
Editorial

Book Reviewing and Academic Freedom

1. Standing Criminal Trial in France

Readers of *EJIL* will be aware of the two book review websites which have been associated for some time with this Journal and of which I am, too, Editor-in-Chief: www.globallawbooks.org and www.Europeanlawbooks.org. You will find links to them on the very Homepage of www.ejil.org and www.ejiltalk.org. On 25 June 2010 I will stand trial before a Paris Criminal Tribunal for refusing to remove a book review written by a distinguished academic to which, however, the author of the book in question took exception. The matter is of serious concern to *EJIL*, but more generally to academic book reviewing in general. At this point, it would be best to allow the written record to speak for itself.

2. Res Ipsa Loquitur

On 3 March 2006 we received from Martinus Nijhoff Publishers the book *The Trial Proceedings of the International Criminal Court. ICTY and ICTR Precedents*, written by Dr Karin N. Calvo-Goller. The subject seemed important and we turned to the distinguished scholar, Professor Thomas Weigend, Dr. jur., Professor of Law, Director of the Cologne Institute of Foreign and International Criminal Law and currently Dean of the Faculty of Law at the University of Cologne, to review the book. He agreed. On 12 March 2007 we received his book review. His review fell into our category of Short Reviews. There did not seem anything untoward in his review and it was duly published. You may read his review here:

<http://www.globallawbooks.org/reviews/detail.asp?id=298>.

On 12 June 2007 I received the following letter from the author of the book, Dr Calvo-Goller: (emphases in the original)

Dear Prof. Weiler,

When updating on recent decisions of the ICC, I saw Prof. Weigend's review of my book 'The Trial Proceedings of the International Criminal Court, ICTY and ICTR Precedents', published on the Global Law Books internet site.

I hereby ask you to remove Prof. Weigend's review from the Global Law Books site, and from any other related site under your direction or control without delay.

Prof. Weigend's review goes beyond the expression of an opinion, fair comment and criticism. It contains false factual statements which the author of the review, a professor of criminal law, could not reasonably believe to be true.

Prof. Weigend's review is libellous. It may cause harm to my professional reputation and academic promotion.

The review is an indirect insult to former ICTY and actual ICC officials, defense counsel of the ICTY and ICTR, who took the time to read and comment on previous drafts of the book.

A review of my book was published in 17 *Criminal Law Forum* (2006) 355–359 (herewith attached). This review was written by Judge Kai Ambos, and as mentioned in the review, he is Professor of Criminal Law, Criminal Procedure, Comparative Law and International Criminal Law at the University of Göttingen. Prof. Ambos published extensively on issues covered by the Rome Statute (six of his works are cited in my book). From the information available on his internet site, Prof. Ambos was also a guest lecturer of the Office of the Prosecutor at the ICC <International Criminal Court: Guest Lecturers>, and participated in the drafting of the Rome Statute as the representative of Germany, among others <Fletcher's *The Grammar of Criminal Law*>.

I have never met Prof. Ambos, nor have I been in contact with him through any academic institution, and it was only recently that it became known to me that he wrote the review.

There is no reason for Prof. Ambos to review my book as he did, if this was not his opinion. The same for Prof. Tigar, a long time defence counsel in criminal matters (his commentary is attached).

With all due respect, anyone familiar with the Rules of Procedure and Evidence of the ICC knows that the said Rules were adopted by the Assembly of States Parties and not by judges.

(see <http://www.icc-cpi.int/about/ataglance/establishment.html>).

In the first paragraph of the review, Prof. Weigend writes 'The Court . . . can rely on . . . its judge-made Regulations'.

Examples of false statements contained in Prof. Weigend's review:

' . . . in the main part of her book she simply restates the contents of relevant parts of the ICC Statute and the Rules of Procedure and Evidence' (emphasis not in original)

Open the book anywhere you choose to see for yourself that this statement is false (NYU Library has the book).

Prof. Weigend's statement:

'augmented by references to the scant English-language literature available at the time of her writing' (emphasis not in original) is factually false, it makes abstraction of over 1,000 references to relevant books and articles, and to some 300 references to the *ad hoc* Tribunals decisions and judgments.

I am aware of the extent of freedom of expression under the First Amendment to the Constitution of the United States (freedom which, as you know, is less extensive in EU countries). However, the extent of that freedom ends where its exercise damages the reputation of an individual.

Prof. Weigend's review presents all the elements for a publication to be considered libellous: the information was published, I was directly identified, the review is defamatory for my reputation, information contained in the review is false, and Prof. Weigend is at fault.

