EDITORIAL

The State of International Law in The Hague:

Great and Various Activity at Courts and Tribunals…

Harry Post[*]

The extra-large size of this last issue of volume 4 of the *Hague Justice Journal* is indicative of the activity in the Hague Courts and tribunals (see also the 'list of documents' at the end). It consists of three commentaries of judgements, another commentary that really evolves into an article, and three other articles, including one with a critical note attached to it.

Yoshifumo Tanaka comments on the 13 July Judgement of the International Court of Justice (ICJ) in the *Dispute regarding Navigational and Related Rights* between Costa Rica and Nicaragua. The case law on the international management and use of (fresh) waterways is still very limited. For that reason it can hardly surprise that the ICJ Judgement sets some interesting precedents. In addition, *Tanaka* notes that apart from the more technical issues raised and solved in the Judgement, the Court revisited some classical questions. It re-assessed the requirements international law sets for local or bilateral custom. In the 1950 *Asylum* case the ICJ required that the State relying on such custom had to show 'constant and uniform practice'. Apparently in a case of 'subsistence fishing' − the subject of the potential custom here− which is not likely to be documented or recorded in any formal way given the remoteness of the area at stake and the small, thinly spread population involved, identifying the local custom requires less than the criteria used in the *Asylum* case. The Judgement seems to leave some room for discussion on this point. In his thoughtful commentary Professor *Tanaka*, further draws attention to the remarkable 'evolutive' interpretation of some terms used in an 1858 Treaty between the two countries. The Court takes account (on at least two occasions) of a time element in the interpretation of that treaty. This recalls, in respect to treaty interpretation, the classic discussion on the principle of contemporaneity as a particular application of the doctrine of inter-temporal law. The doctrine was formulated specifically by Judge Huber in the 1929 *Island of Palmas* case when he argued that 'a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.'

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However having said that Huber was prepared also to take an 'evolutive' element into account by adding that the continued manifestation of a right 'shall follow the conditions required by the evolution of law'. In the past this addition has led to a considerable discussion about the fundamentals of stability and change in international law. It may be that the Judgement in the *San Juan River* dispute between Costa Rica and Nicaragua may give rise to renewed debate on evolutive interpretation of treaties.

Paul von Muhlendahl discusses the politically highly important Award of 22 July in the *Abyei* arbitration between the Government of Sudan and the Sudan People's Liberation Movement and Army that took place at the Permanent Court of Arbitration (PCA). The *Abyei* area is rich in oil resources and accounts already for a substantial part of the oil production of the Sudan. The Award of 22 July is particularly relevant because the residents of the area will decide in 2011 whether to belong to Sudan or to Southern Sudan. A referendum to this extent will coincide with a referendum in Southern Sudan on its secession from the North. If the South chooses independence part of the boundaries of the *Abyei* area determined in the Award will become international boundaries. The author describes the background to the dispute and subsequently analyses the decision, including the rather remarkably forceful dissenting opinion of Judge Al-Khasawneh. He concludes by assessing the reception of the Award which appears positive. However, *Von Muhlendahl* adds some thoughtful critical warnings against too much optimism. He fears in particular that the issue of sovereignty over the oilfields in the region will erupt again in the run-up to the 2011 referendum on the South's independence.

On the occasion of the beginning of his trial on 31 August of this year before the International Tribunal for Rwanda (ICTR), *Cedric Ryngaert* assesses the legal adventures of *Michel Bagaragaza* in Dutch courts. After a first failed attempt to refer the *Bagaragaza* case to Norway, the ICTR Prosecutor had more (initial) success in the Netherlands. The Prosecutors put him on trial but in the end the Hague District Court in 2007, the Appeals Court (but on other grounds) and eventually the Supreme Court all decided that they had no jurisdiction over the acts committed by *Bagaragaza*. In his contribution *Ryngaert* explains the legal grounds of the Appeals Court as well as of the Supreme Court[1] to reach their decisions of no jurisdiction, confirming the Dutch courts' somewhat inflexible application of Dutch criminal procedure law on judicial cooperation. This compromises the ICTR's Completion Strategy: its Prosecutors have −again− not been successful in referring cases to domestic courts. *Ryngaert* criticises: "The *Bagaragaza* saga shows that the architects of the ICTR Completion Strategy paid insufficient attention to the legal details of its implementation. This omission has now backfired." A brighter spot for the ICTR Prosecutor is perhaps that the Dutch Minister of Justice has now submitted a bill to Dutch Parliament that would retroactively apply to the kind of crimes of which *Bagaragaza* is accused.

[1] See C. Ryngaert, *Universal Jurisdiction over Genocide and Wartime Torture in Dutch Courts: an Appraisal of the Afghan and Rwandan cases,* 3 Hague Justice Journal 2 (2007) pp. 13-36, in which Ryngaert analysed the arguments of the District Court.

