

**36 600-V Adoption of the budget statement of the Ministry of Foreign Affairs (V) for 2025**

No.

**REPORT OF WRITTEN CONSULTATIONS**

Adopted, May 2025

The following parliamentary parties represented on the Permanent Committee on Foreign Affairs feel it necessary to submit questions and comments to the Minister of Foreign Affairs on the government response to advisory report number 46 of the Advisory Committee on Issues of Public International Law (CAVV) on the draft conclusions of the International Law Commission on general principles of law (36 600-V, no. 59).

The questions and comments sent to the Minister on 12 February 2025 are printed below, together with the answers sent by the Minister in a letter dated <...>.

Committee Chair,  
Klaver

Committee Registrar,  
Westerhoff

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**I Questions and comments from the parliamentary parties**

**Questions and comments from the members of the Parliamentary People's Party for Freedom and Democracy (VVD)**

The members of the Parliamentary People's Party for Freedom and Democracy have taken note of the government response to advisory report number 46 of the Advisory Committee on Issues of Public International Law (CAVV) and wish to submit some questions and comments about it.

They note that both the government and the CAVV consider the wording used by the International Law Commission (ILC) in draft conclusion 3 (b) to be unnecessarily cautious. However, they believe that the ILC has deliberately chosen this wording in view of the continuing debate about the value of laws within the international legal system. Deleting cautious wording could imply that extra value is attached to the system, whereas cautious wording in fact allows room for debate about the value and reliability of case law. This could actually increase confidence in future judgments. These members would therefore be grateful for the government's views on this.

### **1. Government answer**

**According to the ILC, the wording it has used allows scope for states that are sceptical about the category of general principles of law formed within the international legal system. The recommendation by both the government and the CAVV that the draft conclusion should refer to general principles of law 'formed' within the international legal system rather than general principles of law that 'may be formed' within the international legal system is consistent with previous statements by the Kingdom of the Netherlands. For example, the Kingdom of the Netherlands has invoked the principle of freedom of the high seas before the International Tribunal for the Law of the Sea (ITLOS) and thus explicitly acknowledged the existence of general principles of law formed within the international legal system.**

**The ILC has a mandate to provide an authoritative explanation of the nature, scope and functions of general principles of law, as well as of the manner in which they should be identified. The inclusion of opposing opinions in the commentary or in the report of the ILC itself should be sufficient to provide scope for debate. This does not have to be expressed in the conclusions themselves.**

The members of the Parliamentary People's Party for Freedom and Democracy attach great importance to the conclusion of international treaties. They regard this as an international and democratic means of enforcing international law. These members note that in the CAVV's advisory report the relationship between international treaties and customary international law is assumed to be non-hierarchical. However, these members would submit that a treaty does have more value than customary international law. They would therefore request the government to comment on the hierarchical difference within international law between international treaties and customary international law.

### **2. Government answer**

**The drafters of Article 38 of the Statute of the International Court of Justice did not envisage a hierarchy among treaties, customary international law and general principles of law. However, a hierarchy that is recognised is explicitly described in that article, namely**

**that judicial decisions and the teachings of the most highly qualified publicists are subsidiary sources.**

The members of the Parliamentary People's Party for Freedom and Democracy note that the CAVV itself also takes the view that the distinction between general principles of law and customary international law is unclear. These members would therefore ask the government to confirm that it will do everything possible to resolve this point.

### **3. Government answer**

**The government has responded to the call to UN member states to state their positions and has asked the ILC to clarify the methodology for identifying and differentiating between customary international law and general principles of law. It remains to be seen whether the ILC will take account of and adopt the position of the Kingdom of the Netherlands.**

