ADVISORY COMMITTEE ON INTERNATIONAL LAW ISSUES

Comments on the preliminary report entitled "The peaceful settlement of disputes: prospects for the 21st century" by Francisco Orrego Vicuña and Christopher Pinto

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1 Introduction

The Governments of the Netherlands and the Russian Federation have drawn up a joint plan to commemorate 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 Vicuña and Pinto's report, entitled "The peaceful settlement of disputes: prospects for the 21st century". 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.

Although the Committee appreciates the work that has gone into this report, it cannot disguise the fact that its main response is one of disappointment, for the reasons explained below.

The Committee believes that the report does not contain an adequate analysis of the existing structure either of the international legal order in general or of the settlement of international disputes in particular: on the whole, the authors have paid little or no attention to gaps or specific problem areas. Because of this, in certain areas the report is lacking in depth. What is more, the proposals it formulates are not based on empirical necessity (which would at the same time have indicated their feasibility). Furthermore, the Committee sees the report as leaning too heavily on past proposals without making a proper examination of their effectiveness.

The authors appear to be disappointed in the actual role of arbitration and of the International Court of Justice in the 20th century. They stress the importance of conciliation and urge that the Court acquire a new role. In the Committee's opinion, however, these views take too little account of State practice (notwithstanding all the existing treaty provisions on conciliation) and in some places conflict with the Court's own views and those propounded in legal doctrine concerning the Court's role as the "principal judicial organ of the United Nations". This applies in particular to the Court's role in interpreting and applying the basic principles of international law.

The Committee is aware that a report subtitled "Prospects for the 21st Century" should include proposals for the medium and long term, but the desirability, need and practicability of these proposals can only be debated fruitfully if the premises on which they are based are virtually unassailable, and are hence endorsed by a large majority among the actors concerned.

3 Structure of the report

It seems to the Committee that the preliminary report consists in fact of two separate reports: one dealing with the relationship between the Security Council and the Court, and one dealing with the restructuring of the system for the peaceful settlement of disputes.

As to structure, the Committee proposes that section V be integrated into section III; that section VII.3 be discussed within the context of section III; and that section IV be inserted between sections II and III.

In section I. the Committee would suggest reordering paragraphs 95 to 101 according to form of dispute settlement. The Committee also urges that these paragraphs not be glossed over in any way.

The comments on the WTO (section VI. paragraphs 213 to 216) belong. in the Committee's view. in a new section II.2 (c) on quasi-judicial settlement.

On another point of structure. the Committee regrets that section VI is not properly linked to the other parts of the report.

Finally. the Committee thinks that the observations made in section VII.4 belong in section II of the general part of the report.

4 General comments on a section-by-section basis

4.1 Section I

This section outlines the general framework of an analysis. only to stop short - unfortunately - of making this analysis. The Committee feels that the authors omit discussion of a number of elements that are undoubtedly affecting the development of the international legal order and. in consequence. the international settlement of disputes: in particular. globalisation. the end of the Cold War. and the North-South divide. These points could best be incorporated into section I.2.

The report uses the term "decentralised legal order" with an idiosyncratic meaning. It is evidently used here to mean the emergence and development of specific ways of settling disputes. which would in fact be more aptly described as "functional pluralism". The term "decentralisation" would best be reserved for discussions of the role and influence of non-State entities in the international community.

4.2 Section II

In section II.2(b) the authors present conciliation as one of the best ways of settling disputes. although there is no factual basis for such an assertion, especially given the fact that little use is made of conciliation in State practice.

The Committee favours the insertion of an extra paragraph on quasi-judicial settlement before subsection II.2 (c). It believes that using the various mechanisms of quasi-judicial settlement could help solve the problems that have characterised the peaceful settlement of disputes in the 20th century. Examples of such mechanisms include the WTO dispute settlement regime. the Iraq Claims Compensation Commission and the non-compliance procedures built into a number of environmental and disarmament conventions (e.g. the Montreal Protocol and the Chemical Weapons Convention).

