

ADVISORY COMMITTEE ON INTERNATIONAL LAW ISSUES

Comments on the preliminary report entitled "The Development of International Law Relating to Disarmament and Arms Control since the First International Peace Conference in 1899" by Hans Blix

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I 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 Issues¹ 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 Hans Blix's report, entitled "The Development of International Law Relating to Disarmament and Arms Control since the First International Peace Conference in 1899". Chapter 2 contains general observations on the preliminary report, and is followed by appendix with specific comments on individual sections of the report.

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.

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 drawing up this report, and deems the result well written and logical in structure. It is written from the vantage-point of formulating policy, rather than setting out to present an in-depth legal analysis. The Committee feels compelled to make the following suggestions.

1. The report should conclude with a list of recommendations or points for discussion (e.g. on verification).
2. The author sketches the broad outline of legal and other developments in the area of disarmament and arms control since 1899, concluding with the problems of compliance and verification in respect of obligations concerning weapons of mass destruction, related systems and negotiations in this area. He focuses primarily on multilateral conventions. This approach has the disadvantage of being somewhat fragmented, and of paying too little attention to certain subjects - conventional arms control, for instance, including small arms.
3. Considering the above, the report's title is not quite right: its suggestion that the report will survey the development of international law since 1899 is scarcely made good. The title also suggests that the report will discuss customary law, which it does not. Furthermore, the report is written very much from the position of the IAEA. It might be an idea to reflect this in the title.
4. The Committee is disappointed that the author says nothing about the gradual emergence of a special branch of international law - arms control law; nor does he refer to the literature on this subject.
5. It is interesting that the author shows that arms control and the laws of war overlap, when he touches, for instance, on the banning of certain weapons (such as dum-dum bullets) which violate the principle of necessity. The Committee feels that this could be made more explicit, and that a link could perhaps be made between Blix's report and Greenwood's (paragraph 19 of which refers, for instance, to the borderline between the laws of war and disarmament).
6. The report should look more closely at the topic of technical assistance (e.g. in paragraph 158).
7. The Committee feels that too little attention is paid both to the institutionalisation of arms control and to related legal questions (e.g. re counter-measures).
8. The report does not address the problem of dual use technology.
9. It would be useful to add an appendix, indicating what States have ratified which relevant instruments.

APPENDIX: Specific comments on individual sections of the report

Section I

Paragraph 5

In the sentence beginning "In the last resort", the eventuality "threats to peace" should be added.

Paragraph 7

In the third line, the word "but" in "have all but disappeared" should be deleted.

Paragraph 16

In the fourth line, the words "of [an] 'unnecessarily cruel' nature" should be preceded by the word "also", as it is otherwise unclear why paragraph 16 was not incorporated into paragraphs 14 and 15.

Paragraphs 18 and 19

In the interests of clarity, the author should first summarise the Court's advisory opinion and then revise these paragraphs, the point being that the advisory opinion is more nuanced in content and more comprehensive than Blix suggests.

Paragraph 19

Concerning the comment "the results over time ... have been rather marginal", it appears that the author is giving the 1925 Protocol a very wide interpretation. Blix suggests that there have been few notable developments in relation to a ban on use. As far as chemical and biological weapons are concerned, he bases himself on the 1925 Protocol, which already contained such a ban. This is controversial, however, given that several States entered a reservation to this Protocol in the event of the use of such weapons by another State, making it more of a "no first use" declaration.

Section II

Paragraph 27

This contains a specific reference to the breakup of the Soviet Union. It would seem desirable to avoid singling the country out in this way.

Paragraph 35

Although the author does not set out to make an exhaustive list, other examples could be enumerated, such as the problems surrounding the Kurds in Iraq.

Paragraph 41

The first line of this paragraph is considered incomplete, and requires the addition, "notwithstanding regulations of humanitarian law".

Paragraph 46

A reference should be included here to the relevant UN resolutions.

Paragraph 54

In the fourth line from the bottom, the word "inspections" should be preceded by "UNSCOM".

Paragraph 57

The reference given here to the advisory opinion of the Court should preferably cite specific paragraphs.

Section III

Paragraph 64

The sentence "For inter-State relations after the end of the Cold War, we can register much success", beginning in the sixth line, gives an unduly rosy picture of the real situation.

Paragraph 65

In addition to Somalia and former Yugoslavia, Cambodia, Sudan and Rwanda could also have served as examples here.

Paragraph 66

See the comment on paragraph 19.

Paragraph 110

"... a party requesting a challenge inspection will only need one third of the Council to support it." This does not convey the actual situation entirely accurately; rather, two thirds of the Council can prevent an inspection being carried out.

Paragraph 116

This paragraph could be discussed within the context of, and linked more closely to, paragraphs 112 to 115, in which Iraq comes under scrutiny: the Iraq situation too should be viewed in the context of the uncertainty that is sketched (with sympathy) in paragraph 116.

Paragraph 142

The Commission wonders who is meant by "some US experts". For the rest, how does the content of this paragraph ("counter proliferation") relate to the treaty regime?

Paragraph 147

Last sentence: "that the rule was taken seriously". The Committee considers this an unfortunate remark. It was indeed the response to the tests, and not the tests themselves, that indicated that "the rule was taken seriously".

The Hague, 23 December 1998