The members of the Parliamentary People's Party for Freedom and Democracy note that in recent years there has been much scepticism and debate about the functioning of international law and the International Court of Justice (ICJ). They would therefore ask the government to explain how steps to revise and thereby strengthen the ICJ Statute and hence international law should be viewed in the light of all the criticism and scepticism that exists about the ICJ and international law. These members note that the CAVV's advisory report does not provide a clear answer to the question as to whether general principles of law can independently generate primary rights and obligations and secondary and procedural rules. They wish to express their concerns about this since, if the answer to this question is affirmative, it would seem to represent a major expansion of the ICJ's judicial function. These members wish to know how the government interprets this. Will the government ensure that the ICJ Statute clearly states that this should not be the case? Can the government refrain from agreeing to this until it has been worded more clearly? In keeping with the CAVV advisory report, the members of the Parliamentary People's Party for Freedom and Democracy also wish to know how the government views the further codification of international law, taking into account the measures to strengthen the statutes. Would the government please explain how it views these matters?

### **4. Government answer**

**The Kingdom of the Netherlands is a party to the Charter of the United Nations and therefore also to the ICJ Statute. The government has the possibility of communicating to the ILC the position of the Kingdom of the Netherlands regarding the nature, scope and function of general principles of law within the meaning of Article 38 of the ICJ Statute and the methodology for identifying them. The Kingdom has indicated that it would be desirable for the relationship between the content and scope of a general principle of law and the function it fulfils to be explained in more detail. The government attaches great importance to international law and considers that the work of the ILC on general principles of law benefits the development of the international legal system.**

**Although the question concerning the independent generation of rights and obligations by general principles of law is not entirely clear to the Minister, the government's answer to it is affirmative in so far as it relates to the issue of whether general principles of law can**

**generate rights and obligations for states. That is why general principles of law have also been included as a source of law in Article 38 of the ICJ Statute. For example, the principle of distinction in international humanitarian law does indeed create obligations for parties to an armed conflict. The ICJ's function is to decide disputes and give advisory opinions at the request of authorised bodies and specialised agencies of the UN. In performing that function, the ICJ must determine the applicable law. In doing so, it may identify and interpret a principle of law, on the basis of which it may conclude that a state or states have certain rights or obligations under international law. That is not an extension of the ICJ's function, but goes to the essence of its functioning as an international judicial body.**

#### **Questions and comments from the members of the Parliamentary Party of New Social Contract (NSC)**

The members of the Parliamentary Party of New Social Contract have taken note with interest of the documents submitted for these written consultations. They are satisfied that the CAVV's experts have examined the ILC's draft conclusions with due care. Accordingly, they can agree with the government response to the CAVV's advisory report number 46.

#### **Questions and comments from the members of the Parliamentary Party of the Farmer-Citizen Movement (BBB)**

The members of the Parliamentary Party of the Farmer-Citizen Movement have taken note of the CAVV's advisory report on the ILC's draft conclusions on general principles of law and the government response to the report. They have the following questions and comments. While concurring with the tenor of the government response, they do have a question about the statement on page 6 of the response about the term 'international community', which 'in any case includes states and international organisations as entities that can play a role in recognising, and therefore forming, general principles of law'. What does this mean in the case of non-state actors, for example militias, factions or other groups that appear to have long-term control over a certain area?

#### **5. Government answer**

**As subjects of international law, states are the primary parties that can play a role in forming and recognising general principles of law. As indicated in the ILC's work on the identification of customary international law, it is primarily the practice of states that should be considered when determining the existence and content of rules of customary international law.<sup>1</sup> States are the primary subjects of the international legal system and play an exceptional role in it. If this is true for the development and identification of rules of customary international law, then it is even more so for the development of general principles of law. Furthermore, the possibility cannot be ruled out that international organisations, as subjects of international law, may play a role in the formation and recognition of general principles of law, albeit not to the same extent as states.**

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<sup>1</sup> ILC Draft conclusions on identification of customary international law, with commentaries, 2018.

