

The State of International Law in The Hague:

Chemical Weapons, Genocide, and more...

H. Post

On April 22, 1915 at Ypres, the first significant gas attack during World War I took place. A green-yellow cloud of chlorine gas drifted slowly towards the allied trenches and soon hundreds of soldiers were vomiting, choking and dying while some managed to flee. By 1918 the Allies had also established their chemical warfare programmes. Artillery fired shells which wounded and killed by burning skin, eyes and lungs were now widespread on the battlefields. It has been estimated that by November 1918, at the time of the Armistice, more than 550,000 people had become the victims of the by then great variety of different gases employed by both sides.

Due to the large scale use of airplanes, chemical weapons had also become a very serious threat against cities and civilians. In particular, that prospect seems to have led to the adoption in 1925 of the ‘Protocol on the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare’, better known as the Geneva Gas Protocol. In the Second World War, the Allied policy of ‘no first-use but retaliation-use’ of chemical weapons prevented their employment. During the cold war, the development and stockpiling of new chemical weapons, such as nerve gases, as well as biological weapons increased substantially to diminish the risk of full-scale nuclear war. Accidents with stockpiles and tests of such weaponry in the sixties together with criticism of the use of herbicides by the United States during the Vietnam War, led in 1972 to the first step on the path to abandonment of such weapons: the conclusion of the Biological Weapons Convention.¹

It would take the fall of the Soviet Union before measures could be agreed upon to also bring the chemical arms race to a halt. In September 1992 in Geneva, the Chemical Weapons Convention (CWC) was signed. On 29 April 1997 the Convention entered into

¹ Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, signed on 10 April 1972 in London, Washington, D.C. and Moscow. The Convention entered into force on 26 March 1975.

force and the Organisation for the Prohibition of Chemical Weapons (OPCW) was established with its seat in The Hague. More than 180 States are now a party to the CWC, including the USA, but several States in the Middle East have decided to stay outside the Convention.² In the case of Saddam Hussein's regime, that was no surprise. The use of chemical weapons by Iraq in the 1980s against Iran and against the Kurds was widespread. The nerve agents used in 1988 at the town of Halabja killed over 5,000 and seriously injured an estimated 7,000. In particular, West European firms and businessmen had delivered the necessary chemicals and equipment for Iraq's production of its weaponry.

This issue of the Hague Justice Journal in various ways pays special attention to the prevention of the use of chemical weapons which, together with bacteriological weapons, were once appropriately labelled the 'poor man's atomic bomb'.³ The focus thereby is on the OPCW, whose first decennium of existence was paid attention to on the 9th of May when Queen Beatrix of the Netherlands unveiled a monument in The Hague in memory of the victims of chemical weapons. By co-incidence, on the same day the Hague Court of Appeal convicted a Dutch businessman to 17 years' imprisonment for his role as the main supplier in the 1980s of chemicals used to make war gases for the Saddam regime. In 'Lessons Learned: Chemicals Trader Convicted of War Crimes', four authors—all at the time in one capacity or another connected to the OPCW—provide further scientific and legal background to this *Van Anraat* case.⁴

Genocide

In the *Van Anraat* case the District Court of The Hague, as the court of first instance, had examined and interpreted the crime of genocide, the 'crime of crimes'. The same has been done in cases before the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the International Court of Justice (ICJ) and by the Iraqi Special Tribunal (IST) in Baghdad. In their essay in this issue, *Lisa Tabassi* and *Erwin Van der Borgh* examine genocide and crimes against humanity in light of, in particular, the *Van Anraat* case and the *Al-Afal* case now before the IST. The latter trial concerns the campaign against the Kurds in Iraq in 1988.⁵ The *Al-Afal* case is also related to in *Fausto Pocar's* comments in this issue of HJJ-JJH, but from a different starting point: the execution, on 30 December 2006, of Saddam Hussein. Professor *Pocar*, currently President of the ICTY, argues that the execution is not only regrettable from an ethical point of view, but also from the wider perspective of

² Israel, Egypt as well as Iraq are still not a party to the convention. Israel is a CWC signatory.

³ The phrase is usually attributed to the later Iranian President Rafsanjani (in October 1988).

⁴ The authors write on personal title. In the meantime, Van Anraat has decided to appeal his sentence to the Dutch Supreme Court.

