Guest Lecture Series of the Office of the Prosecutor

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"From international humanitarian law to international criminal law"

28 October 2003

The Hague

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I feel greatly honoured by the request to open this series of Guest Lectures at the Office of the Prosecutor of the ICC. By way of introduction, I start out with some personal reflections to illustrate the colossal distance travelled on the path 'from international humanitarian law to international criminal law'. As my next main points I have selected sources of IHL, notably, issues of customary law and principles of law, and after that, the characterisation of situations as international or internal armed conflict. By way of conclusion, I should like to share with you a few thoughts under the heading 'aspects of complementarity'.

I – Reflections about a quantum jump

In the 1960s, as a naval officer and a lawyer, I was teaching international law at our Naval Academy, including the law of naval warfare. Since this had not been a topic at Leiden university, I was fortunate to find an experienced mentor. He was a rear-admiral and a lawyer, and his name, M.W. Mouton. At the time, one of his jobs was to test line officers coming up for promotion to senior rank: what did they know about the law of war at sea? Any candidate was bound to fail if he was unaware that he could not simply torpedo any presumed enemy merchant vessel on sight. As well, he never failed to impress upon them that such individual violations of the law of war could give rise to reprisals against the state.

Earlier, at the time of the second world war, Admiral Mouton had been involved in the work of the United Nations War Crimes Commission. Then, in 1949, he served as a delegate to the diplomatic conference that drew up the four Geneva Conventions of that year. The records of that conference show him up as one of the persons most influential in introducing into the Conventions the provisions on grave breaches and other violations.

Mouton was absolutely convinced that grave breaches fell under the universality principle. On this point, he had a strong opponent in Bert Röling, a professor of public international law at Groningen University with a profound knowledge of criminal law as well as important post-war experience: Röling had sat as a judge on the International Military Tribunal for the Far East – the Tokyo Tribunal, for short. Hence, he was quite familiar with the idea of holding individuals accountable for their wartime conduct. Yet, when it came to jurisdiction of our domestic courts for war crimes, including grave breaches, he utterly rejected the universality principle and argued that there could be no jurisdiction without solid and direct links tying a case to our national legal order.

The debate between these two Dutch gentlemen had a highly theoretical character. The Netherlands had ratified the 1949 Conventions in 1954, but I am afraid that outside a small circle of military lawyers, this event passed unnoticed. And to the best of my knowledge, no Dutch public prosecutor in those days has ever considered starting an investigation into war crimes committed by foreigners in an armed conflict in a different part of the world.

Questions of implementation and enforcement arose again in the 1970s, in the negotiations that led to the two Additional Protocols of 1977 to the 1949 Conventions. (This time, I was among the participants.) Protocol I, applicable in international armed conflicts, got its own grave breaches provisions (and Protocol II, a single line on dissemination). For the rest, to us here in Holland, the situation remained much the same, with implementation meaning proper instruction of the armed forces, and enforcement not much more than that we had to send in replies to the occasional questionnaires of the ICRC.

Yet, change was in the air. Events in the ongoing decolonisation wars had led to streams of publications about misbehaviour by one or the other party. Vietnam had brought the

pictures of a young girl on fire, and of a South-Vietnamese police general summarily and publicly executing a suspect. Then, there was My Lai, as a rare case where punishment followed the wanton killing of civilians. North Vietnam, for its part, at one stage threatened to put U.S. pilots on trial, and the Vietcong in South Vietnam more than once threatened, or resorted to, reprisal executions in reaction to executions of Vietcong prisoners in Saigon's hands.

Understandably, in light of these developments, the parties negotiating Protocol I spent a great deal of time and energy, first, on drafting the detailed rules on protection of civilians against the effects of hostilities, and then on defining what nowadays is called the 'elements of crime' that would be required for a person to be held guilty of a grave breach of these provisions. The parties also long and bitterly debated, and ultimately accepted, a ban on reprisals against civilians and the civilian population. The creation of a new instrument for the enforcement of IHL, in the shape of the International Fact-Finding Commission of Article 90, was but small compensation for the loss of the right of reprisal as an instant corrective device.

Created on paper in 1977, the Fact-Finding Commission was actually established in 1991. I was among the people elected on that first occasion. That same year, Yugoslavia fell apart, and the ensuing armed conflicts gave rise to a never-ending stream of alleged war crimes. Our Commission was not resorted to by the parties. Instead, the UN Secretary-General, acting on instructions of the Security Council, in October 1992 set up a five-man commission of experts (with two of them also members of the Fact-Finding Commission: Professor Torkel Opsahl and myself). Our task was to collect and analyse information about the ongoing criminality. And May 1993, the Security Council established the ICTY, with jurisdiction over serious violations of IHL committed in that territory since 1 January, 1991. Once that done, there followed in rapid succession the events that ultimately led to your presence here (and in which I was happy to figure as an interested onlooker).

