ADVISORY COMMITTEE ON INTERNATIONAL LAW ISSUES

Comments on the preliminary report entitled "International Humanitarian Law and the Laws of War" by Christopher Greenwood

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1 Introduction

The Governments of the Netherlands and the Russian Federation have drawn up a joint plan to mark the Centennial, in 1999, of the First International Peace Conference. The commemoration will take the form of seminars in The Hague and St Petersburg in mid-May and mid-June 1999, focusing on the three themes that were discussed in The Hague a hundred years ago:

- the peaceful settlement of international disputes;
- international humanitarian law and the laws of war;
- disarmament questions.

Preliminary reports have since been written on each of these themes: by Francisco Orrego Vicuña and Christopher Pinto (peaceful settlement of international disputes), Christopher Greenwood (international humanitarian law and the laws of war) and Hans Blix (disarmament questions). Each report analyses developments in the relevant field of international law, identifies lacunae, and suggests possible ways forward. Prior to the seminars to be held in The Hague and St Petersburg the reports will be debated in regional forums. In January 1999 this debate will be wound up and its conclusions incorporated into the reports, which, thus revised, will form the basis for the seminar discussions.

By letter of 2 November 1998 (ref. DJZ/IR-454/98), the Netherlands Minister of Foreign Affairs asked the Advisory Committee on International Law Issues[1] to advise him on these preliminary reports, to help formulate the Dutch contribution to these discussions.

The following pages contain the Advisory Committee's comments on Christopher Greenwood's report, entitled "International Humanitarian Law and the Laws of War". These comments are arranged as follows:

- chapter 2 contains general observations on the preliminary report;
- chapter 3 discusses the report's structure;
- chapter 4 makes general comments on a section-by-section basis;
- specific comments on individual sections of the report are gathered together in an appendix.

The Advisory Committee wishes to emphasise that where it does not comment on a specific part of the report, this should not be interpreted as an endorsement of the views expressed there.

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[1] The Advisory Committee on International Law Issues advises the Netherlands Government and both houses of the States-General on questions of international law. Its composition is as follows:
Chair: Prof. K.C. Wellens
Members: Dr N.M. Blokker, Prof. T.C. van Boven, Prof. T. Heukels, Dr E. Hey, Prof. B. Kwiatkowska, Prof. P. Malanczuk, Dr E.P.J. Myjer, J.W.H.M. van Sambeek, Prof. N.J. Schrijver, Prof. A.H.A. Soons
Secretary: A. van Woudenberg

2 General observations on the preliminary report

The Advisory Committee wishes to begin by noting that the material dealt with in the preliminary report is extremely important, and that it is essential that this material be addressed in a wide-ranging debate.

The Committee is appreciative of the work that the author has put into this report, and wishes to start by saying that the result is in general well-written and readable, although in places a little on the technical side.

The Committee is pleased to see that the report's emphasis is on improving the enforcement of existing laws, and not on creating new ones. One drawback is the fact that the laws were not written from the vantage-point of protecting civilians (notwithstanding the staggering numbers of civilian casualties that wars have claimed since 1899), although other themes do of course impinge on the question of protection.

The final report will incorporate the outcome of the Rome negotiations on the International Criminal Court. The Committee considers this highly desirable, especially since as it now stands, the report devotes relatively little attention to the punishment of war crimes.

The Committee welcomes the authors' inclusion of a number of developments that could foster compliance with the laws of war (i.e. the ICRC Advisory Service and the Sirus Report).

It is also pleased that the report dwells at length on the requirements of necessity and proportionality in relation to self-defence.

The Committee feels it would be preferable to deal more explicitly with the questions of aggression and armed attack, criteria that determine the lawfulness of self-defence, partly in the light of the definition of the crime of aggression to be arrived at pursuant to Article 5 of the Statute of the International Criminal Court.

The report comments cogently on the relationship between the *ius ad bellum* and *ius in bello*, as well as discussing the links between human rights and the humanitarian laws of war.[1] These comments are well received by the Committee, although one might perhaps have wished for a little more detail. Finally, the preliminary report discusses the differences in the nature and application of laws according to whether the armed conflict concerned is "international" or "internal". The Committee is pleased to see that in the author's view, such differences are in the main unjustified.

