

## EDITORIAL

### **The State of International Law in The Hague:**

#### **Impact from elsewhere**

Harry Post\*

On April 6 1994 the passenger plane carrying President Juvénal Habyarimana of Rwanda was shot out of the sky over Rwanda. That crime, to this day neither properly investigated nor fully explained, triggered more heinous crimes on a scale not seen since the Second World War. Not since that time had the “banality of evil”<sup>1</sup> been so manifest: in Rwanda neighbours killed neighbours, husbands killed wives, shepherds killed their flocks. Eyewitness testimony before the ICTR recounted:

[...] heaps of bodies [...] on the roads, on the footpaths and in rivers and [...] many wounded persons [...] who had sustained wounds inflicted with machetes to the face, the neck, and also to the ankle, at the Achilles’ tendon, to prevent them from fleeing.<sup>2</sup>

An estimated 800 000 people lost their lives in the Rwandan hell.

Seven months later on 8 November 1994, by way of Resolution 955 the UN Security Council created the International Criminal Tribunal for Rwanda (ICTR). The case law that the ICTR has produced ever since documents the sheer madness and unbelievable cruelty of the events that took place in those months from April through to July, fifteen years ago. The Rwanda Tribunal has convicted and sentenced some of the most high-profile of the ‘génocidaires’, interpreting and explaining the law on genocide and mass killings along the way.

In his most useful and detailed article in this issue of the Hague Justice Journal, *David Taylor* recounts the atrocities committed in Rwanda and critically reviews the role and contribution of the ICTR mandated to prosecute “persons responsible for genocide and other serious violations of international humanitarian law”. He concludes that

[f]ifteen years after the Genocide, the International Criminal Tribunal for Rwanda has made some significant achievements. However, with thirteen accused still at

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<sup>1</sup> H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, New edition (1994).

<sup>2</sup> *Prosecutor v. Akayesu*, Trial Chamber Judgment, ICTR-96-4-T, 2 September 1998, para. 115.

large, seven cases going through appeals procedures and five suspects awaiting trial, on top of the ongoing trials of over twenty accused, the Tribunal still has some way to go in the search for justice for its victims and survivors.

It remains to be seen whether the Tribunal will in fact meet its Completion Strategy, especially in view of the reluctance to refer trials to the national jurisdiction of Rwanda of which considerable doubts remain over its fairness. However, UN Under-Secretary-General for Legal Affairs, Patricia O'Brien, recently warned that the remaining fugitives of the ICTR "will not be let off the hook" and that a draft residual mechanism for the remaining cases will soon be presented to the UN Security Council.

In the meantime, the ICTR, including its Appeals Chamber in The Hague, continues actively with its prosecution of genocide and other international crimes and in 2009 has already produced a number of judgements (see the overview of Court documents, below). In this issue *Laetitia Husson* comments on the Appeals Chamber's judgement in the *Karera* case. In April 1994 *Francois Karera* was appointed Prefect of Kigali, before which he had already enjoyed a long administrative and political career in Rwanda. The Trial Chamber held him responsible for ordering a number of murders, of having instigated and participated in attacks against Tutsi refugees at the Ntarama Church and for inciting and aiding and abetting the murder of Tutsis in the Rushashi commune. The Trial Chamber took his superior responsibility in respect of other murders committed into account as an aggravating factor in his sentencing.

The Appeals Chamber largely confirmed the initial judgement. Also on appeal *Karera* was sentenced to life imprisonment for genocide, as well as for extermination and murder as crimes against humanity for the atrocities that took place in his Kigali *préfecture*. In her clear and very well informed explanation of the Appeals judgement, *Husson* argues that this judgement further strengthens the ICTR Appeals Chamber's jurisprudence in quite a number of respects including through its approach to site visits and its intervention in respect to defects in an indictment.