This short and personal history may have brought out the enormous distance separating the post-war period, with as major feat the 1949 Geneva Conventions with their grave breaches provisions, and the present with the Yugoslavia and Rwanda Tribunals and the ICC: certainly, a quantum jump that justifies the title of this presentation, 'from IHL to international criminal law'. I add two comments. First, I want to remove any suggestion that in moving from IHL to international criminal law we might have lost IHL somewhere on the road. Far from it, IHL is still very much with it, and the remainder of my lecture serves to underscore this point.

The second comment is that although the jump has been enormous in the institutional sphere, issues and ideas may have developed less drastically. The discussion between Mouton and Röling about universality versus national interest may have been an intellectual discourse of two gentlemen, but the topic was the same as that concerning the Belgian genocide act, with the international uproar it caused.

II – Sources of international humanitarian law

First, a few words about the phrase 'international humanitarian law'. It came into common use at the time of the Geneva Conventions of 1949. Indeed, for the lawyers of the ICRC, IHL was synonymous with the so-called law of Geneva: i.e., the rules for the protection of war victims. This excluded the law of The Hague, or the law of combat. Nor did it appear to incorporate the then brand-new category of 'crimes against humanity', introduced with the Charter of the Nuremberg Tribunal.

In 1977, Additional Protocol I largely did away with the distinction between Geneva and Hague law, incorporating the conduct of hostilities and some principles on use of weapons into the body of IHL. However, when in 1980 a United Nations conference adopted the Conventional Weapons Convention, with its annexed Protocols which put limits on the use of specified weapons such as land mines and incendiary weapons (the napalm of the Vietnamese girl), it was not automatically evident that this new set of rules too would be part of the extended IHL family. By now, however, the term IHL may be understood to cover at least the whole of the law of warfare.

In effect, the term has undergone further extension with the arrival of the ICTY, the ICTR and the ICC. The statutes of these bodies define their jurisdiction as 'international humanitarian law'. For the ICTY, this includes grave breaches of the Geneva Conventions, war crimes proper, and genocide and crimes against humanity, in that order; for the ICTR, genocide, crimes against humanity, and violations of common Article 3 of 1949 and Protocol II of 1977; and for the ICC, genocide, crimes against humanity, and war crimes (as well as, ill-fitting, the crime of aggression, which I shall not refer to any more). To me, the addition of genocide and crimes against humanity stands not so much for an expansion in substance as in the sphere of enforcement and, more particularly, in the way one looks at violations of substantive IHL rules from a penal and, I would say, moral perspective.

Listing genocide and crimes against humanity first in the ICTR Statute and violations of applicable IHL instruments in second place, accurately reflects the killing frenzy that had occurred in Rwanda. For the ICC, relegating war crimes to third position (with genocide in pole position, in racing terms) we may find a comparable ground in the Preamble. This reminds us "that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity," and it defines the ICC mandate as "the most serious crimes of concern to the international community as a whole". Criminal acts of that order may well fall in the category of crimes against humanity, if not of genocide. At the same time, we should not forget that they plausibly also are war crimes in the classical sense, i.e., violations of specific substantive IHL rules.

These substantive rules find their major source in the IHL treaties I have been referring to. Apart from that, there are customary law and the principles of law. An early example of resorting to these latter sources is the ICJ judgment of 1986 in the *Nicaragua* case (where the United States had been actively supporting the *contras* engaged in an internal armed conflict with the Sandinista government). The Court felt free to judge "the conduct of the United States […] according to the fundamental general principles of humanitarian law", which were "expressed and in some respects developed" in the 1949 Geneva Conventions. Reinforcing the impression that the Court was dealing here with principles of law as a distinct source of obligation, it also adduced the denunciation clause in these Conventions, which emphasises that denunciation leaves unimpaired the obligations resting upon Parties to an armed conflict "by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience" – the famous Martens clause, introduced in the Preamble to the Hague Convention on land warfare of 1899 and oft repeated in subsequent treaties.