Moreover, Prof. Weigend's statements such as

'An author who maintains that, in an 'inquisitorial' system, 'the defendant is expected to cooperate with the prosecution' can hardly be expected to sensibly analyze. . .'

shows that Prof. Weigend choose not to relate to the implicit consequences deriving from non-cooperation with the prosecution in inquisitorial systems (from which I come and in which I practiced), or to cases such as *Prosecutor v. Blaskic*, (Judgment, ICTY Case No. IT-95-14-T, 3 March 2000), stating that '[t]he Trial Chambers have, on several occasions, ruled that failure to co-operate constitutes an aggravating circumstance' (para. 774).

There are other statements in Prof. Weigend's review which, in view of the existing jurisprudence on the subject, whether in the US or in Europe, could not be considered as expression of an opinion, a fair comment or criticism.

In order to avoid any misunderstanding, I hereby inform you that I disagree with the publication of Prof. Weigend's review of my book, by any medium or means whatsoever, without prejudice.

Please remove the said review from the Global Law Books internet site, and from any other related site under your direction or control without delay

Best regards,

Dr. Karin Calvo-Goller

I replied to Dr Calvo-Goller with the following letter

Dear Dr. Calvo-Goller (Dear Karin)

Thank you for your letter of June 12th.

Since we have known each other for many years and have been friends I would like first to make some personal comments.

It is, I know from personal experience, very unpleasant to read a critical book review of one's own book. Some of my books over the years have seen reviews far more critical than the one published of your book in our Global Law Books website. I also know, from personal experience, the frustration of having a book severely criticized by one reviewer when other reviews lavish praise. Most recently one of my books was severely criticized – as was I personally – in the *European Law Review*, whereas the very same book was named by the influential German *NJW* as their selection as one of the five best law books to appear in the year of its publication. On those occasions I also felt that the reviewer misunderstood, misrepresented etc. And, of course, one worries as you do, on the effect a bad review might have on one's professional reputation as an academic and as a practitioner of law – I am both, as you know. The experience can be frustrating and painful and as your friend I am sorry about this. I think, however, that your reputation would suffer even more if you emerged as someone who tried to suppress a critical book review of the kind published by Globallawbooks.org. That is my advice to you as a friend.

I am, however, also the Editor of the GlobalLawBooks.org and EuropeanLawBooks.org and in that capacity there are a different set of considerations that I have to consider. I have some experience as a Book Review Editor. I served for many years as the Book Review Editor of the *European Journal of International Law* and also as the Book Review Editor of the *World Trade Review*. I have seen all manner of reviews and from time to time received letters from unhappy authors. In these long years of experience I have never received a letter such as yours both in content and tone. It departs from what in my view are considered common conventions of academic discourse and academic publication.

Book reviews are not published ‘with the agreement’ of the author of the book in question. So having your agreement to the publication of a review of your book is not really germane to a decision whether or not to publish a review or to suppress a review. To accept otherwise would, I am sure you will understand, signal the death of the tradition of independent book reviewing.

You will also, of course, understand that publication of a book review, negative or positive, does not mean that the Editor agrees, one way or another, with the review in question. One does not read all the books that come in for review and inevitably one relies on academic citizenship and self policing for the integrity of the enterprise, otherwise, again, book reviewing, so central to academia and the profession would not be sustainable.

It is a very extreme request to ask for a critical review to be removed. I could imagine acceding to such a request only in most egregious circumstances of, say, bad faith, conflict of interest etc. In reviewing a complaint such as yours the task of the editor is not to engage in a *de novo* review, but to assess whether the review falls into one of those extreme categories of egregious unreasonableness.

We try our best to choose our reviewers with care. Professor Weigend is a distinguished academic in the field. He is professor of Criminal Law and Director of the Institute of Foreign and International Criminal Law at the University of Cologne. He is a prolific author and very well respected in the profession.

Because of the urgency of your request I have conducted a preliminary review of your complaints. I did have your book at hand when I conducted this review.

Here are my findings following the order of the various complaints you make:

1. I cannot accept your overall contention that the review in question contains statements that the reviewer, Professor Weigend ‘... could not reasonably believe to be true.’ Whether or not one agrees with his review, I could find nothing to impugn the good faith or integrity of the reviewer. If there are factual mistakes in his review, there is nothing to suggest that any such mistakes (if indeed there are mistakes) were not made in good faith. Mistakes do happen.

