the International Labour Organisation on the matter. The judgement has already led to questions about his capability to serve and to calls for the resignation of the Prosecutor. The author of this article does not exclusively blame the Prosecutor for the Court's crisis of maturity. The article concludes by pointing to more general short-comings of the ICC for which not only the Prosecutor is responsible. The author argues that participation of victims in the proceedings has remained theoretical and laments that arrest warrants have still not been executed in Uganda. Most importantly, perhaps, is the absence of trials since the first arrest warrant was issued in 2006. The world, and in particular the States who have founded and are financing the ICC, are waiting for real trials to be conducted. Crisis in The Hague? Perhaps there is.

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