The impression that the Court was dealing here with principles of law as a distinct source of law is disturbed when one reads in Judge Jenning's dissenting opinion that he "very serious doubt[ed] whether [the Conventions of 1949] could be regarded as embodying customary law." Similarly, Judge Ago in his separate opinion declared himself "most reluctant to be persuaded that any broad identity of content exists between the Geneva Conventions and certain 'fundamental general principles of humanitarian law', which, according to the Court, were pre-existent in customary law, to which the Conventions 'merely give expression' … or of which they are at most 'in some respects a development' …." After all,

these gentlemen had been privy to the discussions that underlay the judgment; could they have misunderstood where the Court was heading?

Assuming that Ago and Jennings had correctly interpreted the Court's words, it must be held guilty, not just of confusing the reader, but of disregarding its own rule set out earlier in the judgment: "Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them; but in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice." (para 184) I find no trace in the judgment of an effort by the Court to find this practice in relation to the rules embodied in common Article 3.

I ought to say a little more about common Article 3. It is part of the Geneva Conventions and hence treaty law in the first place. It reflects the strenuous attempts at the Conference of 1949 to introduce into the Conventions, language that would make, if not the basic rules, at least the essence of the Conventions applicable in internal armed conflict. As a provision of treaty law, the scope of Article 3 cannot extend beyond that of the Conventions. These deal solely with persons who one way or another find themselves in the power of the enemy: war victims, in the narrow sense. The Conventions do not cover the conduct of war, including the protection of civilians against the effects of hostilities. Common Article 3 therefore has nothing to say about this issue either. The thesis one occasionally hears that Article 3 covers the protection of civilians against enemy bullets or bombs in a situation of internal armed conflict is simply ill-founded.

Another matter altogether is whether the prohibition to attack or do disproportionate damage to civilians in internal armed conflict might be a rule of customary law. On this, I note that a publication by the ICRC on this and all other questions of customary IHL is foreseen for the end of this year. Although not authoritative, the information the ICRC is going to provide will certainly be influential.

Even if state practice does not support the proposition that in internal armed conflict, a rule of customary law protects civilians from enemy fire, one may contend that such protection arises from a principle of IHL. Early support for this contention may be found in UNGA Resolution 2444 (XXIII) of 19 December 1968 on 'Respect for Human Rights in Armed Conflicts'. Under the heading "principles for observance by all governmental and other authorities responsible for action in armed conflicts" it reaffirms that it is prohibited "to launch attacks against the civilian population as such", and "distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible." Clearly, the resolution deals with principles, not specific rules; and it covers all armed conflicts without exception.

Common Article 3 does not itself speak of civilians. It protects "persons taking no active part in hostilities", and this includes "members of armed forces who have laid down their arms and those places *hors de combat*". The fundamental difference between common Article 3 and Resolution 2444 may be clear: while Article 3 grants humane treatment to anyone who has fallen into the power of an adverse party, the resolution demands respect of civilians ('as such') who are not in enemy hands.

That civilians ought to be respected in any situation of armed conflict may be regarded as an application of what the ICJ referred to as long ago as 1949, in the *Corfu Channel* case, as 'elementary considerations of humanity'. To me, the Court's 'considerations of humanity' do not provide yet another source of law: they are, literally, considerations that underlie the principles and rules of IHL. Being no more than that, they are not necessarily decisive in all circumstances. As considerations go, they have to compete among

themselves. And in matters of warfare, humanity may be one elementary consideration but military necessity is another.

The struggle between these two basic notions may be illustrated with a simple example. In the negotiations of the 1970s, one delegation fought for a rule effectively making civilians and civilian populations immune from the effects of hostilities. On top of a total ban on making civilians the object of attack, this would imply that no military objective could be attacked if there was a risk of collateral damage to civilians. This was the 'elementary considerations of humanity' implied to perfection. It also was an impossible provision in a treaty that was not designed to prevent armed conflict but only to reduce the hardships of war as far as possible.

A few words about Protocol I of 1977, with its detailed set of rules aiming to protect civilians against the effects of hostilities. Many states are party to this Protocol, but a few important ones are not. Among the non-parties are, e.g., the United States, Israel, Afghanistan, Iran and Iraq, as well as India and Pakistan. This situation of fact is apt to lead to a situation where not all parties to an international armed conflict are party to the Protocol. Those who are not, are bound by customary law. Here again the question: what exactly has customary law to say about the protection of civilians against the effects of hostilities? While much of the content of Protocol I is said to be pre-existing customary law, views differ on two crucial points: the definition of a military objective; and the issue of reprisals.