2. As a matter of principle I cannot accept the notion that a critical book review constitutes an ‘indirect insult’ to readers of previous drafts of any given book. That happens all the time.

3. I am very glad for you that other reviewers, such as Professor Ambos, reviewed the book favorably. But it is a very normal occurrence that the very same book is reviewed favorably by one reviewer and critically by another. I do not doubt for one

moment the integrity of Professor Ambos (it is really not necessary to point out to me that you never met him etc.) but if, as seems to be the case, you are trying to suggest that because there is a favorable book review by one distinguished reviewer, the integrity of another, unfavorable review, is automatically called into question, I must politely express my dissent. The Talmud has long ago taught us that even contradictory conclusions can both be the living word of God. (Ellu veEullu Divrey Elohim Chayim).

4. You take issue with the first statement in the review which you cite as saying: 'The Court. . . can rely on . . . its judge-made Regulations' in relation to which you say: 'With all due respect, anyone familiar with the Rules of Procedure and Evidence of the ICC knows that the said Rules were adopted by the Assembly of States Parties and not by judges.' (The emphasis is in your letter). I think you are trying in this case to call into question not the integrity but the professional competence of Professor Weigend.

The ellipses in your quote slightly but meaningfully change what Professor Weigend wrote in his Review: He wrote:

'The Court does not exactly set out into uncharted territory because it can rely on its Statute, on extensive Rules of Procedure and Evidence and on its judge-made Regulations.'

As you can see, he says that the Court can rely on three sources: The Statute, the extensive Rules of Procedure and Evidence (which, indeed, as you point out were adopted by the Assembly of State Parties) and on its judge-made Regulations (my emphasis).

I am not an expert, like you and Professor Weigend, of International Criminal Law and the procedure before the ICC. But with all due respect am I wrong in stating that the Rome Statute provides, *expressis verbis*, in Article 52 that '[t]he judges shall, in accordance with this Statute and the Rules of Procedure and Evidence, adopt, by an absolute majority, the Regulations of the Court necessary for its routine functioning?' To a non expert such as myself it would seem that in this case Professor Weigend got it absolutely right and in fact the mistake might be yours. (If I am not mistaken Article 51 provides that the judges may even adopt provisional rules of procedure.)

I examined too the examples of alleged false statements you give.

5. You take exception to his evaluation that the book simply restates the contents of relevant parts of the ICC Statute and Rules of Procedure. This, I am sure, is a painful statement to read by an author of a book such as yours. But the extent to which a book on, say, rules of procedure goes meaningfully deeper than their primary source is a matter of evaluation by the reviewer and not, in my view, as your letter suggests, a clear cut factual matter which is susceptible to an easy true-false test. What is profound in the eyes of one can be superficial in the eyes of another. I did look into the book, though because of the urgency of your letter and your telephone call to my office, I could only do it in a preliminary manner. I do not necessarily agree with the reviewer on this point, but I am satisfied that his comment is not

such that would take it outside an acceptable difference of opinion among reviewers into the category of falsehood.

6. You take exception to his statement about ‘references to the scant English language literature. . .’ and you claim that this statement ‘. . . is factually false, it makes abstraction of over 1000 references to relevant books and articles, and to some 300 references to *ad hoc* Tribunals decision [sic] and judgments.’

It is difficult for me to respond because I am not sure what the phrase ‘it makes abstraction’ means in the English language. But I think you are under a misapprehension of what Professor Weigend actually said. He did not, as I think you believe, criticize the scant references in your book – in which case it would indeed be reasonable, as you do, to point out that the book has 1000 references to the relevant books and articles and 300 references to Tribunal decisions and judgments. What I believe Professor Weigend wrote was that the English language secondary literature (books, articles) on the subject of your book available at the time you wrote it and on which you relied, was, in his view, scant. That, in and of itself, is not a derogatory statement about your book.

7. Finally, his statement on the ‘inquisitorial’ system may not be shared by others and might even be a wrongheaded opinion, but that is his opinion and hardly brings the book into the category of falsehood.

My conclusion from this preliminary enquiry is that the heavy burden needed in my eyes to suppress a book review has not been met. In fact not even a *prima facie* case has been made. I found nothing to impugn the integrity or professionalism of the reviewer and, independently of whether or not I share his opinions or conclusions on your book, I must decline your request to suppress the book review by removing it from the site.

I do, however, want to make two proposals.