In this issue we are glad to be able to present a long and thorough discussion of a difficult and sensitive subject matter in Humanitarian and Criminal Law, both at the international and national level: torture and inhuman and degrading treatment. Professor *Jordan Paust* reviews and thoroughly analyses the international obligations to prevent torture and degrading human behaviour. Subsequently he examines in detail the American politics and practice as it took place during the previous administration. In the first part of his article he has convincingly shown that in addition to explicit treaty obligations, preventing torture and inhuman and degrading treatment is also an obligation under international customary law. On the basis of a careful analysis he even concludes that this international duty has the status of *ius cogens*: it is a peremptory norm. The ultimate question to answer then is what type of behaviour precisely is to be prevented? To outline an answer *Paust* refers to examples of behaviour condoned by American authorities under the previous administration. He concludes his detailed analysis by stating that "[n]ever in the long history of the United States has there been such widespread

serial criminality authorized and abetted at the highest levels of our government. Never in the history of our country has any other President been known to have authorized war crimes and crimes against humanity.”

His fervent appeal to President Obama and the new administration is “... to restore the rule of law; to bring an end to seven years of impunity that must be effectuated through Executive prosecution or extradition of all who are reasonably accused; and to restore American honor, integrity, and respect within the international community.”

The *ad hoc* tribunals have made a great contribution to International Humanitarian and Criminal Law by way of interpreting and elucidating genocide as well as crimes against humanity, a contribution also of the greatest importance to the ‘permanent’ International Criminal Court. The discussion by *Laurence Carrier-Desjardins* of the approach chosen by the ICC Prosecutor in his indictment of the Sudanese President, *Omar Al Bashir* illustrates once more how important this jurisprudence is. The Prosecutor has decided to indict *Al Bashir* for genocide in Darfur. *Carrier-Desjardins*, after a detailed analysis, argues that an indictment for persecution instead of for genocide would not only be legally more correct but would also have considerable additional advantages. She points for example to the disastrous practice of the Sudanese Government to destroy at a massive scale the livelihood of the inhabitants of Darfur. An indictment for persecution would bring this plainly to the fore. It would also give a more prominent role to the ‘other’ UN Human Rights Covenant, the Covenant on Economic, Social and Cultural Rights, which explicitly prohibits such policies and practices. According to the author, International Criminal Law very much needs to clearly establish the individual criminal accountability for such fundamental human rights violations. An indictment for persecution in this case would give the (additional) opportunity for the ICC to clarify what the actual state of the law is.

In the last contribution of this issue *Francesco Moneta* analyses a complicated and remarkable case that, on 23 December 2008, was brought by Germany against Italy before the International Court of Justice (‘Jurisdictional Immunities of the State’ -Germany v. Italy). This case also deals with deeds committed during armed conflict, but in a different sense than in the cases alluded above. In recent years family members of victims of cruel and murderous acts committed in Italy in the Second World War by German occupation forces, including SS regiments, have been successful in civil law cases instituted against Germany in Italian courts. These claims were honoured notwithstanding the international rules on sovereign immunity and despite reparation and compensation agreements already concluded between the two countries. The current German Government is concerned about this judicial development in Italy (courts imposed measures of constraint against German property) and has asked the ICJ (with Italian agreement) to decide on the legality of these Italian judicial decisions in light of, notably, German sovereign immunity. *Moneta* explains the relevant Italian case law and assesses the complicated case now initiated before the World Court. The interaction between fundamental human rights with even a preemptory status in international law, and sovereign immunity is essential here. It would certainly benefit from clarification as the rather diverse national practice the author introduces clearly

demonstrates. The ICJ will have “...to trace back the development of human rights norms in international law and the position held by these norms among the sources of law. This is sufficient in itself to make the litigation before the ICJ extremely interesting for international lawyers and everyone who is interested in the promotion of human rights”, the author rightly concludes. Its outcome may of course also have considerable practical implications for family members of victims in countries other than Italy where World War II atrocities took place.

Fifteen years after the horrors in Rwanda, International Criminal Law has certainly developed considerably. This issue of the Hague Justice Journal written by academic authors and by those working in various courts and international tribunals illustrates that quite clearly. In my opinion the result is a challenging second issue of the 2009 Journal. However, some reflection fifteen years after Rwanda should teach us that there is no time to sit back and enjoy the fruits of legal development and progress. Events in Darfur (or Somalia) show clearly that preventing human atrocities like those in Rwanda remains the real challenge.

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