In practical terms, how could different views on the definition of a military objective become an issue before this Court? Suppose the ICTY had adopted a reading closest to the wording of the specific rule in the Protocol, or even improving on it; suppose that the drafters of the ICC Statute simply copied the ICTY solution into the article defining war crimes in international armed conflicts; and suppose, finally, that an accused before this Court comes from a country that is not a party to the Protocol and in fact does not accept the rule in question as customary law: Can this accused be held criminally liable for an act of war that may not be unlawful on the international plane? An interesting question; my answer would be: No.

Obviously, the question will remain academic if in such circumstances, the Prosecutor desists from including the specific act in the indictment, as the ICTY prosecutor did with respect to the attack on the TV station in Belgrade – an act that shocked the conscience, perhaps not of mankind but certainly of the media.

III – Definition and types of armed conflict

Whether a situation qualifies as an international or internal armed conflict often poses no problems at all. However, as with any dichotomy in law, borderline cases are bound to arise. The so-called wars of national liberation illustrate the point: whereas to the colonial powers, they were internal affairs, the outside world increasingly regarded them as international armed conflicts.

The break-up of Yugoslavia, with the long series of armed conflicts that ensued, provides another example of this difficulty. The UN commission of experts established in 1992 made short shrift of the problem: already in its first interim report it states that 'for its purposes', it chose to regard the whole situation as one of international armed conflict. I may disclose here that my reason to accept this blunt solution was dissatisfaction with the effects the dichotomy had in such a situation of long-lasting, massive, organised fighting.

The ICTY could not take such an easy way out of the dilemma. Time and again, it needed to determine whether certain phases of the fighting in Bosnia-Herzegovina could be

qualified as international armed conflict, in particular after the ostensible withdrawal of the JNA from Bosnia – the famous watershed date of 19 May 1992. Or, rather, a failed watershed: applying the so-called 'overall control' test, the ICTY Appeals Chamber in the *Tadić* case concluded that Belgrade had remained so deeply involved that the war in Bosnia did indeed qualify as an international armed conflict.

For this, the Appeals Chamber had to disavow the somewhat stricter 'effective control' test the ICJ had applied in the *Nicaragua* case. It could do this because *Nicaragua* did not bind the ICTY. Similarly, the jurisprudence of the ICTY does not bind this Court, and this will be free to devise its own test to determine what level of third-party intervention in an internal armed conflict it considers required to justify its characterisation as an international armed conflict. Given the character of many present-day conflict situations, this issue may be expected to come up sooner or later in cases before this Court. IHL freaks like myself shall follow your jurisprudence with interest, if only because this is one of the issues the conferences of the 1970s failed to tackle, leaving us with a dividing line separating the two main categories of armed conflict that we all knew did not reflect reality.

Interestingly, whereas the ICC Statute in no uncertain terms reaffirms the distinction between international and internal armed conflicts, a strong tendency nowadays is to get away from the distinctions at all. Resolution 2444 of the General Assembly provides an early example, but in 1968, this was 'soft law' at best. In 1993, the commission of experts took the same stance – without any lawmaking capacity. The ICTY, too, several times found that in light of the facts of the case it could do without a determination of the type of armed conflict.

Even more important are the cases where our international lawmakers decided to make a set of rules applicable to all armed conflicts, mainly in the sphere of weapons. In 1996, a review conference of the 1980 Conventional Weapons Convention adopted the Amended Protocol on mines and booby-traps and decided that it will be applicable in all types of armed conflict. Then, the Ottawa Convention of 1997 (which prohibits the use, stockpiling, production and transfer of anti-personnel mines) records the undertaking of contracting states "never under any circumstances to use anti-personnel mines", and 'never' evidently includes situations of internal armed conflict. Again, a recent review conference of the Conventional Weapons Convention decided to redraft Article 1 of the Convention itself, to the effect that for states accepting the new text, the Convention and the annexed Protocols will apply in all armed conflicts.

IV – Aspects of complementarity

Leaving the scene of substantive law, I now would like to turn to what I indicated as 'aspects of complementarity'.

A first, obvious if not trite observation is that not just the ICC but the whole of criminal law comes into play only when things have gone wrong. IHL is not designed to bring soldiers in jail but to reduce the number of victims of war. This requires compliance – a point that these last times is incessantly being emphasised from all quarters.

The situation that interests us here in this meeting is when things went terribly wrong and huge numbers of unnecessary victims were made. A great deal of research is being done into the perceived desires of the victims, and not surprisingly, these vary widely, from the simple opportunity to be heard to compensation and, indeed, punishment of perpetrators. To meet these various needs, different formats and procedures may be appropriate. Registration of the complaint may satisfy one victim, restoration of property, another.