1. I am sending your letter to Professor Weigend for his reaction. If he wishes to change something in his review, I will consider such a request by him. (That would be sailing into uncharted water – another example of how the internet changes our publishing habits conditioned by hard copy.)

2. You will also note that at the end of each review there is a button which invites comments. This has been used once before on Globallawbooks.org. It would be perfectly in order for you to write a comment which, after editorial approval, could be posted on the website and seen by anyone who reads the review. If you decide to make use of this facility, I kindly ask you to be judicious in your manner of expression.

With friendship

Joseph Weiler (by email attachment)

On 21 June, in reply to my response I received a second letter from Dr Calvo-Goller:

Dear Prof. Weiler,

In order to stop the continuation of the damage caused and that may be caused by the statements in Prof. Weigend’s review on my book to my professional reputation, I ask you for the time being, to remove this review from the Global Law Books site.

I look forward to be informed of Prof. Weigend's position relating to my letter dated 12 June 2007.

Best regards,

Dr. Karin Calvo-Goller

I replied on 22 June 2007:

Dear Dr Calvo Goller,

Thank you for your second letter in which you ask me temporarily to remove the book review of Professor Weigend from GlobalLawBooks.org. I note that your letter to me was copied by you to Professor Weigend.

I shared your first letter to me with Professor Weigend as well as my reply to you. The position of Professor Weigend is that he stands by his book review as published. We stand by our reviewer and by the integrity of his review. Of course, as I explained already, publication of a review does not mean that we either agree or disagree with his opinions and evaluations expressed in such reviews.

In my first letter to you I explained in detail, covering all the points raised in your first communication, why I found no case, not even a *prima facie* case, to remove the book review of Professor Weigend from the site I edit. Even to remove it temporarily, as you now suggest, would in my view compromise the academic integrity of the GlobalLawBooks.org and violate important canons of academic freedom and freedom of speech.

Although this is not the custom of most Book Reviews, we offer the possibility of writing a comment on reviews published by us. After editorial approval, that comment would be published alongside the book review. It may even be the beginning of a public dialogue with the reviewer if he elects to respond to the comment. Very few authors, whose books are negatively reviewed, have such a facility. In the circumstances, I think this is a fair and judicious manner in which to deal with your complaint.

I regret, however, that for the reasons explained in my earlier letter to you, I am unwilling to remove the book review, not even temporarily.

With good wishes

Joseph Weiler

With that, I believed, the matter rested. More than a year later, on 26 September 2008 I received a Subpoena to appear before a French Examining Judge in connection with an investigation of alleged criminal libel based on a complaint made by Dr Calvo-Goller essentially replicating the complaints in her first letter to me.

In a brief hearing in Paris shortly thereafter it was explained to me by the courteous Examining Judge that, under French law, in cases such as this her role was purely formal – to establish that I am who I am and that it was indeed I who published the Book Review in question – both questions to which I readily confessed. She explained that unlike other areas of the criminal law she had no discretion to examine the merits of the complaint. The Examining Judge further explained that,

in libel cases, all investigations of the merits of the case are exclusively reserved for the Criminal Court itself and, therefore, as a direct consequence of the complaint being filed, it was necessary that I be referred to the Court for trial. The date for the trial has now been set for 25 June 2010.

3. Some Reflections

I believe that my offer to publish a response by Dr Calvo-Goller alongside the Review of Professor Weigend, so that anyone reading the review would immediately be able to read her reply, would have amply and generously vindicated all possible interests of the author of the book. I continue to believe that in all the circumstances of the case as outlined above, removing the review by Professor Weigend would have dealt a very serious blow to notions of freedom of speech, free academic exchange and the very important institution of Book Reviewing.

Consequently, I am saddened by the actions of Dr Calvo-Goller. I believe that in the circumstances of this affair, her action of instigating a criminal libel case against me for refusing to remove the book review is misguided and inconsistent with the most fundamental practices of all academic institutions with which I am familiar and with traditional academic discourse. It is not for me to criticize the French legal system under which I will stand criminal trial, but I would simply emphasize that the fact of being referred to trial before a criminal court does not, unlike many other systems, carry the implication that any public authority in France has concluded that there is any substantive merit in the complaint brought by Dr Calvo-Goller. Rather, the referral by the state follows automatically from the Criminal Complaint filed by Dr Calvo-Goller.

