

The State of International Law in The Hague:

Delicate issues in international criminal law

Harry Post *

This issue of the *Hague Justice Journal-Journal judiciaire de La Haye* (HJJ-JJH) contains two commentaries on decisions by international criminal tribunals, and two more theoretically focussed contributions emerging from two important practical problems. In addition, Professor Yves Daudet reflects on The Hague Academy of International Law, the oldest of the academic institutions in The Hague. I am pleased to say that this issue is again a happy mixture of contributions by both very senior, experienced authors and by younger talents.

Gabriël Oosthuizen and *Robert Schaeffer* discuss the ever more pressing issue of finding a solution for carrying out the ‘residual functions’ of the *ad hoc* tribunals after their closure. *Linda Keller*, in what is the longest and most detailed analysis presented in HJJ-JJH since it was first published in 2006, assesses the delicate ‘dichotomy’ of peace and justice as faced by the International Criminal Court (ICC) in respect to the situation in Northern Uganda. The issue opens, however, with an entirely different subject: The Hague Academy of International Law.

Ever since 1923 the summer courses of the Academy have hosted a significant segment of the world’s future international lawyers. In particular, the General Courses in both International Public and International Private Law have consistently been taught by the most prominent international lawyers; the more than 325 volumes of the ‘*Recueil des Cours*’ (*Collected Courses*) of the Academy are a lasting testament to the salience of The Hague Academy of International Law’s achievement.¹ The highly topical 2008 programme demonstrates that the Academy is at present a modern academic institution where the legal subjects most relevant in modern international society are still taught by excellent international lawyers. The programme for this summer is included in the reflection on the

* Harry Post is General Editor of the HJJ-JJH and Editor-in-Chief of the Hague Justice Portal

¹ Since January 2008 the *Collected Courses of the Hague Academy of International Law/ Recueil de Cours de l’Académie de droit international de La Haye* also have been made available in digital form, published by Martinus Nijhoff Publishers (a division of Royal Brill Publishers, Leiden); see: www.nijhoffonline.nl

history and current state of this venerable institution by Professor *Yves Daudet*, Secretary General of The Hague Academy.

In a thoroughly researched and creative article, Professor *Linda Keller* analyses the ‘peace versus justice’ dilemma in which the ICC seems to find itself as a result of Prosecutor Moreno-Ocampo’s investigation into the situation in Northern Uganda. In 2005 (amended in 2007), the ICC Prosecutor issued an arrest warrant for Joseph Kony, leader of the Lord’s Resistance Army. He is charged with 12 counts of crimes against humanity and 21 counts of war crimes. Following an in-depth examination of the possibilities in the Court’s Statute to drop cases, including their deferral to Alternative (local) Justice Mechanisms, *Keller* develops a set of guidelines to help the Prosecutor decide whether or not such alternative mechanisms are appropriate, taking into account the wider objectives of criminal justice to which the ICC is committed. Regarding the situation in Uganda, it is clear that the Prosecutor finds himself grappling with a very difficult dilemma, but *Keller* submits that the apparent dichotomy between peace and justice is largely a fallacy. It will be interesting to see whether the ICC will be able to solve this matter in a way that, on the one hand, furthers the case of international criminal justice but, on the other hand, provides an acceptable answer to the urgent and justified request for peace of the peoples in the region. The matter is all the more relevant because in the future, as Professor *Keller* contends, such tension between the pursuit of peace and the fulfilment of justice is likely to re-appear at the ICC.

Gabriël Oosthuizen and *Robert Schaeffer* discuss the so-called ‘residual functions’ of the *ad hoc* tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL). Supervision of prison sentences, determinations on pardons and arranging residual trials of at-large indictees are just some of the functions that need to be performed for years to come following the completion of the main tasks of the *ad hoc* tribunals. The authors address the qualities of several mechanisms that could feasibly assume such functions. In view of the advanced state of the completion strategies, they argue that choices on what is to be done cannot be postponed much longer. However, solutions are not easy to find; they raise fundamental questions of human rights and the choices made may also have a profound impact on the future quality of the evolving international criminal justice system as a whole. The authors also examine the rather formidable procedural hurdles in the case of ICC involvement. From a practical point of view, *Oosthuizen* and *Schaeffer* plead for an extension of the lifespan of the *ad hoc* tribunals in a limited capacity, progressively downsizing them and giving each a limited mandate tailored to their residual function purposes.

As the list of decisions included in this issue of the *HJJ-JJH* from 2008 shows, at this moment in time all these *ad hoc* tribunals are still fully active. *Sophia Kagan* comments on the judgement of the ICTR Appeals Chamber in what is commonly referred to as the ‘Media’ case, *Prosecutor v. Nahimana, Barayagwiza and Ngeze*. These three individuals were alleged to be the masterminds behind a campaign in the Rwandan media to

desensitise the Hutu population and incite them to murder Tutsis during the 1994 genocide. On 3 December 2003, the Trial Chamber of the ICTR had found all three defendants guilty of genocide, direct and public incitement to commit genocide as well as of several counts of crimes against humanity. On 28 November 2007, the Appeals Chamber of the ICTR acquitted all three defendants of genocide and conspiracy to commit genocide. However, the Appeals Chamber upheld the convictions of Barayagwiza and Ngeze for crimes against humanity and upheld those of both Nahimana and Ngeze for direct and public incitement to commit genocide. The sentence of the latter two was commuted from life imprisonment to 30 years and for Barayagwiza, from life to 32 years. In a detailed analysis, *Kagan* discusses several of the most interesting legal issues of this comprehensive and extremely important judgement. She assesses the definition of a ‘protected’ group, which the Appeals Chamber sees in a more limited way than the Trial Chamber did. Foremost however, *Kagan* examines the way in which the Appeals Chamber dealt with direct and public incitement to commit genocide. This ICTR case on the criminalisation of speech inciting genocide is the first since the *Streicher* and *Fritzsche* cases decided by the Nuremberg International Military Tribunal in 1946.

Finally, *Cedric Ryngaert* analyses two issues of great interest raised recently in the Extraordinary Chambers in the Courts of Cambodia (ECCC), another tribunal of the ‘internationalised’ variety. In some of its first decisions the Pre-Trial Chamber of the ECCC immediately faced a problem central to its specific ‘hybrid’ nature’: could a judge with a rather prominent and political role in recent Cambodian history be an impartial judge at the tribunal? Would his participation not seriously jeopardise the high legal standard the Extraordinary Chambers are supposed to live up to? Although *Ryngaert* is aware of the fact that the ECCC is the result of a compromise after difficult and protracted negotiations between the United Nations and the current Government of Cambodia, he nevertheless expresses grave concerns regarding the impartiality of the Cambodian judges. Furthermore, *Ryngaert* examines in detail the Pre-Trial Chamber’s findings regarding the participation of victims in ECCC (pre-trial) proceedings. He looks at this issue from a comparative perspective, drawing parallels with proceedings before the other tribunals and the ICC. The author is impressed by the Pre-Trial Chamber’s decision to allow civil party participation in appeal procedures relating to provisional detention. The ECCC’s balanced decision on this point leads him to the conclusion that the ECCC is “a unique experiment in victims’ participation in international criminal justice...”.

This conclusion, coupled with *Sophia Kagan*’s observation that the ICTR Judgement in the ‘Media’ case is the first of its kind since the *Streicher* and *Fritzsche* decisions in 1946, should give us pause for thought. It may cause us to contemplate once more that we are witnessing unique developments in international criminal law.

(Bologna, May 2008)