EDITORIAL

The State of International Law in The Hague:

Much Activity at the International Court of Justice and Some Reflection on Other Matters

Harry Post*

In the last six months the International Court of Justice (ICJ) has rendered judgments in three cases. This issue of the Hague Justice Journal provides reflections on the Court’s decision of 18 November 2008 on the Preliminary Objections raised by Serbia in the case brought against it by Croatia. Furthermore, on 19 January 2009, the ICJ delivered its Judgment on the Merits in a case brought by Mexico against the United States, and on 3 February in a maritime case between Romania and Ukraine. Both latter judgments are also commented upon, below.

This issue contains two longer articles. The first one is a lengthy and ‘daring’ reflection on the development of international humanitarian law and international criminal law, notably on the origins of Crimes against humanity and the crime of Genocide. The second article is a critical and imaginative examination of ‘situational gravity’ as a central criterion for the choice of crimes to Prosecute before the International Criminal Court (ICC).

Serbia had raised several Preliminary Objections in the case Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia). Several of these objections concerned (again) the Serbian legal identity. As Wouter Werner argues below: ‘The Court’s judgment can be read as yet another episode in the continuing saga on the international legal position of Serbia.’ Did Serbia actually have legal standing to act in the proceedings against it? Not too surprisingly the Court found that it had jurisdiction. It acknowledged that at the time Croatia submitted its Application in the case, Serbia’s predecessor, the Federal Republic of Yugoslavia (FRY), was not a member of the United Nations and, hence, ‘formally speaking’ Croatia could not have brought its case. However, within a year the FRY had become a UN member, making the application perfectly possible. The ICJ argued that it should show ‘realism and flexibility’ here because Croatia could have brought its case a year later. The Court then turned to the most important of Serbia’s Preliminary Objections: could Serbia be considered a Party

---

* Harry Post is General Editor of the HJJ-JJH and Editor-in-chief of the Hague Justice Portal.
to the 1948 Genocide Convention. Croatia had based its view that the ICJ had jurisdiction under Article XI of the Convention. Serbia objected that it could not be considered bound by Article XI.

The Court rejected that objection, finding that Serbia was bound by the Genocide Convention and notably by its compromissory Article XI. The ICJ decided by majority that it considered the FRY Declaration of Continuity to the previous Socialist Republic of Yugoslavia as a Declaration of Succession to its obligations, including those under the Genocide Convention. Professor Werner points out that the four judges who were members of the Court that thought differently about the same Declaration in the 2003 Yugoslavia v. Bosnia and Herzegovina Judgment were not at all happy with the current Judgment and expressed so in a Joint Dissenting Opinion. They considered the Court’s argumentation as lacking “legal validity and consistency”, while being “contra legem, untenable and extra-legal”.

On 25 March, 2008 in the Medellin v. Texas case, the US Supreme Court drew a major blow to the enforcement of the ICJ’s 2004 Judgement in the Avena case (Mexico vs United States). The Supreme Court found that Texas was not bound to “review and reconsider” Mr Medellin’s previous conviction, as the ICJ had ordered. Following the Supreme Court decision, Mexico had asked the World Court later in 2008 for an interpretation of the Avena Judgment also in view of the fact that another 48 cases should have been reviewed with several of its citizens, like Mr Medellin, waiting on death row. The ICJ had ordered (again) Provisional Measures suspending the execution of his sentence, but that did not prevent the execution of José Ernesto Medellin Rojas. This lack of enforcement of the Avena judgment in fact brings a more general question of the enforceability of such ICJ judgments in the (Federal) United States, as Paul von Muhlendahl argues in a concise comment on the ICJ Judgment on the Merits of Mexico’s Request for Interpretation. The Court rejected almost all of Mexico’s claims. It found that the ‘direct effect’ of its Judgment on all State organs in the US was simply not decided upon in the 2004 Avena Judgment and, hence, could not give rise to interpretation. The ICJ did consider that its 2008 Order indicating Provisional Measures was indeed violated in Medellin’s case and confirmed that the United States remains under its already existing obligation fully to implement the 2004 Avena Judgement. However tragic its context, Von Muhlendahl sees the reasoning of the Court in the Judgment on the Merits of the Request for Interpretation as virtually flawless. He concludes that Mexico was “looking for the wrong thing… using the wrong procedure…in the wrong place…”