Even for very grave crimes perpetrated against an important number of persons, symbolic satisfaction may be what the group is seeking. I am thinking of the so-called 'comfort women' who in the course of the second world war had been exposed to multiple rape by Japanese soldiers. I met a number of them some years ago in connection with procedures being conducted before the Tokyo District Court. Since these were tort cases against the Japanese Government, the remedy sought was financial compensation. However, the only thing the women themselves were interested in was to know that their case was being heard and their plight recognised. In effect, when some of these cases had been lost and the women's group supporting them in despair had stated a mock trial in Tokyo (before a tribunal with Judge Gabrielle MacDonald in the chair), it was precisely the opportunity this gave them to tell their story in public, even if only in this quasi-judicial setting, that finally provided them with the satisfaction they had been craving for, for more than fifty years.

One theatre where endless streams of serious violations of human rights and IHL have been committed, is Latin America. The armed forces in those countries, by tradition quite separate from the rest of the population, had their own disciplinary and judicial system. Apart from that, amnesty at the end of a conflict was equally traditional. These two factors combined led to a system of virtually complete impunity of the military, even of superior rank and in the face of the most gross and systematic violations imaginable. In some cases, dissatisfaction with this situation of impunity gave rise to the establishment of truth commissions, charged with sorting out events and identifying those cases and actors where culpability was so high that non-punishment would be intolerable. The reports of these commissions were received with expressions of gratitude for the work done and then, for all practical purposes, shelved.

The argument for governments to pursue this line of action is simple: what the country needs is peace and reconciliation, and any attempt to put the military leadership of the war period on trial risks disturbing if not fatally damaging that process. In support of their position, the authorities may even wish to refer to Article 6, paragraph 5, of Protocol II of 1977. This states that "[a]t the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict […]."

The Inter-American Commission and Court of Human Rights have never accepted this line of argument. I will just quote two paragraphs from its report of 13 April 2000 in the case of the assassination of Monsignor Romero, an event that had occurred at the outset of the armed conflict in El Salvador:

> *The right that all persons and society have to know the full, complete, and public truth as to the events transpired, their specific circumstances, and who participated in them is part of the right to reparation for human rights violations, with respect to satisfaction and guarantees of non-repetition. The right of a society to have full knowledge of its past is not only a mode of reparation and clarification of what has happened, but is also aimed at preventing future violations.*
>
> *The IACHR considers that despite the important role the Truth Commission played in establishing the facts related to the most serious violations and for promoting national reconciliation, the functions it performed do not take the place of the judicial process as a method for arriving at the truth. The value of truth commissions is that their creation is not based on the premise that there will be no trial, but on their being seen as a step towards restoring the truth and, in due course, justice.* [paras. 148, 149]

Three comments: the Commission was speaking in terms of human rights but with IHL at the back of its mind. It spoke of a right to the truth, both of individuals (the victims) as well as of society as a whole. And it placed the role of the Truth Commission in its proper context, not as an end station but as a step on the road to truth and justice and, as it specifies elsewhere in the decision, to ultimate reconciliation and real peace.

In Latin America, the issue is far from settled. It does not seem unlikely that in other theatres, similar differences of opinion about the best way to end a war may appear, especially if the war had all the characteristics of internal armed conflict. I immediately add that I have no idea what role this type of considerations may come to play in a tribal society such as we are told still subsists in parts of Africa.

Cases before the Inter-American Commission and Court that arise out of a situation of internal armed conflict do not necessarily focus on impunity alone. Often, their decisions will envisage other measures, including compensation, as means to settle the case and provide satisfaction to the victims. In the case of Bámaca Velásquez, a Guatemalan guerrilla leader who had been tortured and 'disappeared', the Court in its judgment of 25 November 2000 on the merits ordered the prosecution and punishment of those responsible, and it decided that damages would be awarded the relatives of the victim, including his American wife, Jennifer Harbury, a lawyer and journalist. By its judgment of 22 February 2002, it allotted important amounts of money in damages, both material and immaterial, to these relatives.

Cases like Bámaca may be evidence of a pattern of criminality warranting prosecution before the ICC. Whether they actually are brought to The Hague will always be a difficult decision to take. Particularly though not exclusively in the aftermath of internal armed conflict, local or regional procedures, including a judicious application of amnesty, may stand a better chance of bringing peace-plus-justice to a ravished country. Complementarity, viewed thus, might then be felt to imply that the Court would come into action only if, indeed, the events in a particular country have literally shocked the conscience of mankind, i.e., the international community as a whole; and that the Court's action should start while the shock wave still persists. But here I better stop: I am entering unfamiliar ground where I can only hope to learn from you.