**As militias, factions and other groups that operate independently are not part of the international community in the same way as states and international organisations, they do not contribute to the formation of international law. As regards the identification of customary international law, the ILC indicates that the conduct of entities other than states and international organisations, for example non-governmental organisations and non-state armed groups, cannot create customary international law or be an expression of it. Their actions do not contribute to the formation or expression of rules of customary international law. The same conclusion can be drawn with regard to the formation and recognition of general principles of law. Militias, factions and other groups do not contribute to this. However, this does not prevent them from being bound by certain elements of international law, such as international humanitarian law, when they are parties to an armed conflict.**

### **Questions and comments from members of the Parliamentary Party of the Christian Union (CU)**

The members of the Parliamentary Party of the Christian Union have taken note with interest of the documents submitted for these written consultations. They note that on page 2 of the government response to the CAVV advisory report the Minister states that ‘[i]n the government’s view, the search for a methodology for identifying general principles of international law illustrates the historical tension between proponents of natural law on the one hand and those of legal positivism on the other.’ Although, in the opinion of the members of the Parliamentary Party of the Christian Union, this observation is correct, the government subsequently omits to take a position. What is the government’s position on the tension between natural law on the one hand and legal positivism on the other? Does the government acknowledge that natural law implies a transcendental order? How does the government deal with this when positive law leads to tension with these widely accepted principles?

#### **6. Government answer**

**The government acknowledges that the debate about general principles of law as a source of law has its history in natural law, as is also evident from the *travaux préparatoires* of the ICJ Statute. This is an observation by the government that does not entail any value judgement. The government also notes that the term ‘transcendental order’ implies a hierarchy that does not ensue from the text of the ICJ Statute.**

The members of the Parliamentary Party of the Christian Union note that positive law in an international sense is also a product of the interplay of political forces. Does the Minister acknowledge this? If so, is it theoretically possible for positive international law to conflict with principles of law? And, if so, can the Minister give a few examples of cases where he has seen that, although positive international law did indeed operate as a legal norm, it turned out in retrospect to be in conflict with the broader assessment of sources that must be consulted in order to determine whether law exists?

#### **7. Government answer**

**The Minister acknowledges that international law is part of the international legal system of which political forces are also part. In this respect, the international legal system does not differ essentially from the national legal system. Rather than creating conflict, positive law may develop in a manner aimed at establishing an exception to a recognised general principle of law. An example of this is the principle of freedom of the high seas, to which exceptions have been made over the decades, such as the right of innocent passage through the territorial waters of a coastal state. A foreign vessel is only entitled to ‘innocent passage’ if a number of conditions are met. This legal regime was codified in the 1982 United Nations Convention on the Law of the Sea. A similar exception is provided by the conditions attached to the ‘right of transit passage’ through straits connecting two parts of the high seas or exclusive economic zones and the right of coastal states to establish safety zones around installations and artificial islands in their exclusive economic zone. In situations of this kind, state practice may initially be at odds with a relevant general principle of law, but this practice may, with sufficient support from other states, lead to a new rule of positive law that constitutes an exception to the legal principle in question.**

The members of the Parliamentary Party of the Christian Union note that international law and the ILC’s analysis focus on the rights of people, whereas there is also now greater emphasis on safeguarding the rights of animals through positive (international) law. Would the government explain what principle underlies the difference between the rights of people and the rights of animals?

#### **8. Government answer**

**States are the primary subjects of international law and, as already noted above, therefore play a role in recognising and forming general principles of law. In principle, international law applies between states, but individuals too can have rights under international law and can therefore be regarded as subjects of international law. These human rights apply (primarily) between states and individuals.**

**Animals do not yet have rights under international law in the same way as humans do. This does not mean that animals cannot be subjects of international law. Although greater attention has recently been paid to animal rights and recognition of the intrinsic value of the environment, this has not yet been reflected in the development of positive (international) law with regard to the recognition of animals as subjects of international law. Nonetheless, animals (and other organisms) are protected under international law, in particular under conventions designed to conserve biological diversity such as the Convention on Biological Diversity.**

The members of the Parliamentary Party of the Christian Union agree with the government and the CAVV that the notion of ‘civilized nations’ is problematic and anachronistic. These members would ask the Minister to reflect on how this notion has influenced the development of international law to date, since this largely took place in an era in which it was still common to refer to ‘civilized’ and ‘uncivilized’ nations. Could it be that insufficient account has been taken of the interests of ‘uncivilized’ nations in the development of international law? What

consequences does the Minister think this has had for the current constellations of international law and the sources from which we have drawn in recent centuries?