The other ICJ Judgment on the Merits, in the Maritime Delimitation case between Romania and Ukraine, is probably also not very controversial although there were preliminary jurisdiction issues at stake. The parties disagreed on the scope of the Court’s jurisdiction. The Court decided that it had relatively wide discretion in establishing the requested delimitation of the Continental Shelf and the Exclusive Economic Zone between the two countries. In his succinct and clear commentary, Alex Oude Elferink shows that the ICJ stuck quite clearly to the relevant provisions of the United Nations Convention on the Law of the Sea (UNCLOS) as the applicable law. A Romanian Declaration made under Article 310
of UNCLOS which would lead to the exclusion of Serpent’s Island, a Ukrainian uninhabited island distanced from the mainland, from affecting the delimitation, was not considered relevant. Neither did other Romanian arguments to question the Ukrainian entitlement to maritime zones beyond the outer limit of its territorial sea have much effect. Next, Dr Oude Elferink briefly describes the methodology the ICJ applies to actually effect the delimitation. As it has done in other recent maritime cases, the Court first determines the ‘provisional equidistance line’ (i.e. ‘the line that is always at the same distance of the baselines of both States’) as the starting-point for its delimitation. Serpent’s Island was as such disregarded in drawing the line due to its considerable distance from Ukraine’s mainland. Oude Elferink believes that the island was also excluded due to its rather small size. It did, however, produce a minor modification when the Court considered circumstances calling for an adjustment of this line’. The ICJ finally considered whether the thus established line would lead ‘to a disproportion between the length of the relevant coasts of both States and their respective maritime zones’. It decided unanimously that this was not the case. As none of the judges appended any individual opinion to the Judgment (the first time ever, according to Oude Elferink), it seems safe to assume that here the ICJ has not only further ascertained and confirmed its already quite consistent delimitation jurisprudence but also that it has solved another international dispute.

In a lengthy and learned essay Jeremy Sarkin examines the origins of the modern international legal regime for the protection of individuals. He argues that at the beginning of the Nineteenth Century, although no specific enforcement mechanisms existed, such protection was in fact not only found in international humanitarian law but in several branches of international law. He makes a convincing case that the relevant rules against genocide and crimes against humanity, had already been in existence long before World War II when they are commonly held to have been created. He discusses in particular the origins of the international rules on the prohibition of genocide and those on crimes against humanity. Professor Sarkin submits that already before the 1899 and 1907 Hague Conventions the Martens Clause was part of international customary law. The Clause does not ‘only’ express principles of humanity, but in fact codifies existing rules prohibiting crimes against humanity inflicted upon minority groups. In an extensive analysis of jurisprudence as well as legal literature in respect to genocide, he shows that also the ‘crime of crimes’ as a norm of customary international law dates back to the nineteenth century and perhaps much further.

According to Article 53 of the Rome Statute, the International Criminal Court’s Prosecutor is supposed to decide whether to initiate an investigation taking into account the ‘gravity’ of the crime. Mark Osiel discusses what would or should be a situation of sufficient ‘gravity’ for the ICC prosecutor. Or, to take a more practical point of view: “How should the Court’s scarce resources be distributed among the wide array of crimes throughout the world that might legitimately become the focus of its scrutiny?” The choices made so far seem to indicate an interpretation of ‘situational gravity’ as, basically: mass atrocities. Dr Osiel finds such a choice understandable and criticises the approach of Prof. Kevin Heller who submits a three-part qualitative set of criteria. Osiel examines what changes, advantages
and disadvantages Heller’s qualitative test of ‘situational gravity’ would bring in comparison to the current quantitative ‘mass atrocities’ approach and he is not very positive. He is afraid that although such a qualitative approach might lead to a less ‘African’ focus of the Prosecutor, it would easily lead to political manipulation. At the end of his imaginative article the author submits that the ICC simply does not have enough power and support to successfully pursue a policy fighting mass atrocities and bringing the instigators and perpetrators to trial. Although Kevin Heller’s approach may not bring the solution either, further reflection and creativity on which crimes are to be prosecuted and which not, is much needed.

From this 2009 volume on there will be some important changes in the Hague Justice Journal. The English language version will no longer only be available as an e-journal, but on subscription basis in paper and electronic format. For the time being the French language journal will continue to be published only in digital form (for the subscription rates and other details, see elsewhere in this issue). As the Editorial board we are proud to say that Eleven International Publishing in Utrecht will publish HJJ-JJH. The Board also has undergone a few changes. Vincent Prouliot and Jed Odermatt are prepared to serve as managing editors. Nicholas Walbridge, the previous managing editor will continue to contribute to the Hague Justice Journal as a Correspondent.