

Summaries

Justitiële verkenningen (Judicial explorations) is published nine times a year by the Research and Documentation Centre of the Dutch Ministry of Justice in cooperation with Boom Juridische uitgevers. Each issue focuses on a central theme related to judicial policy. The section *Summaries* contains abstracts of the internationally most relevant articles of each issue. The central theme of this issue (nr. 4, 2006) is *International criminal tribunals*.

The International Criminal Tribunal for the former Yugoslavia (ICTY); a state of the art

G. Sluiter

The article offers some selective and strictly legal observations on the work of the ICTY since its creation in 1993. Being the first international criminal tribunal since 'Nuremberg' and 'Tokyo', the ICTY has contributed tremendously to the development of international criminal law. As a result of the work of the ICTY one can now speak of a 'system' of international criminal law, with its own general principles. Although many positive elements can be identified the ICTY is also subject to criticism in important aspects of its work. Firstly, the law has sometimes been established too hastily without sufficient anticipation on future developments. Secondly, the judges have at occasions wrongly applied customary international law and have taken risks in expanding the scope of international criminal liability. Thirdly – and most importantly –, the development of the law of international criminal procedure, in the form of a 'hybrid' model, has failed, as evidenced by the trials of extreme duration.

The Rwanda Tribunal: a valuable exercise or a waste of money?

L.J. van den Herik

The situation in Darfur and the persistent call for more appropriate action by the international community has often been compared with the Rwanda tragedy in 1994 and the lack of proper action then taken. Given the fact that the UN Security Council has now referred the case of Darfur to the International Criminal Court (ICC), the question arises to what extent the Rwanda Tribunal can serve as an example for the ICC. More generally, the question is whether expensive tribunals far away from the crimes scene should deal with these

cases or whether it is actually preferable that national courts undertake to prosecute the perpetrators. Based on the experiences of the Rwanda Tribunal, the article demonstrates that there is certainly still a role for international criminal tribunals to play, and despite the many criticisms that can be made to the Rwanda Tribunal, the overall conclusion is that the Tribunal was a valuable exercise.

Mixed tribunals and high expectations

A. Nollkaemper and S. Nouwen

The article discusses the advantages and opportunities of mixed tribunals for the prosecution of international crimes. However, it also warns for unrealistic expectations. The mixture of national and international participation, occurring in the establishment and trial process of these courts, creates potential for strengthening both the domestic and the international legal order and for combining the assets of purely domestic and purely international prosecution. However, in order to be able to fulfil this potential, mixed courts should be specifically designed for and tailored to the identified potential advantages. Furthermore, some obstacles are inherent in the prosecution of international crimes and thus cannot be overcome by mixed courts either. These warnings are important, as unrealistic expectations of mixed courts jeopardise rather than boost their potential by causing disillusionment in courts and the rule of law in general.

Violence in former Yugoslavia; general explanations and individual motives

F. de Vlaming

The article describes the motives of Yugoslav perpetrators of mass violence (1991-1995) who have been prosecuted by the International Criminal Tribunal for the former Yugoslavia (ICTY). On the basis of a case study of mid and low level perpetrators from the western Bosnian district of Prijedor, the central question considers the extent to which this groups' motives fit into the existing historical-sociological accounts of the Yugoslav last war as formulated by Zwaan (2001) and others. These studies describe the collapse of the Yugoslav Republic and the subsequent search for a new identity as leading factors for the occurrence of violence. This study has found that the war crimes committed by the district level political cadres seem to have been the result of a pure lust for power; while it was

the dynamics and the break down of norms within a small social entity such as a detention camp that influenced the lower levels of perpetrators such as the camp guards.

State cooperation and international criminal tribunals

G.J.A. Knoops

The article focuses on the emerging and underexposed topic of state cooperation before international criminal tribunals. Based on an analysis of the case law of the European Court of Human Rights (ECHR) and international criminal tribunals, it addresses the impact of the principle of equality of arms on state cooperation and the tension between these two subjects. The author develops the view that a fair application of the principle of equality of arms on state cooperation before these tribunals is hampered by the reality and practice that state cooperation is subjected to duality. States tend to rely also on real politics when dealing with requests to turn over evidence to international criminal tribunals. This may especially undermine the principle of equality of arms when it concerns the defence. Therefore, the author canvasses a more extensive interpretation of this principle in order to safeguard defence rights within international criminal proceedings.

The ICC and the role of victims

H. Verrijn Stuart

The International Criminal Court (ICC) is the first international tribunal giving victims the right to active participation in the proceedings. While at the ad hoc tribunals the victims mainly were involved in the role of witnesses, at the ICC they will be able to express their views and concerns, hear witnesses, read documents and claim damages or ask for reparations. This new approach is considered a giant leap forward by non governmental organisations (NGO's), human rights groups and victims organisations all over the world. Since the Rome Statute and the Rules of procedure and Evidence of the ICC are the result of compromises made by the drafters, the actual reality of victims as an influence at the ICC still has to be carved out. Already in the DRC situation (Democratic Republic of Congo) the first fiery debates between the Pre-Trial Chamber and the prosecution about the involvement of victims at the stage where not even a suspect has been identified, show that there is a long way to go from theory to practice. The trial at the ICC

will be dominantly Anglo-Saxon in approach, with two opposing parties presenting their case. The Chamber will not receive a dossier with evidence in advance and thus will not be able to place the information received by the victims in the context of the upcoming case. The Pre-Trial Chamber seems to be using the victims to force the prosecutor to give information to the judges, even in the earliest stages of his investigation. And although all parties agree that the participation of victims is of the utmost importance, concerns about the security of victims, witnesses, investigators and other ICC officials are major obstacles whenever they go to the areas where violent conflicts are still raging. The ICC is proceeding in three situations, Northern Uganda, The Democratic Republic of Congo and Darfur in Sudan. Close reading of the first documents regarding the participation of victims in the DRC situation gives an impression of the many questions the ICC will have to face.

The forgotten dimensions of 'transnational justice' mechanisms; cultural meanings and imperatives for survivors of violent conflicts

B. Pouligny

Behind 'transitional justice' mechanisms lay a host of unremarked and unanalysed cultural meanings. This essay concentrates on the ones conveyed by the survivors of violence themselves as their interpretations of justice may differ greatly from the one implicitly promoted (albeit with variations and ambiguities) by the 'international community'. The analysis shows how far these subjective dimensions impact the way the different actions aimed at addressing past abuses and reforming post-conflict societies are perceived. The various mechanisms known as part of 'transitional justice' also proceed from a certain interpretation of reality, and therefore belong to the vast domain of the practice of producing narratives and creating meaning. In this process, we often tend to forget that several registers of truth coexist but do not necessarily coincide. This is a second dimension in which the highly subjective dimensions of any judicial process remain the most neglected today. This has not only to do with individual and collective memories but also with individual traumas and their collective implications, an aspect very badly considered so far in post-conflict rebuilding strategies. The article suggests some avenues for research and assistance to better integrate these dimensions, and to better address the imperatives faced by survivors trying to reconcile their past.