#### **9. Government answer**

**The term ‘civilized nations’ in Article 38 of the ICJ Statute dates from a period in which a distinction was made at international level between European Christian states and states and communities that did not have the same values and legal systems. During that period, little if any account was taken of the interests of those other states and communities in the development of international law because only the ‘civilized nations’ developed international law and only they were expected to adhere to that law.**

**This changed after the Second World War, mainly due to the establishment of the United Nations, the decolonisation process and the recognition of individual human rights. The states that emerged as a result of decolonisation were now able to sit at the table as legal equals with other states when rules of international law were established or adapted. Owing to the so-called ‘clean slate’ doctrine as laid down in the Vienna Convention on Succession of States in Respect of Treaties of 1978 (not yet in force), these new states were also not bound by the treaties previously concluded by the colonial powers. An exception to this rule was formed by treaties that specifically relate to the territory, such as border treaties. The new states also developed regional instruments (such as the African Charter on Human and Peoples’ Rights and the American Convention on Human Rights), acceded to existing treaties and obtained influence over the development of international law through their membership of various (universal) international organisations.**

**The decolonisation wave prompted the emergence of various movements that focused on improving and revising international law. The conventions concluded after this period and the customary law rules established since then reflect much better the interests of these new states. It follows that the term ‘civilized nations’ is now interpreted as a reference to all states that form the international community.**

The members of the Parliamentary Party of the Christian Union would request the Minister to discuss the reality of the situation, namely that international law and its applications are politically determined, on the one hand by member states agreeing on something and then defining it as international law and on the other by member states invoking that law for political reasons, for example in UN resolutions. Does the Minister acknowledge that giving resolutions the same weight as other sources described in Article 38 of the ICJ Statute is complicated because political and power motives also play a role in resolutions?

#### **10. Government answer**

**Not all UN resolutions have the same status. UN Security Council resolutions can be legally binding and thus have the same status as other binding sources of international law. UN General Assembly resolutions are not given the same weight as the sources described in Article 38 of the ICJ Statute. Consequently, they are usually not legally binding. However, resolutions of this kind are used in practice to interpret norms as laid down in treaties or customary law. Moreover, resolutions can be used to determine the existence of a rule of**

**international law: a resolution may reflect a rule of customary law and, if adopted unanimously, by consensus or by an overwhelming majority of votes, can confirm the customary law status of a rule. According to the ICJ, it depends on the wording of a resolution and on the manner of its adoption (voting ratios) whether a UN General Assembly resolution reflects international law. The ICJ regularly refers to resolutions of the General Assembly for the formulation of a rule of international law. Examples include resolutions on relations between states (such as Resolution 2625 (1970)), *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*), decolonisation (such as Resolution 1514 (1960)), *Declaration on the Granting of Independence to Colonial Countries and Peoples*) and the draft articles on responsibility of states for internationally wrongful acts (Resolution 56/83 of 12 December 2001).**

The members of the Parliamentary Party of the Christian Union wonder whether those instruments should not be recalibrated to limit the effect of power considerations. These members wish to know whether the Minister acknowledges that there is a difference between the international legal system and international law. If so, can the Minister explain how article 90 of the Constitution should be interpreted and what the difference would be if it referred to ‘international law’ (*internationaal recht*) rather than ‘the international legal order’ (*internationale rechtsorde*)?