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[1] See note 1 to the report, where Greenwood points out that the terms "laws of war" and "international humanitarian law" are used as synonyms. The term "law of armed conflict" is also used as a synonym for "laws of war", although the report's title suggests otherwise. Where Greenwood uses the various expressions interchangeably, the Committee has decided to refer here consistently to the term "humanitarian laws of war".

2.1 Suggested improvements

1. In the Committee's view, the analysis of past experience is insufficient; the author does not devote enough space, for instance, to the experience gained in the Vietnam War, the Iran-Iraq conflict or Iraq's invasion of Kuwait.

2. It would have been appropriate, in a report on the humanitarian law of armed conflict, to include an analysis of the question of why this law has not proved sufficiently effective to date.

3. The report does not discuss in any depth the question of compliance. Perhaps this is related to an informal agreement that the three preliminary reports looked at by the Committee will mainly be debated in The Hague, leaving in-depth discussion of other topics (such as compliance) to St Petersburg. Even so, the Committee feels that since implementation by States is a relatively big problem, it should receive extra attention in the report.

4. It would perhaps be preferable for the report to go into detail more frequently on the relationship between the humanitarian laws of war and human rights.

5. It might perhaps be appropriate to devote some attention to the role of child soldiers.

6. It would be a good idea to include an appendix listing the States that have ratified each of the relevant conventions.

3 Structure of the report

The report is well structured. It would be preferable, however, to reverse the order of sections VI.1 (prosecution of war crimes) and VI.2 (peacetime measures).

It would be useful if the report were to state more clearly which subjects in the field of the humanitarian laws of war were deliberately not discussed, in order to give a fuller picture.

4 General comments on a section-by-section basis

4.1 Section I

Paragraph 2
This paragraph should refer to the problem of the poor level of compliance with the humanitarian laws of war. The question should be posed of whether there is any special reason (characteristic of the humanitarian laws of war) to believe that compliance is a bigger, or different, problem in this case than where other international legal norms are concerned.

4.2 Section II

The Committee is pleased to see that the author has included the "Martens Clause" in this section.

4.3 Section III

Paragraph 22
An important question here is how the specific parts of international law relate to international law in general. The text could be interpreted here as suggesting that the system of international law only exists in order to preserve the connections between its various parts. This would be a misconception. The international legal system is more than the sum of its parts.

Section III.1 should stipulate that the applicability of the humanitarian laws of war need not depend on the reasons for, or lawfulness of, the resort to force.

Paragraphs 43-44
The question should be asked here of where the applicability of the humanitarian laws of war ends. The author should study this question in greater depth. There is also a need, as the author himself indicates, for a study of the full implications of the relationship between the contemporary *ius ad bellum* and *ius in bello* (paragraph 44).

Paragraphs 65 ff.
The Committee is pleased that the issue of the applicability of the humanitarian laws of war in UN operations and the problems raised by the 1994 Safety Convention receive the attention they deserve. More needs to be said, however, on the humanitarian laws of war in relation to the protection of safe areas and the enablement of humanitarian aid in the context of peacekeeping missions with a wider mandate. Another question that needs answering is whether the use of force by peacekeeping forces automatically changes the nature of a conflict.

4.4 Section V

The Committee regrets that section V.2 does not mention the ICRC study of customary law.

4.5 Section VI

Paragraph 167
Regarding the periodic reporting system mentioned by the author, it should be noted that the political will to make such reports is absent in a great many States. Nonetheless, the Committee would favour a proposal that States should report on issues that are relatively less sensitive, such as:

- legislation on the punishment of war criminals;
- the implementation of the Geneva Conventions;
- education in the armed forces.

In addition, even though the reporting system has not yet got off the ground, it might be worth considering an alternative mechanism, which could play a not insignificant role. For instance, in prosecutions of war criminals, the International Criminal Court (or the ad hoc tribunals) could call journalists, medical staff and human rights observers to testify, thus creating a kind of "report" after all.

4.6 Section VII

The Committee is of the opinion that the conclusions tie in well with the report as a whole.

It might be a good idea to add a separate section on implementation to paragraph 189, for instance in the form of an overview of the implementation measures adopted by individual States.