4.3 Section III

This section contains the core of the report. The Committee is therefore dismayed that this discussion on the present and future role of the Court is not furnished with corroborative references to the Court's practice or to relevant legal doctrine. Indeed, were Section III to be retained in its current form, a unique opportunity would be missed "to review the experiences arising from a century of efforts to achieve an adequate international dispute settlement system" (paragraph 26). The same applies, it may be added, to section V (see below, at 4.5).

4.3.1 Section III.1

The authors propose a new role for the Court in relation to the fundamental principles of international law, to help meet the needs of an increasingly decentralised international community (paragraphs 38, 103, 108 etc.); furthermore, they feel the Court should confine itself to major cases involving fundamental principles, leaving lesser disputes to other tribunals.

The second of these recommendations is scarcely practicable. The importance of a dispute is sometimes far from clear when it is first brought before a court. As for the authors' first suggestion, the Committee believes it to be based on a misconception, given the fact that the practice of the Court and the extensive legal doctrine leave no doubt that it is this very role of the Court - as the only truly universal judicial body of general jurisdiction - that has been an indispensable factor in the enforcement and development of the international legal order since 1922.[1]

The Committee believes that the same misconception underlies the authors' views on the proliferation of international tribunals (paragraph 105).

4.3.2 Section III.3

The Committee would point out that the practice of the last half-century belies the authors' line of argument and, given the increasing number of cases heard by the Court (paragraph 118), refutes their belief that contentious jurisdiction is unlikely to be a "core feature" of the Court's evolution in the future (paragraph 119) and that the Court's advisory functions will become the most appropriate way of dealing with the problems posed by fundamental principles of international law (section III.4).

Here the Committee endorses the observations made by the President of the Court in his

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[1] See e.g. Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (Cambridge 1982).

address to the UN General Assembly on 27 October 1998:[2]

- as the principal judicial organ of the United Nations, the Court also plays a role in the maintenance of international peace and security;
- the Court is the most authoritative interpreter of the legal obligations of States in disputes between them;
- the Court is the supreme interpreter of the UN Charter;
- there is ample evidence that since the 1980s States have been more inclined to present their disputes to the Court and hence to acquire a "law habit".

Regarding section III.3, the Committee holds that the uncertainties surrounding the status of international law as a possible explanation for States' supposed reluctance to submit their disputes to the Court are not necessarily any greater than in the case of specialised courts and tribunals, contrary to what the authors suggest in paragraph 115.

Furthermore, the Committee is puzzled by the authors' view that States would be more inclined to accept the Court's jurisdiction in respect of the fundamental principles of international law (paragraph 119), whereas such judgments can potentially have just as much of an impact on the conduct of States as in traditional contentious proceedings.

4.3.3 Section III.4

Concerning the expansion of the Court's advisory functions, the Committee believes that the need for this and considerations of feasibility both justify re-examining the proposal that the UN Secretary-General be authorised to request an advisory opinion on legal questions connected with the discharge of his responsibilities (paragraph 121). The proposal that certain additional UN organs and agencies as well as international organisations be similarly authorised (paragraph 122) likewise merits re-examination.

However, the Committee rejects the authors' proposals that NGOs too be so authorised (paragraph 122): the Committee does not see the need for this, given that NGOs can already be brought into advisory procedures and contentious proceedings in an effective,

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[2] "While not acting as a court of appeal, the International Court of Justice has acted as the principal judicial organ of the United Nations in more than one way. First of all, the Court contributes to the peaceful settlement of international disputes in furtherance of the first Purpose of the United Nations, to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes which might lead to a breach of peace.
[...] Thus a primary way in which the Court acts as the principal judicial organ of the United Nations is as a factor and actor in the maintenance of international peace and security.
[...] To turn to the second way in which the Court acts as the principal judicial organ of the United Nations - and of the world community as a whole - it is the most authoritative interpreter of the legal obligations of States in disputes between them.
[...] In the third place, the Court as the Organization's principal judicial organ has acted as the supreme interpreter of the United Nations Charter [...] It has been the authoritative interpreter of the legal obligations of States under the Charter.
[...] Finally, [...] the Court is the only truly universal judicial body of general jurisdiction. [...] the Court is available to all States of the international community, on all aspects of international law."

if indirect, manner.[4] Moreover, the authors' proposals have almost no chance at all of being implemented.

