

The State of International Law in The Hague

Much activity at the International Court of Justice

*Harry Post**

This issue of the *Hague Justice Journal–Journal judiciaire de La Haye* focuses on proceedings at the International Court of Justice (ICJ). Four of the contributions below comment on cases before the World Court. The remarkable issues underlying the *Macedonia v. Greece* case initiated on 17 November 2008 are scrutinised by *Nicholas Walbridge*. The no less remarkable but more obviously tragic affair leading to the *Djibouti v. France* case, in which the ICJ passed judgment on the merits on 4 June 2008, is examined by *Vincent Pouliot*. The ICJ issued orders of provisional matters in two other cases which both seem more substantial than the *Macedonia v. Greece* and *Djibouti v. France* cases. *Prof. Willem van Genugten* examines the Court’s Order of 16 July 2008 in the *Avena* case between Mexico and the United States; *Dr Phoebe Okowa* comments on the Order of 15 October 2008 in *Georgia v. Russia*.

Although this issue pays special attention to ICJ cases it opens with a very substantial detailed contribution by *Dr Matteo Fiori* regarding the ‘most spectacular news in the last half year from The Hague’, the arrest of Radovan Karadžić. The developments in the case before the International Criminal Tribunal for the former Yugoslavia (ICTY) since Karadžić’s apprehension have been a little less spectacular, although his appearances in court understandably have continued to draw a lot of attention from the public and media. It has taken quite a while to adapt the indictment against him undoubtedly also because its nature and quality is essential for a successful trial. In his article *Fiori* analyses the stages through which the indictment of Karadžić has gone: from the two 1995 initial indictments via the ‘operative’ indictment of May 2000 to the 2008 amended one. International criminal law has developed in a rather crucial way in the eight years since 2000. It comes as no surprise that the Office of the Prosecutor of the ICTY wanted to amend the 2000 indictment. The indictment of 22 September 2008, the so-called ‘Proposed Second Amended Indictment’, clarifies the charges. For instance, it specifies ‘joint criminal enterprise’ liability as the form of Karadžić’s co-perpetration. This mode of liability is predominant in the new indictment, *Fiori* shows: Karadžić acted in concert with different people at different times. Ratko Mladić, still on the run, is identified as a key member of all

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these criminal undertakings. The indictment ‘geographically’ narrows down the charges against Karadžić. Apart from crimes in the Sarajevo and Srebrenica areas, the number of municipalities where crimes are alleged to have been committed is reduced from 41 to 27. Although this reduced indictment, on the one hand, may mean that many serious crimes run the risk of being forgotten, on the other hand, *Matteo Fiori* argues, it could provide a better opportunity to prove the charges and obtain a guilty verdict. He concludes that after the *Milošević* trial this Indictment with its manageable number of eleven counts may provide the Tribunal “...with a golden opportunity to redeem itself in the eyes of its critics...”. *Fiori’s* article is serious if not essential reading for everyone who wants to follow what is likely to be one of the most important war crimes cases ever conducted.

To understand the case concerning *Certain Questions of Mutual Assistance in Criminal Matters* (Djibouti v. France), one needs to go back to 19 October 1995, *Vincent Pouliot* argues. On that day “...the half-charred corpse of Bernard Borrel, a French magistrate and technical adviser to the Djiboutian Ministry of Justice, was found at the bottom of a ravine, 80 km away from the city of Djibouti...” The widow of Judge Borrel initiated an investigation in France to find out what had actually happened to her husband. She doubted in particular the version of the authorities in Djibouti that he had committed suicide. From 2004 the idea that Bernard Borrel had been the victim of a political murder ordered by the Djiboutian authorities was openly ventilated in France. From a story fit for a ‘krimi’ on television, the tragedy of Borrel developed into the major topic of conflict between Djibouti and France, eventually even leading to a contentious case before the ICJ. On 4th June 2008 the Court gave its judgment on the merits. *Pouliot’s* clear and profound commentary provides the background needed to comprehend the Court’s finding and, subsequently, analyses the legal finesse, notably, the unusual ground for the Court’s jurisdiction. France explicitly consented to the jurisdiction pursuant to Article 38, paragraph 5 of the Rules of Court. Such consent has a deferred and *ad hoc* nature which allows the Court to establish a *forum prorogatum*. As is shown here this is not only a rare ground for the Court’s jurisdiction but also a complicated one which has gradually developed in the jurisprudence of both the ICJ and its predecessor the Permanent Court of International Justice. For the first time in over fifty years the Court had a chance to re-affirm the modalities for an application of *forum prorogatum*. Although from this legal point of view the 2008 judgment is important and interesting, in respect to the substance *Pouliot* has to conclude that “...this judgement will probably not put an end to the dispute between the two countries”