I very much hope that we will prevail before the Criminal Tribunal of Paris. Any other result will deal a heavy blow to academic freedom and change the landscape of book reviewing in scholarly journals, especially when reviews have a cyber presence as is so common today. Even if we do, the very fact of being subject to a criminal process by French public authorities and having to undergo a criminal trial in these circumstances coupled with the heavy financial burden of defending such a case – expenses which are in large part not recoverable even if acquitted – constitutes a serious chilling effect on editorial discretion, freedom of speech and the very important academic institution of book reviewing. When the dust settles it may well be worth raising the question whether the French law which so easily allows a private complaint to become a public prosecution well balances the various competing interests in cases such as this. We would hope to hear from our French colleagues and readers.

4. An Appeal for Assistance

Readers and friends of the *European Journal of International Law* may be of moral and material assistance in the following ways:

a. You may send an indication of indignation/support by email attachment to the following email address EJIL.academicfreedom@Gmail.com Kindly write, if possible, on a letterhead indicating your affiliation and attach such letters to the email. Such letters may be printed and presented eventually to the Court. Please do not write directly to Dr Calvo-Goller, or otherwise harass or interfere in any way whatsoever with her right to seek remedies available to her under French law.

b. It would be particularly helpful to have letters from other Editors and Book Review Editors of legal and non-legal academic Journals concerned by these events. Kindly pass on this Editorial to any such Editor with whom you are familiar and encourage him or her to communicate their reaction to the same email address. It would be especially helpful to receive such letters from Editors of French academic journals and from French academic authors, scholars and intellectuals.

c. Finally, it will be helpful if you can send us scanned or digital copies of book reviews (make sure to include a precise bibliographical reference) which are as critical or more so than the book review written by Professor Weigend – so as to illustrate that his review is mainstream and unexceptional. You may use the same email address EJIL.academicfreedom@Gmail.com

I understand, of course, that there may be some readers who disagree with my actions, including the use of this Editorial space for a matter which concerns me personally. I want to believe that I would write in the same vein and use the same space if it were an Editor of another learned Journal who was facing similar threats.

In this Issue

Turning from the Ridiculous to the Sublime, this issue brings to a close our 20th Anniversary volume. In the previous three issues we commissioned symposia on three central themes in the life of international law over the last 20 years: general systemic issues in Issue 1, the Use of Force in Issue 2 and Globalization in Issue 3. In all three symposia we attempted to highlight theoretical innovation or doctrinal developments in the last two decades. In this issue we have collected the most interesting of the many reactions which we received to the symposia contributions.

We also publish a symposium – the topicality of which is self-evident – on the new debate about the Crime of Aggression. Professor Andreas Paulus, member of our Scientific Advisory Board, served as Special Editor for the symposium for which we extend warm thanks.

With just slightly imperfect timing we mark the anniversary of the Genocide Convention with three contributions of different genre: first, an enlightening tribute to Ralph Lemkin – one of the architects of the Convention, written by Sergey Sayapin. Second, we publish in a genre somewhat reminiscent of our occasional series on the European Tradition in International Law a fascinating article of considerable historical interest and acuity on Lauterpacht and Lemkin in this same context authored by Ana Filipa Vrdoljak. Finally, in our occasional series on the critical review of

jurisprudence we publish a critical review by Amabelle C. Asuncion on the relationship between state and individual culpability for genocide.

The featured article in this issue, by a first time author to *EJIL*, Sarah Miller, on Extraterritorial Jurisdiction under the European Convention is thoughtful, provocative and despite its relative brevity will, in our view, have considerable shelf life.

A Review Essay by Niels Petersen on Rationality and International Law completes this issue. We believe there is much worth in Review Essays, especially when they cover several books. We treat them as veritable articles, they are peer reviewed, and – just like ‘crossover’ automobiles – are the real thing! We encourage readers thinking of a Review Essay to communicate with our Book Review Editor.

The Last Page features a poem by Richard Falk, yes, The Richard Falk.

House Keeping

Starting January 2010 *EJIL* will implement the ScholarOne Manuscript Management System. All new manuscripts will henceforth have to be submitted via this system. With an ever-increasing manuscript submission rate and our Editorial offices split between Florence and New York, the ScholarOne Manuscript system will assist in streamlining operations and decreasing article turnover time. The ScholarOne Manuscript system is well designed to provide additional comfort for authors (manuscript status may be viewed;), ease and efficiency for reviewers (the system provides a live link to reviewers and a template for review) and additional control and flexibility for our Editors (additional assurances regarding our double-blind review system; sophisticated manuscript tracking) et cetera. We look forward to implementing this system to serve you – our readers, authors, reviewers and friends – more ably in the years to come.

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