As for the authors' proposal that the Court should be able to act in an advisory capacity *ex proprio motu* (paragraph 122), the Committee would point out that no such powers exist even in an advanced form of regional integration such as the EU. On these grounds alone the Committee rejects this proposal.

The Committee would note that the UN General Assembly can request an advisory opinion from the Court under Article 96 of the UN Charter. Whether States should be able to do so, either individually or jointly (as the authors suggest in paragraph 123) requires further study. Nevertheless, the Committee would make the following comments. When two or three States are involved, it is worth asking if the political will does not perhaps exist to settle the dispute in contentious proceedings, as the authors also present such a request as an alternative to submitting a contentious case. For individual States, the Committee believes that this possibility should be considered only along the lines suggested in paragraph 140, by having the highest national judicial body in a country request a preliminary ruling from the Court (see 4.3.6 below).

In the Committee's view, the proposals contained in paragraphs 124 and 126 do not correspond to relevant trends in recent practice. The old channel, which involved going through the UN Administrative Tribunal, was deliberately scrapped, and a similar screening procedure (see paragraph 126) applied by the European Commission on Human Rights was also recently abolished.

4.3.4 Section III.5

The Commission would merely remark here that the proposals in paragraphs 132 and 133 (on developing an *actio popularis* and on the availability of a trigger mechanism) are unnecessary and unrealistic. They tie in neither with customary practice nor with the needs of legal practice.

4.3.5 Section III.6

The Committee feels that the authors' approach in this section is not based on an adequate, correct analysis of the shortcomings that are inherent to peaceful settlements of disputes. It would cite paragraph 135 in particular. The Committee sees the suggestion made in paragraph 136, of amending Article 34 of the Court's Statute to provide the new actors in the international legal order with access to the Court, as unrealistic; introducing the subject at the Centennial Conference would prompt endless discussions without making any positive contribution to the general debate on the peaceful settlement of disputes.

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[4] The case of the French nuclear tests and the request for an advisory opinion on nuclear weapons may be cited as examples.

4.3.6 Section III.7

In section III.7 the authors turn to the Court's potential role as a court of reference for international law, both for other international tribunals and for the highest national judicial bodies.

As far as international tribunals are concerned, the Committee believes that it should not be assumed at the outset that the risks attached to possible divergent trends in international case law are such as to necessitate a reference procedure. The Committee would defer to the President of the Court, who holds that all international courts may be expected to respect one another's case law.[4] The authors' point about the absence of a formal judicial hierarchy (paragraph 139) applies just as much to the reference procedure they have in mind as it does to judicial review or appeals.

As far as the highest national judicial bodies are concerned, the Committee would refer in the first place to the lengthy debate on this issue during the annual meeting of the Dutch International Law Society, based on the preliminary reports submitted by Stephen Schwebel, the current President of the Court,[5] and the former Attorney-General at the European Court of Justice in Luxembourg, P. Verloren van Themaat.[6] The pros and cons are just as valid now, in the Committee's view, as they were then.

The Committee believes further debate on this issue would be useful provided the following basic principles are adhered to:
a) the highest national judicial bodies should have competence, not be under an obligation;
b) requests for rulings should be confined to general questions concerning the interpretation of a treaty, international customary law or general principles of international law;
c) questions concerning the legitimacy of the actions of international organisations or the compatibility of national legislation with international law should be excluded.