#### **11. Government answer**

**International law is based on rules, standards and principles that primarily regulate relations between states. The ‘international legal order’ (i.e. the international legal system) should be understood in the broad sense of ‘an international system based on universally applicable legal norms’ (Parliamentary Paper 15 049 (R 1100), no. 7, p. 5). The international legal system is therefore a broad concept that refers to the system in which international law operates, including international diplomacy and compliance as well as respect for international law. It also includes the mechanisms for enforcement and dispute settlement, and for the creation of new rules of international law.**

**In accordance with article 90 of the Constitution, the government promotes the development of the international legal system. That constitutional task, which affects many departments and policy areas, is implemented by the Netherlands in various ways. This is set out in, for example, the Policy Document on Human Rights, Democracy and the International Legal Order, and the Global Multilateralism Policy Framework (see Parliamentary Paper 32 735, no. 370 and Parliamentary Paper 31271, no. 22).**

The members of the Parliamentary Party of the Christian Union would request the Minister to state whether the sovereignty of states is really a general principle of law and, if so, since when has it been established as such? Does the Minister believe that the established borders – for example, those set around the time of the Berlin Conference, but about which there is still

conflict today – are an expression of these principles of law? Does the government consider that these established decisions are immutable and are an expression of principles of law?

## **12. Government answer**

**State sovereignty denotes the supreme authority exercised by a state over a certain territory (and the people living there). The borders of a state can be disputed without this affecting statehood and thus the sovereignty of that state. The concept of state sovereignty (and thus the sovereign equality of states, regardless of territorial size or political system) can be traced back to the Peace of Westphalia of 1648. This was a peace settlement between European states, in which a legal system based on persons (monarchs) was transformed into a legal system based on territory (of states) and the sovereign equality of states. When various former colonial areas became independent states as a result of decolonisation after the Second World War, the principle of state sovereignty also applied to them. The International Court of Justice has confirmed the principle of sovereign equality of states (and thus state sovereignty) as a principle of international law, for example in the context of the principle of non-intervention and the prohibition of the use of force.**

**On the basis of the principle of *uti possidetis* (derived from Roman law), the external borders of a territorial entity are ‘frozen’ at the time of independence. This principle was first applied at international level during the formation of South American states, later during the formation of various states on the African continent and subsequently in the context of the former Yugoslavia, the break-up of the USSR and the dissolution of Czechoslovakia. In most cases, the borders established in Africa by colonial powers during the Berlin Conference (1884-1885) did indeed form the basis for the external borders of the independent states after decolonisation through application of the principle of *uti possidetis*. The Constitutive Act of the African Union confirms the applicability of this principle to the external borders of a colonial territory upon attainment of independence. However, external borders of this kind are not immutable. They may be altered by mutual consent of the states concerned.**

The members of the Parliamentary Party of the Christian Union would refer to the following sentence on page 4 of the government response. ‘The CAVV notes that the ILC does not address the issue of what distinguishes a principle from a principle of law, but the government would observe that, according to its understanding, a principle of *law* is a legally binding norm that can be the origin of other rules, whereas a principle is an extralegal norm that is not itself legally binding.’ These members wish to know whether this means that, if a principle of law is no longer perceived as a norm, it loses its persuasive authority. Does the Minister recognise the danger that an act that constitutes a breach of the norm when only a few countries no longer view the principle of law as binding may, once more countries come round to this point of view, come to be seen not as a breach of the norm but as a further development of a principle of law? How should this conclusion be reconciled with the essence of principles, with international power relations and the protection of minorities and with the factual observation that legal positivism ultimately proves to be more decisive than principles? Does the Minister not regard this reasoning as highly problematic since it is also susceptible to manipulation by the most powerful

countries, which can use compulsion to ensure that a principle of law is no longer treated as a binding norm (by other countries dependent on them)?

### **13. Government answer**

**States are the primary actors that shape international law, for example in the formation and recognition of general principles of law that are regarded as an intrinsic part of the international legal system. It follows that there is scope for principles of law to develop in accordance with changing views and practices. However, such changes require the broad and consistent support of the entire international community. This is also evident from the wording used by the ILC, which provides that the general principle of law must be recognised by the community of nations as intrinsic to the international legal system. The government therefore does not acknowledge that the risk mentioned by the Parliamentary Party of the Christian Union exists in this connection.**

The members of the Parliamentary Party of the Christian Union wish to know how the Minister assesses the eight criteria which, according to Professor Lon Fuller, should be observed by a law-making body. These criteria are:

- laws must be general (ensures fairness and prevents arbitrariness);
- laws must be publicly promulgated;
- laws must be non-retroactive (prevents arbitrariness and abuse of power);
- laws must be sufficiently clear;
- laws must be non-contradictory;
- laws must not require the impossible;
- laws must be stable and constant over time;
- laws must be administered in such a way that they do not diverge from their obvious meaning; the authorities too should be bound by laws and should not change laws too frequently.

