The State of International Law in The Hague:
Developments in international criminal law and in the law of the sea

*Harry Post*

In this issue of the Hague Justice Journal-Journal judiciaire de La Haye, two important maritime delimitation cases and two complicated, but crucial issues of modern international criminal law are discussed and further explained. The judgement of the Appeals Chamber of the Yugoslavia Tribunal (ICTY) in the Zelenović case has concluded the appalling Foča rape cases. Matteo Fiori reviews this gruesome episode in the Bosnian War and examines what the case law on these events has brought for the identification and punishment of the crime of rape. The judgement in the case of Sefer Halilović led Harmen van der Wilt to a discussion of the intricate concept of ‘effective control’, central to the doctrine of superior command responsibility. A third Appeals Chamber Judgement, this time in the Simba case before the Rwanda Tribunal (ICTR), is discussed by Roland Adjovi focusing on why all the grounds of Appeal were rejected including in respect to the length of the sentence. In general international law, Martin Pratt and Yoshifumi Tanaka discuss two maritime delimitation cases, one decided by the International Court of Justice (ICJ) and another by a special Arbitral Tribunal. The judgements in these cases, Nicaragua v. Honduras and Guyana v. Suriname, show some divergence in the approach to delimitation.

On the 31 October 2007, the ICTY Appeals Chamber rendered its judgement in the case against Dragan Zelenović. This judgement concluded the so-called Foča “rape-camp” cases. Matteo Fiori in his article in this issue describes the events as follows:

Rape camps were established; Muslim women were detained and endured the most heinous violations of their basic rights. The victims went through an indescribable ordeal, living in constant fear of repeated rapes for an extended period of time which, if possible, exacerbated the trauma.

Judge Mumba, the presiding judge of the Trial Chamber, affirmed that “Rapes were used by members of the Bosnian Serb armed forces as an instrument of terror. An instrument they were given free rein to apply whenever and against whomsoever they wished.” Perpetrators like Zelenović, he continued, had “shown the most glaring disrespect for the women’s dignity and their fundamental human rights on a scale that far surpasses even

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what one might call the average seriousness of rapes during wartime.” The atrocities committed in the area marked “one of the darkest pages of the war”, as Fiori says. The author goes on to explain the rather complicated (procedural) history of the ‘Foča rape cases’. Two of these, against Gajko Janković and Radovan Stanković, were the first cases the ICTY referred to the national Court of Bosnia & Herzegovina. Both were convicted by the Sarajevo court and received lengthy prison sentences. Remarkably, on 25 May 2007, Stanković managed to escape and is still at large. In 2001 and 2002, the ICTY – in the Kunarac et al. judgements – had already convicted three other perpetrators involved in the Foča ordeal and handed out long prison sentences. In total, eight accused were indicted in the Foča rape cases. Six of them, including Zelenović, have now been convicted while two others died awaiting trial.

Fiori concludes his essay with a detailed assessment of the state of the law in respect to ‘rape as a crime against humanity’. He shows that as a result of the Foča jurisprudence, some particularly difficult definitional problems of the specific elements of the crime of rape have now been identified and addressed. The complicated relationship between rape and torture has been clarified. The Foča cases have made clear that “rape under international criminal law is among the graviest offences and that there will be no leniency shown for the perpetrators of such crimes.”

The judgement on 16 October 2007 of the ICTY Appeals Chamber in the case of Sefer Halilović addresses the important concept of ‘effective control’, which plays such a crucial role in the doctrine of superior criminal responsibility. The progressive identification and explanation of superior command responsibility can be said to be one of the major contributions of ICTY jurisprudence to international criminal law. The price to be paid has perhaps been that the concept has also become increasingly complicated. But such developments seem to fit in with the ever more complex nature of modern armed conflict. Harmen van der Wilt analyses the ‘superior-subordinate’ relationship in the case of a de facto military commander, Halilović being the chief of the Supreme Command Staff of the Army of Bosnia and Herzegovina in 1993. This case focuses on the superior-subordinate relationship and the ensuing ‘material ability to prevent or punish the crimes’. The Appeals Chamber holds that the gist of superior responsibility is ‘effective control’ over subordinates and that implies the ‘material ability to prevent the crimes or punish the perpetrators’. Another issue the Appeals Chamber had to address was whether Halilović really had the opportunity to prevent or punish the war crimes at stake. Was he in fact able to exert ‘effective control’? In the view of the Appeals Chamber, Halilović was not in that position. In his detailed analysis Van der Wilt illustrates that determining whether a military commander has such capacity eludes the ‘binary’ approach of the doctrine, i.e., that people are either under or in control. It can be a very demanding task to adequately assess the actual situation (as it was in this case). Professor Van der Wilt concludes his article with the suggestion that the sheer difficulty of the doctrine of superior responsibility might explain the growing popularity of the “more blunt instrument of participation in a Joint Criminal Enterprise”.