The Committee would also note that even now, States are free to embody in a treaty provision the principle that the highest national judicial bodies of the States Parties can request a preliminary ruling on the interpretation of the treaty.[7]

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[4] See the address given by Stephen M. Schwebel to the UN General Assembly on 27 October 1998.

[5] Stephen M. Schwebel, "Preliminary Rulings by the International Court of Justice at the Instance of National Courts", *Mededelingen Nederlandse Vereniging voor Internationaal Recht*, October 1987, pp. 1-17. See also Stephen M. Schwebel, "Preliminary Rulings by the International Court of Justice at the Instance of National Courts", *Virginia Journal of International Law* (VJIL) 28 (1988), p. 495; Shabtai Rosenne, "Preliminary Rulings by the International Court of Justice at the Instance of National Courts: A Reply", VJIL 29 (1989), p. 401; S.M. Schwebel, *Justice in International Law: Selected Writings of Judge Stephen M. Schwebel* (Cambridge 1994), p. 19, n. 5, p. 68, n. 127, pp. 84-92

[6] "Preliminary Rulings by the International Court of Justice at the Request of National Courts: Lessons from the EEC Experience"; *Mededelingen Nederlandse Vereniging voor Internationaal Recht*, October 1987, pp. 53-102.

[7] L. Caflisch, ibid., p. 39.

4.4 Section IV

In the Committee's view, section IV could perhaps best be thoroughly revised, the aim being to attain a higher level of scholarly argument and to relate the points raised to current debates, such as those concerning the Security Council (composition, mode of operation, limits to its powers etc.).

4.5 Section V

It is worth pointing out that one of the authors previously published the text of this section elsewhere, on the occasion of the fiftieth anniversary of the International Court of Justice.[8]

In the Committee's view, section V does not contain a balanced appraisal of arguments for and against certain of the authors' proposals. Moreover, it compares the Court with other bodies, such as the International Law Commission and other tribunals, both international and regional. Yet each body is so distinct in terms of composition, mandate, jurisdiction and mode of operation that comparisons should be made with extreme circumspection, if at all.

4.5.1 Section V.1

The Committee deems it useful to discuss the problems involved in the Court having the power to review the legality of acts. It should be noted, however, that this debate will retain a speculative element until judgment has been given on the merits of the Lockerbie case.[9]

4.5.2 Section V.2

The Committee is not swayed by the authors' arguments in favour of enlarging the Court. Furthermore, no such desire has come to the fore in the Court itself, in State practice, or in legal doctrine. The feasibility of implementing the proposal is therefore zero.

4.5.3 Section V.3

The Committee fully endorses the authors' emphasis on the importance of the Court receiving adequate funds, a plea made by the president of the Court to the UN General

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[8] See M.C.W. Pinto, "The Court and Other International Tribunals" in Connie Peck and Roy S. Lee, *Increasing the Effectiveness of the International Court of Justice*, Martinus Nijhoff Publishers 1997, p. 281 ff. (esp. pp. 296-309).

[9] The Court proved to be divided on this issue, even at the stage of provisional measures (Order of the International Court of Justice of 14 April 1992).

Assembly in October 1998.[11] The idea of appointing government officials to assist the judges is worthy of consideration, although the problem of the selection procedure should not be underestimated.

4.6 Section VI

The Committee believes that the title of this section does not properly convey its content: for one thing, it wonders what the authors believe should be privatised. Not only can the term Alternative Dispute Resolution (ADR) be used to mean a variety of things, but it is also legitimate to ask whether ADR would be an appropriate mechanism in a privatisation framework such as that favoured by the authors.

4.6.1 Section VI.1

In this section it is in fact only paragraph 188 that deals with an "evolving approach"; paragraphs 189 to 191 discuss factors or phenomena that influence the way in which the settlement of disputes is approached. The choice of the term "privatising international justice" in paragraph 192 reveals, in the Committee's view, that the authors are proceeding on a false assumption, as explained above.