These members wish to know whether the Minister believes that current international law complies with these eight principles. If not, in what areas does it not comply and can the government give specific examples?

### **14. Government answer**

**Professor Fuller's criteria do not necessarily apply to international law.**

**The formation of international law is based on consent. \Most rules of international law are not general, but apply only between parties who have agreed to them (in the case of treaties) or to parties who have not persistently opposed them since their inception (in the case of customary international law). The exception to this is formed by rules of peremptory international law (*jus cogens*), which apply to all states regardless of whether they have given their explicit consent.**

**The importance of consent before a state is bound by a rule of customary international law is evident from the fact that international law allows a state to object to the formation of that rule by persistently objecting. This requires that a state persistently objects to both the**

formation of a rule and to the existence of the rule once it has been formed. In that case, the state concerned is not bound by the relevant rule of customary international law.

International law is not publicly promulgated in the same way as statute law: customary law is by definition unwritten. Although the Vienna Convention on the Law of Treaties states that treaties do not, in principle, apply retroactively, this is not excluded. Parties to a treaty may nonetheless decide that their agreements should have retroactive effect, which may be necessary to achieve the intended purpose of the treaty. Particularly in the case of the dissolution of states, decolonisation and independence, it may be important to regulate matters that have occurred in the past.

Moreover, international law is not as clear and unambiguous as national law can be. Nor would this necessarily be desirable, since the situation to which a rule of international law applies can differ from country to country. International law must therefore allow countries to have a margin of appreciation with regard to its implementation in the national legal system.

Although international law is unlikely to contradict itself, this is not impossible. At the same time, international law has clear rules that determine which rule takes precedence in the event of a conflict between them. First of all, a rule of peremptory international law always takes precedence over a rule that lacks that status. Treaties that conflict with a rule of peremptory international law are null and void. Moreover, Article 103 of the UN Charter provides that obligations under the Charter prevail over obligations under any other international agreements. In addition, treaties themselves may contain specific rules of precedence. One example is Article 311, paragraph 1 of the Convention on the Law of the Sea, which provides that the Convention prevails over the 1958 Geneva Conventions on the Law of the Sea. Finally, treaty law provides that specific rules take precedence over general rules (*lex specialis derogat lege generali*) and that later treaties take precedence over earlier treaties on the same subject (*lex posterior derogat lege priori*). What rule takes precedence can therefore be determined in almost all cases.

In practice, international law is unlikely to require the impossible. Nonetheless, a solution for this can be found under international law. If a state is unable to meet its obligations through no fault of its own, it can invoke a ground for exclusion of responsibility. It might do so, for example, where there is force majeure or an unforeseeable and material change in circumstances. These grounds give states the right not to comply with a rule or the right to suspend or terminate a rule.

International law is relatively stable and constant, but evolves in such a way as to keep pace with state practice. In this regard, it does not differ markedly from national law. Rules govern the development of not only national law but also international law. Customary law is formed by state practice and states' corresponding belief in the existence of a legal obligation. If this changes, customary law too changes, provided the conditions for the creation of a new rule of customary law are met. These conditions are set out in the ILC's 2018 draft conclusions on identification of customary international law. Treaties can be concluded, amended and terminated, as circumstances dictate in the international

community. An example of this is the absolute and relative immunity of states. The principle that states can no longer rely on absolute immunity in respect of acts that are of a private law nature and do not serve a public purpose crystallised over the course of the previous century and was subsequently also laid down in treaties.