The concept of Joint Criminal Enterprise also played a role in the case of Aloys Simba, a career military officer in the Rwandan army, which was decided by the Appeals
Chamber of the ICTR. Simba was allegedly involved in no less than five massacres. The Trial Chamber had found him guilty of genocide and extermination as a crime against humanity and had sentenced him to 25 years’ imprisonment for his involvement in two of the massacres. In respect to the three other atrocities, the Trial Chamber found that Simba had not participated in a Joint Criminal Enterprise. Both the Defence and Prosecution appealed. However, on 27 November all grounds of Appeal were rejected.

In his comments on the Simba Appeals judgement, Roland Adjovi critically examines the reasons for these rejections. Simba’s possible liability due to his involvement in a Joint Criminal Enterprise was dealt with by the Appeals Chamber in its rejection of the two grounds of Appeal put forward by the Prosecution. Adjovi’s final remarks concern the length of the sentence. The Prosecution had challenged the 25-year sentence, arguing that it was too lenient in light of the Trial Chamber’s conclusion that Simba was a principal perpetrator of the genocide. However, the Appeals Chamber decided not to curtail the Trial Chamber’s discretion in this respect and confirmed the sentence of 25 years.

The International Court of Justice has decided yet another boundary dispute in the Caribbean, this time between Honduras and Nicaragua. In its 60-year history, the ICJ has certainly made an important contribution to greater stability (and peace) in that region. Between Nicaragua and Honduras alone, it has been involved in boundary disputes on no less than three occasions. Martin Pratt, an expert on such conflicts, explains the ICJ judgement of 8 October 2007, which concluded the most recent case to the broad satisfaction of both governments. In the course of the proceedings the case evolved beyond maritime delimitation to include a question of sovereignty over ‘a cluster of cays’, between 30 to 40 nautical miles from land. Consistent with previous jurisprudence, the Court determined sovereignty (in favour of Honduras) on the basis of ‘limited effectivités’, steering clear of any application of the uti possidetis juris principle. Pratt considers the decision of the maritime boundary as generally balanced and acceptable although the Court chooses not to begin by defining the ‘equidistance line’ (as seemed to have become settled practice in maritime boundary adjudications), but rather embraces ‘bisector methodology’. However, his criticism of the judgement focuses more on some of the technical aspects of the delimitation as opposed to the choice of approach itself. In the author’s view, the Court is well advised with respect to technical matters to follow the example of recent delimitation cases by arbitration tribunals, notably in Barbados v. Trinidad and Tobago and Guyana v. Suriname.

Yoshifumi Tanaka comments on the latter rather intriguing case. On 3 June 2000, the maritime boundary dispute between Guyana and Suriname risked deteriorating into a military conflict between the two states when the Government of Suriname decided to forcefully resist activities in a concession granted by Guyana in the disputed area. The Tribunal found Suriname’s action an illegal threat of the use of force under international law but in the end it decided not to award damages to Guyana because of a lack of satisfactory proof of those damages. In respect to the delimitation of the maritime boundaries, Tanaka finds that the Award follows current international practice in maritime delimitation cases including the return to prominence of the ‘equidistance principle’. In

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1 In Volume 2, No. 1 (2007) of the HJJ-JJH, Professor Tanaka wrote on Barbados v. Trinidad and Tobago.
this respect the author believes that the ‘bisectoral methodology’ followed by the ICJ in the Honduras v. Nicaragua case is not entirely uncontroversial, notwithstanding the Court’s cautious statement that ‘equidistance remains the general rule’. As a whole he considers that the Guyana v. Suriname Award further enriches existing case law relating to maritime delimitation.

As usual, this fully bilingual issue of the HJJ-JJH concludes with a review of the decisions of The Hague’s international tribunals, courts and organisations produced in the period covered (August to December 2007).

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