4.6.2 Section VI.2

The Committee noted above (at 2 and 4.2) that the authors' preference for strengthening conciliation as a mechanism for settling disputes cannot be based on trends in State practice. In general, the Committee also has the impression that this section places an unnecessary emphasis on the importance – which it believes is not argued convincingly – of ensuring that existing mechanisms are institutionalised as much as possible.

4.6.3 Section VI.4

The Committee is doubtful as to whether it is justified to compare the shortcomings of different ways of settling disputes relating to questions of general international law with those of dispute settlement mechanisms in specialised areas.

4.6.4 Section VI.5

The Committee believes that this section fails to take account of recent research in legal doctrine into the friction between traditional mechanisms for settling disputes in themselves and their use in the framework of an institutional supervisory regime to monitor compliance with treaty obligations, for instance in the area of environmental law,

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[11] See note 5.

disarmament or the protection of human rights.[11] For the rest, paragraphs 226 and 227 add nothing to the existing structures and systems.

4.7 Section VII

Why it should be necessary to develop a more organised structure of dispute settlement is a question that is unfortunately not asked, let alone answered.

4.7.1 Section VII.1

Here the Committee would refer back to the observations made at 4.1 above concerning the authors' outlook on the new structure of the international legal order.

4.7.2 Section VII.3

Given its views on the future role of the Court, the Committee sees no point in discussing the authors' proposal for the establishment of a pre-trial committee to be attached to the Court.

4.7.3 Section VII.5

In the Committee's view, this section once again presents an incorrect picture of the way in which judicial settlement functions (i.e. the likelihood of a narrow angle of vision, as discussed in paragraphs 241 and 244).

4.7.4 Section VII.6

Here the Committee would refer to its previously stated views concerning the authors' advocacy of the reinforcement of conciliation as a mechanism for the peaceful settlement of disputes (see 4.2 above).

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[11] C. Chinkin, "Alternative Disputes Resolution under International Law", in *Remedies in International Law: The Institutional Dilemma*, M. Evans, Hart Publishing, Oxford 1989, pp. 123-140.

APPENDIX: Specific comments on individual sections of the report

Section I

Paragraph 35
The validity of the last sentence ("It is therefore not to be expected ... dispute settlement arrangements") is open to question.

Section II

Paragraph 43
The observation "Such rules ... courts" (top of p. 12) is incorrect.

Paragraph 61
This paragraph is not in the most suitable place. What is more, its content is incorrect. The WTO's dispute settlement system does not belong under the heading of conciliation.

Paragraph 73
The formulation of the two sentences towards the end of this paragraph ("It is not clear ... Tribunal for arbitration") is infelicitous.

Paragraphs 76 - 89
The Committee would like to see these paragraphs rearranged. Their present structure gives the mistaken impression that all tribunals operate on an equal basis.

Paragraph 81
Some Committee members would point out that the fairness of the UNCC's procedure is disputable.

Paragraph 85
The year "1994" should read "1996".

Paragraph 87
The list of courts given here is incomplete and displays a Western bias.

Paragraph 88
The Committee would point out that it is not the prestige of individual members of the Court that provides the surest guarantee of consistency, but the quality of its judgments and advisory opinions. Furthermore, this paragraph gives rather an over-inflated picture of the Court's role. Proceedings before the Court constitute only *one* of the various dispute settlement mechanisms.

Paragraph 94
The Committee dislikes the wording of the sentence that begins in the seventh line of this paragraph ("This would be particularly true ..."). The phrase "economically backward" should be replaced by words such as "with a developing economy".

Paragraph 95
The last sentence of this paragraph is in the wrong place: it belongs after the first of the two categories mentioned in the paragraph.

Note 64
Although the Committee does not in general wish to comment on footnotes, it feels compelled to observe that the Inspection Panel mentioned in this note cannot be regarded as a dispute resolution mechanism.

Section IV
Paragraph 148
This paragraph contains a factual inaccuracy. International friction belongs in chapter VI of the Charter, not in chapter VII.

The Hague, 23 December 1998