The formation of rules of international law is necessarily time-consuming: the formation of customary international law requires state practice that is virtually universal together with states' corresponding belief in the existence of a legal obligation (see also the above-mentioned *Draft conclusions on identification of customary international law*); the conclusion of treaties requires negotiations and, in general, national procedures must be followed if states are to be bound by them; and the formation of general principles of law requires that they are common to the various legal systems of the world or are recognised by the community of nations as intrinsic to the international legal system. Change will therefore be neither frequent nor quick. On the other hand, agreement on the precise scope of rules cannot be determined in advance. Reference is made here to the earlier comment on the necessary margin of appreciation. A rule of international law is usually agreed in broad outline, and although the precise manner in which it should be interpreted in a specific case is predictable, this cannot be set out in the rule itself.

The members of the Parliamentary Party of the Christian Union note that the principles underlying the Convention on the Prevention and Punishment of the Crime of Genocide are examples of principles that prohibit certain types of conduct. Can the Minister explain how the steps taken by the Dutch government in the Myanmar/Rohingya case with a view to achieving a more precise definition of genocide can be reconciled with the principles of the predictability of laws and the immutability of principles?

#### **15. Government answer**

The intervention in the case of *The Gambia v. Myanmar* before the International Court of Justice (ICJ) concerning the alleged genocide against the Rohingya is intended to communicate to the ICJ the views of the Netherlands, as well as of Canada, Denmark, Germany, France and the United Kingdom, on the construction of the Genocide Convention. The purpose of the intervention is therefore not to change or amend the Convention but to interpret some of its provisions, including those relating to the requirement of genocidal intent, and thus to clarify an existing obligation.

The members of the Parliamentary Party of the Christian Union note that, according to the ILC, a general principle of law is intrinsic to the international legal system if it is specific to the international legal system and reflects and regulates its basic features. The government agrees with the CAVV that this requirement needs more explanation. How does the Minister envisage this? Could Professor Fuller's criteria provide guidance here? Does this conclusion also mean that there are grounds for considering the possibility of recalibrating international institutions (e.g. the UN Security Council and permanent missions, the veto right of five member states and the voting on UN resolutions)? If not, why not?

#### **16. Government response**

**Professor Fuller's criteria relate to the adoption of national legislation. They are not suitable for analogous application to general principles of law formed within the international legal system (see also answer 14 above). In the Netherlands, as in most other states, national legislation is adopted by means of a fixed legislative procedure, with parliamentary involvement. The formation of international law is based on the consent of states.**

**The government considers that taking a different approach would be undesirable in light of the sovereignty of states and also unrealistic in light of the legal views of other states on the formation of international law.**

The members of the Parliamentary Party of the Christian Union wish to know how the Minister assesses the *lex specialis* agreements between states or groups in relation to UN decision-making? Should respecting *lex specialis* mean that UN decision-making (which is vested in a number of countries that introduced a veto structure upon the establishment of the UN and is also given political significance and weight through UN resolutions) might, in theory, not meet the criteria of international law because it would conflict with respect for *lex specialis* agreements? Can the government provide past examples of this? If the Minister draws this conclusion, how would the government deal with this if this scenario were ever to occur in the future?

#### **17. Government answer**

**The *lex specialis* rule, also mentioned in answer 14, concerns the nature of rules: is what is regulated in a treaty provision more specific than another rule that reflects a more general norm, whether in the form of a treaty provision, customary law or a general principle of law? If so, the more specific provision prevails. The *lex specialis* rule does not concern the manner in which a rule is formed. In that respect, it is therefore irrelevant whether the group of states adopting a treaty provision is small or large. Nor does the binding force of a rule depend on whether it was adopted in a political context.**

**As noted above in answer to question 14, international law provides for the precedence of rules of peremptory international law and the UN Charter for its precedence over other treaty obligations. This also means that binding decisions of the UN take precedence over other treaty obligations, even if the latter are more specific.**

**Decisions of the UN Security Council that are not taken in the context of Chapter VII of the UN Charter and most decisions of the United Nations General Assembly are not binding. This means that they can never take precedence over agreements that are binding, regardless of whether such agreements qualify as a *lex specialis*. However, they can play a role in interpreting binding standards laid down in treaties or customary law. See also answer 10 above.**

#### **Questions and comments from members of the Parliamentary Calvinist Party (SGP)**

The members of the Parliamentary Calvinist Party have gratefully taken note of the CAVV's advisory report on general principles of law and the government response. These members see

some merit in the ILC's draft conclusions in relation to the identification of general principles of law. They have a number of questions about this.