⁵ The Special Tribunal has decided to try the gas attack on Halabja in a separate trial.

international justice. He emphasises how important the former dictator's presence during the *Al-Anfal* trial would have been. That trial might have benefited from his evidence and testimony, but, in particular, a second trial involving the former dictator would have offered a chance to improve the image of international justice. The conduct of Saddam Hussein's trial has been the subject of much criticism, criticism that included the dictator's hasty execution, filmed on mobile phones, and reminding so distinctly of an act of plain and personal retaliation.

During the period covered by this issue of HJJ-JJH, the crime of genocide has been a prime concern in two other cases and judgements. On 13 December 2006, the ICTR condemned the reverend Athanase Seromba to 15 years' imprisonment for aiding and abetting genocide and crimes against humanity (extermination) in one of the dramatic and gruesome events of the Rwanda slaughter. *Gabriella Venturini* critically discusses the judgement of the ICTR in the *Seromba* case (of which an appeal is pending in The Hague). Professor *Venturini* points also to the lack of satisfaction, in any real sense, which the judgement is likely to give the thousands of victims of Seromba's deeds.

In its judgement of 26 February this year, the International Court of Justice presented its own assessments of the crime of genocide, but in this case (primarily) of the meaning of genocide on the level of the State and its responsibility. The ICJ made clear that the 1948 Convention on Genocide did not only incur duties on individuals to refrain from committing genocide, but that also the State itself could be held responsible for various forms of genocide. The Court declared Serbia guilty of not having prevented genocide, notably in respect to the killings at Srebrenica in July 1995. Although Serbia was thus convicted, the ICJ was not able to provide any form of reparation other than 'satisfaction' to Bosnia and Herzegovina. The judgement did not open up the possibility of financial compensation for the complaining State or the victims of the genocide. *Terry Gill* explains and discusses this complicated judgement which has taken over 14 years' time to materialise. It is likely to remain a subject of discussion (and criticism) for quite some time to come.

And more...

Earlier, the ICJ had to concern itself with a seemingly much less dramatic conflict which had arisen between Argentina and Uruguay. This dispute on the construction of pulp mills on the River Uruguay, the boundary river between the two countries, nevertheless has already led to two requests for preliminary measures under Article 41 of the Court's Statute. In July last year, the ICJ rejected the request by Argentina and then, in January of this year, the Court also turned down a request for such measures by Uruguay. The sheer fact of their requests suggests already that this case arouses more (political) emotions than might perhaps be expected from a 'quiet' environmental case. *Malgosia Fitzmaurice*

explains what the *Pulp Mills on the River Uruguay* case is about and comments on the ICJ's rejection of Argentina's request for preliminary measures.

Barbados and Trinidad did not manage to find a solution for their different opinions on their mutual maritime boundaries. Following a period of prolonged negotiations they agreed to have their conflict decided by an Arbitral tribunal in accordance with Annex VII of the 1982 UN Convention on the Law of the Sea. The Tribunal was set up in The Hague and the Permanent Court of Arbitration acted as its registry. *Yoshifumo Tanaka* provides an analysis of the *Barbados and Trinidad and Tobago* Case explaining the 2006 award in view of the state of the complex law on maritime delimitation. The award has been accepted by both parties thus dispensing with one of the number of territorial conflicts of which the world has too many remaining.

None of the above described events taking place during the last half year, however important they are, has drawn so much attention as the hunger strike Vojislav Šešelj begun on 10 November 2006 in the UN Detention Centre in The Hague. Like the late Slobodan Milošević, Šešelj had been allowed to represent himself during the proceedings of his trial but his obstructionist and offensive conduct had continuously caused great problems. In the first week of December, his prolonged hunger strike to get some of his demands fulfilled seemed to be close to a dramatic end. By then the Šešelj drama at the ICTY was drawing world-wide attention. Eventually, a remarkable decision of the ICTY Appeals Chamber on 8 December led to an end to the deadlock. However, whether this decision of the Chamber has done the ICTY any good in the long run is doubted strongly and for good reasons by *Göran Sluiter* in a critical essay in this issue. Professor *Sluiter's* criticism has become even more pungent, now that in a decision of 11 May 2007 by the Appeals Chamber, another important defendant, Momčilo Krajišnik, the former vice-president of Republica Srpska, has also been granted the right to represent himself during the Appeal of his September 2006 conviction to 27 years' imprisonment.

(Bologna, May 2007)