Andrea Ewing's analysis of the 20 July Judgement of the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the gruesome *Lukić & Lukić* case (*Prosecutor v. Milan Lukić & Sredoje Lukić*) leads her into an in-depth discussion of the meaning of 'mass killings' in international criminal law, in particular with regard to extermination as a crime against humanity. The threshold for the crime of extermination is the 'massiveness' of the crime. The judges in the ICTY Trial Chamber that tried the *Lukić & Lukić* case differed in their opinion on the content of that criterion. This case concerned atrocities committed in the municipality of Višegrad which belong to the worst of the 1992-1995 Bosnia and Herzegovina War. 'Killing on a large scale' is what distinguishes extermination from murder. According to the Trial Chamber the necessary scale is to be established 'on a case-by-case basis taking into account all relevant factors.' *Ewing* analyses the reasons provided by both the majority and by dissenting Judge *Van den Wyngaert* to interpret this criterion and reviews the arguments in light of the jurisprudence. A core aspect is that extermination having begun as a crime describing the systematic and widespread execution of millions of Jews and other civilians, has recently (in the 2006 *Krajišnik* Trial Chamber Judgement at the ICTY), been applied to the killing of 24 civilians imprisoned in a detention facility. Although not doubting the culpability of *Milan Lukić,* in particular*,* for the terrific killings he committed *Andrea Ewing* doubts whether the Trial Chamber sentenced him for the right crime. It is likely that the matters she raises and which will determine to a large extent the content of extermination as a crime against humanity, will eventually be decided in the ICTY Appeals Chamber.

Mario Odoni analyses Security Council Resolution 1757 of 30 May 2007 establishing the Special Tribunal for Lebanon. The Tribunal is to try those responsible for a huge bombing in Beirut on 14 February 2005 which killed 23 people including the then Lebanese Prime Minister Rafik Hariri. The article examines in great detail how the Special Tribunal is supposed to function, in particular how it is to operate in view of the constitutional division of domestic powers within Lebanon. Resolution 1757 more or less overrules a conflict between in particular the Lebanese Parliament and the Government of Prime Minister Siniora. By invoking Chapter VII of the UN Charter the Security Council overrides the competence of the Lebanese legislative organs because it 'arbitrarily' decides on the date of entry into force of the Statute of the Special Tribunal. But also in other respects of the arrangement the Security Council introduces rather precise procedural duties of internal Lebanese organs and their relationship with the Special Tribunal. The author analyses the legality of imposing such duties in light of Article 2 (7) of the UN Charter and the previous practice of establishing criminal tribunals. He wonders what is left of the once so sacred 'domestic reserve' of Article 2. Furthermore, he finds that the Special Tribunal has not been constructed as an enforcement mechanism under Chapter VII of the Charter comparable to the ICTY or the ICTR and concludes therefore:

> The non-configuration of the Special tribunal as an enforcement mechanism and the consequent inapplicability of the exception provided for in the last sentence of

> paragraph 7 of Article 2 of the Charter seems to prejudice, already *prima facie*, the legitimacy of the Resolution *de quo* and the binding effects themselves pursued by it.

It is precisely to 'protect Member States from this sort of intrusion that the prohibition provided for in paragraph 7 of Article 2 of the Charter was inserted'. *Odoni* submits that in the case of the Special Tribunal the Security Council has legally overstepped the limits of State sovereignty and that '…the generic reference to Chapter VII is not sufficient to provide valid legal cover for the intrusive action taken by the Security Council'.

What is the real value of all these (Hague) developments in International Criminal Law, *Carsten Stahn* wonders, almost literally. After all, international criminal tribunals are expensive. *Stahn* puts forward some challenging questions: 'What can international justice really achieve, for victims and affected societies and what impact does it have on the perpetrators?' 'How does and can it relate to domestic legal orders?' and 'How can it be effectively executed domestically?' In respect to the two latter questions *Stahn*'s answer seems to be that we are still far away from ICC Prosecutor *Moreno Ocampo*'s dream outlined in 2003 when taking office, namely: an International Criminal Court that has to deal with no cases because of the effective functioning of domestic judiciaries. Today, international justice appears to be in a stage of transition, Professor *Stahn* submits; it is fundamental to explore how it can interrelate better and more effectively with domestic justice systems. His discussion of the role of international justice in 'incapacitating' political leaders induced *David Saxon* to a reply. He challenges that international criminal tribunals should have a role in 'de-legitimising' political leaders to 'incapacitate' them. Saxon does not think that such incapacitation' is a proper legal (as opposed perhaps to political or moral) objective of international justice.

The theme of the final article in this issue by Yvonne McDermott concerns the position of victims in the (international) courtroom. She reviews the proposals on the improvement of the position of victims and reflects upon their merits in the light of the virtues of the 'right to a fair trial'. After a thorough analysis of both domestic and, in particular, international criminal justice systems and the relevant literature, *McDermott* pleads for a return to serious 'service' rights of victims over increasing their 'procedural' rights. She provides a number of arguments to conclude that the only way forward, for domestic as well as for international justice, is a 'balanced' approach of paying dignified respect to the dreadful experiences of victims and a fair trial of the accused. Also for victims the latter is crucial.

Yvonne McDermott's essay entitled "Victims and International Law: Remedies in the Courtroom" is the prize-winning submission for the BFKW (Böhler Franken Koppe Wijngaarden advocaten) Hague Academic Coalition Award for Young Professionals, a € 1,000 prize that included publication of the essay in the Hague Justice Journal. Ecco lo, congratulations!

I regret to say that in 2010 we can no longer make use of the great competence and energy of *Vincent Pouliot*, managing editor in particular in charge of the French version of the Journal. He has moved back to Paris on to even more

prestigious activities. It is encouraging to be able to conclude this fourth year of publication of the Hague Justice Journal with such a substantive and, I believe, most interesting issue. It seems a proper tribute to the variety of international legal events in The Hague which were also manifold in 2009. It is a great pleasure to see – once more –a fine mixture of contributions by senior experts in the field and by aspiring greatly talented younger authors.

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