They wish to know how the government views a right such as sovereign equality, given that it is a general principle of law and has also been codified. What are the current methods for resolving any interpretation conflicts that may arise?

Are there also ways of making reservations or exceptions in the case of principles of international law, such as those that exist in treaty law?

The members of the Parliamentary Calvinist Party wish to know whether such an instrument exists, but would like to see any such instrument used only sparingly. How does the government reflect on draft conclusion 9, which is not explained at any length in the CAVV's advisory report? This reads, '[t]eachings of the most highly qualified publicists of the various nations may serve as a subsidiary means for the determination of general principles of law'. In international law, the opinion of legal scholars is often treated as a source. How is a choice made and balance achieved in the event of different interpretations by different scholars whose views may sometimes be very disparate? These members wonder how the government ensures that there are not too many general principles of international law which, when specifically implemented, applied and assessed, unduly restrict our foreign policy? They consider it important that the government too can be obliged to honour agreements, but acknowledge that this is hard to reconcile with the notion that the government should have greater freedom in foreign policy and in judicial review of, among other things, arms exports.

### **18. Government answer**

**The basic principle is that rules of international law should be interpreted harmoniously wherever possible. This means that, in the interpretation of international law, rules are given maximum effect and a rule is disregarded only where necessary because it conflicts with another rule and that other rule prevails. International law has clear rules on precedence in the event of a conflict (see also the answer to question 14). These rules of precedence therefore apply only if harmonious interpretation is not possible.**

**Treaty law (as codified in the Vienna Convention on the Law of Treaties) provides a method of interpreting treaties: a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the object and purpose of the treaty. If this leaves the meaning ambiguous or obscure or leads to a result that is manifestly absurd or unreasonable, recourse may be had to the supplementary means of interpretation.**

**A treaty is binding on a state only after the state has become a party to it. A rule of customary law is not binding on a state that has persistently opposed its formation. However, the ILC has not identified a rule under which a state would have the right to consider itself not bound by a general principle of law. Nor is the government aware of a situation in which this has occurred.**

**Legal doctrine, which includes not only judicial decisions but also the views of the most highly qualified publicists of the various nations, is a subsidiary source of international law. It follows that this source is only relevant in two cases. First, doctrine can be important if the first three sources (treaties, customary law and general principles of law) fail to provide a rule that governs a specific situation. In the absence of a rule, judicial decisions and the views of the most highly qualified publicists can be consulted. Second, judicial decisions and the views of the most highly qualified publicists may be relevant where an existing rule requires further clarification or where an apparent conflict between two rules needs to be resolved.**

**The government is very hesitant to use the subsidiary sources of international law. The exception to this is formed by judgments of the ICJ. The government regards these as authoritative and, in principle, as a reflection of existing international law. With the exception of ICJ judgments, the government will not be readily swayed by doctrine. As the members of the Parliamentary Calvinist Party themselves indicate, this would be undesirable because for every opinion it is possible to find an opposing opinion. The opinions of a highly qualified publicist are therefore of limited value.**

**As regards the concerns about the (unduly) specific interpretation of general principles of law, I would refer to my answers to questions 4 and 13. International law offers states a margin of appreciation to be able to apply an international rule in a way that is appropriate within the context of the state in question. This applies, in particular, to the interpretation of general principles of law, which are inherently less specific than treaty provisions and rules of customary international law.**

## **II Minister's answer / response**

### **III Complete agenda**

- Letter from the Minister of Foreign Affairs on the government response to advisory report number 46 of the Advisory Committee on Issues of Public International Law (CAVV) on the draft conclusions of the International Law Commission on general principles of law (36 600-V, no. 59).