Of the two cases in which the ICJ delivered an Order in respect to Provisional Measures, the jurisdictional basis in the case *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation) seems to be the most remarkable. *Phoebe Okowa* provides a thorough analysis of both the wider context of this recent military conflict and of the decision of the ICJ. The Court is supposed to have powers in this case under Article 22 of the 1965 *International Convention on the Elimination of all forms of Racial Discrimination* (CERD) to which both States are party. As neither Georgia nor Russia has accepted the Court’s jurisdiction

as compulsory under the optional clause, invoking the CERD seemed to be a ‘tactical’ choice on the part of Georgia to ensure that Russia would at least be answerable in some way before the Court in respect to the military operation in Georgia in August 2008. The ‘price’ Georgia pays for bringing a case based on the CERD is that in terms of substance it can only claim with respect to rights under that Convention and not under international humanitarian law or under *jus ad bellum* regarding this (primarily military) conflict. Although in its Order of 15 October 2008 the ICJ, indeed, appeared convinced that it had *prima facie* jurisdiction for the purpose of a decision on provisional measures, it is still to be seen if the Court also finds that it has jurisdiction for a judgement on the merits of the case, *Okowa* argues. The Court ordered both Georgia and Russia to ensure that no further violations of the CERD would take place. In respect to the final judgment of the ICJ she concludes that “...it is unlikely that the Court will deliver a judgment that will definitively resolve the central issues underlying the dispute.”

That the ICJ had jurisdiction for its Order for Provisional measures of 16 July 2008 in *Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals* (Mexico v. United States of America) was not an issue as the Court was dealing with a ‘direct’ interpretation sequence to its Judgment of 31 March 2004 in the *Avena* case. Neither did the question whether the request was ‘urgent’ enough for provisional measures to be ordered require much legal argument. It concerned one Mexican prisoner for whom the date of his execution was set and four more who were in imminent danger of having such dates set (in the United States). There was reason for Mexico to be glad about the March 2004 Judgment of the Court, *Willem van Genugten* argues. The ICJ had found that the USA had violated several articles of the 1963 Vienna Convention on Consular Relations and that by way of reparation it has the duty to “...provide (...) review and reconsideration of the convictions and sentences of the Mexican nationals referred to...”

However, the USA was allowed to do so, said the Judgment “by means of its own choosing”. Mexico argued that this involved an obligation of *result* and not just of *means*. Both parties even seemed to agree on this. The roads diverge however, on the answer to the question: to whom does this duty apply? Here the federal structure of the United States appeared to provide a barrier to the United States’ fulfilment of its duties under international law. The Court indeed ordered that the five Mexicans whom it concerned most urgently were not to be executed pending its judgment on the Request for Interpretation.¹ Professor *Van Genugten* also provides a detailed examination of the dissenting opinions of the judges who pronounced against this Order (it was, surprisingly, a close 7 to 5 decision). The last part of his contribution consists of a most interesting review of the legal and in part political (a Presidential Memorandum) reaction to the 2004 *Avena* Judgment in the USA itself. The ICJ case and decisions could not save José Ernesto Medellín Rojas. He was executed in Texas as scheduled, on 5 August 2008. *Van Genugten* concludes: “It is hugely regrettable ... that it did not save his life, or at least that the US

¹ Which was given recently, on 19 January 2009.

Supreme Court and the authorities in Texas did not find grounds to wait with the execution until the ICJ will have decided on the merits.”

This issue is concluded by a reflective elucidation of a rather curious case brought before the ICJ by the former Yugoslavian Republic of Macedonia (or the Republic of Macedonia, or, perhaps FYRO Macedonia, etc.) against Greece. The Court is asked to decide whether Greece has committed “a flagrant violation of its obligations under Article 11” of the 1995 Interim Accord between both States, by objecting to (in fact ‘threatening to veto’) Macedonian membership in “international, multilateral and regional organizations and institutions of which [Greece] is a member”. The Court is in a rather delicate position here, *Nicholas Walbridge* argues, as it almost inevitably will find itself involved in the dispute between both States on what the correct name of the applicant is. He warns that instead of contributing to the resolution of the dispute, as the ICJ is prone to do, it is likely that the case will prolong and even aggravate the basic conflict between the parties. *Walbridge* in fact regrets the Court’s involvement at a moment when the diplomatic solution to the issue of the name seems within grasp. *Walbridge’s* most useful and lucid contribution concludes this issue of HJJ-JJH. It also marks the farewell of *Nicholas Walbridge* as its managing editor. It was a great pleasure to work with him and enjoy together the successful launching of the journal during these three years. He has made a splendid contribution!

(Bologna, January 2009)