Appendix: Specific comments on individual sections of the report

Section I

Paragraph 4
The observation "... it seems obvious that that law ... achievement" should be supported in a footnote. Alternatively, a fuller analysis should be given of past experience.

Section III

Paragraph 34
This paragraph refers to Security Council Resolution 687, which states that Iraq is "liable under international law for any direct loss, damage ... or injury to foreign Governments, nationals or corporations as a result of its unlawful invasion and occupation of Kuwait". However, the Resolution says nothing about the procedure that should be adopted to enforce this liability.

It should be noted that the approach adopted in the aftermath of the Gulf conflict, as mentioned in paragraph 34, was far from uncontroversial.

Finally, the last words of paragraph 34 (" ... and the criminal responsibility of the State itself") are based on a false premise, as there is no such thing as "criminal responsibility" under international law. The Committee would suggest changing the text to read " ... and the responsibility of the State itself for an international crime".

Paragraph 35
The requirement defined at a) should be lengthened to read "the resort to force is compatible with the United Nations Charter and/or international customary law".

Paragraph 41
The word "mandate" in the sixth line should be replaced by "authorisation".

At "In so far as other justifications ..." it would be best to begin a new paragraph.

Paragraph 42
After the word "mandate" should be added "or an action authorised by the Security Council".

Paragraph 51
The sentence beginning in the fourth line ("Thus, the laws of war ... neutral States") can apply only to States that have not signed and ratified the First Protocol, which does discuss the treatment of the civilian population.

Paragraph 52
The author appears to be suggesting here that Principle 24 of the Rio Declaration constitutes binding international law, which is a controversial view, to say the least. It

would therefore be preferable to add a parenthetical comment concerning the Rio Declaration ("the legal value of which has likewise prompted much comment and controversy").

Paragraph 53
The Committee would deem it appropriate here for the author to indicate where he stands in this matter.

Paragraph 54
The quotation from the Court that is included here can best be moved so that it precedes paragraph 52.

Paragraph 64
This paragraph should include a reference to the Court's case law - the Nicaragua case, for instance (which is quite different from the ICTY's Tadic case). The author should also address the question of the point at which an armed conflict may be said to exist, for the purposes of applying the humanitarian laws of war.

Paragraph 64 does not contain an analysis of past experience.

Section IV

Paragraph 76
The point made in the sentence "A particularly important development ... individuals depended" needs elaboration.

Paragraph 90
The sentence at the end of this paragraph, which states that the Ottawa Convention will supersede Protocol II to the Weaponry Convention, is not entirely correct, certainly where antitank mines are concerned. Adding the words "in part" would correct this problem.

Paragraph 93
This paragraph states that disarmament is the most effective way of ridding the world of particularly inhumane weapons. This proposition needs to be supported with more forceful arguments.

Paragraph 114
The first sentence of this paragraph is supported by only two historical examples; the Committee feels that more are needed.

Section IV.5
The Committee is pleased to see that this section looks at the law of naval warfare in general and the San Remo Manual in particular. On a different point altogether, it finds the use of the phrases "internal conflicts" and "internal armed conflicts" interchangeably in this part of the report rather confusing.

Section V

Paragraph 139
This paragraph makes some important observations on common Article 3 and Additional Protocol II, but the question is how governments can be made to comply - how to prevent them from evading their obligations.

Paragraph 144
The sentence "Additional Protocol II has no equivalent of the provisions of the Second Convention" is not entirely correct. This applies in particular to the subject of shipwrecked persons, which is addressed in Articles 7 and 8 of Additional Protocol II.

Paragraph 148
In the third line, "Protocol I" should read "Protocol II". Moreover, the Committee finds the text of the paragraph unclear. The criterion of "unnecessary suffering" is in principle so bound up with the use of weapons that it is illogical to link it in this paragraph to the order not to give quarter. For this reason, it is recommended that this paragraph be divided in two, with the words "The logic which lies behind ..." starting a new paragraph.

Section VI

Paragraphs 172-174
The Committee is of the opinion that the author should indicate that the Fact-Finding Commission itself favours an extension of the mandate (i.e. to include internal armed conflicts); the FFC has issued a declaration about this.

Paragraph 176
The reference to Common Article 1 is very cursory. There has been much discussion in the past about what could be included under Article 1; this point should be addressed in the preliminary report.

The Hague, 23 December 1998