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on Issues of Public International Law (CAVV)

Date: 9 January 2025  
Subject: Government response to the CAVV's advisory report no. 46 on the ILC's draft conclusions on general principles of law

*[This is a translation of the official government response in Dutch ('Kabinetsreactie op CAVV-advies nr. 46 over de ontwerpconclusies van de International Law Commission inzake algemene rechtsbeginselen'), published on February 10, 2025.]*

Dear Professor Ryngaert,

Thank you for your advisory report on the draft conclusions of the International Law Commission on general principles of law. I am pleased to enclose the government response to the report.

Minister of Foreign Affairs

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**Our reference**

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**Annexe**

## **Government response to the advisory report 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**

### **1. Introduction**

On 19 May 2023, the International Law Commission (ILC) adopted, on first reading, 11 draft conclusions on general principles of law, and subsequently added commentaries to them. On 31 October 2023, the Advisory Committee on Issues of Public International Law (CAVV) was requested to prepare an advisory report on the draft conclusions. On 12 June 2024, the CAVV issued advisory report no. 46 on this subject.<sup>1</sup>

In its advisory report, the CAVV discusses six themes: the general approach adopted by the ILC, the positioning of general principles of law within Article 38 of the Statute of the International Court of Justice (ICJ), their relationship to the other primary sources of international law, the nature and functions of general principles of law, the categories of principles of law recognised by the ILC, and the various methods by which general principles of law can be identified.

The government is grateful to the CAVV for having prepared the advisory report. The government will use this report, and its own response to the report, as a basis for drafting a reply to the request of the Secretary-General of the United Nations (UN) to submit comments and observations on the draft conclusions. Along with its reply, the government will send both the advisory report and the present response to the report.

### **2. Government response to the advisory report**

As a source of international law, general principles are intrinsically less tangible than written treaty rules as well as rules of customary international law. Clarity about the methodology for identifying rules of customary international law exists only in a general sense, as the ILC project on the identification of customary international law clearly shows.<sup>2</sup> In 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. It follows that a debate about the legal nature of general principles as a source of international law quickly becomes a debate about the nature of international law itself, or even about law in general. The CAVV's advisory report clearly reflects this tension in its discussion of the two categories of general principles of law as a source of international law and how they can be identified.

The government discusses the CAVV's advisory report below in three sections:

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<sup>1</sup> Advisory Committee on Issues of Public International Law (CAVV), *Advisory report on the draft conclusions of the International Law Commission on general principles of law*, The Hague, 12 June 2024.

<sup>2</sup> International Law Commission, *Draft Conclusions on Identification of Customary International Law*, Conclusion 2, Yearbook of the International Law Commission, 2018, Vol. II, Part Two; CAVV, *Advisory report on the identification of customary international law* no. 29, The Hague, 1 November 2017; Government response to CAVV advisory report no. 29 on the identification of customary international law, 2017–2018 session, 34 775.

- I. the existence in international law of two separate categories of general principles of law;
- II. the functions of general principles of law and their relationship with other sources of international law; and
- III. the methodology for identifying general principles of law.

### **I. The existence in international law of two categories of general principles of law**

The government endorses the ILC's draft conclusion that, besides general principles of law derived from national legal systems, there is also a category of general principles that have been formed within the international legal system. The government agrees with the CAVV in this regard that the wording used by the ILC in draft conclusion 3 (b) (i.e. 'may be formed') is unnecessarily cautious and that the doubts of some ILC members about the existence of this category of general principles of law should not be reflected in the wording of this draft conclusion.

By letter of 27 December 2019, the Permanent Mission of the Kingdom of the Netherlands to the United Nations sent the ILC an overview of selected judgments by Dutch courts in which general principles of law were relied on, as well as an overview of Dutch contributions to international courts and tribunals which referred to general principles of law. The overview referred not only to judgments on various general principles of law derived from national legal systems but also to the principle of freedom of the high seas. This latter principle is, by definition, a principle that is not derived from national legal systems. It follows that the Kingdom of the Netherlands explicitly recognises the existence of the category of general principles of law formed within the international legal system; it has also stated as much in its oral interventions in the General Assembly of the United Nations on the work of the ILC in 2021, 2022 and 2023. In the government's view, the principle of the sovereign equality of states (as referred to in Article 2, paragraph 1 of the Charter of the United Nations), which is described by the CAVV as the 'primary' example of general principles of international law that have been formed within the international legal system, also falls under this category.

Furthermore, the government thus confirms that general principles of international law that have been formed within the international legal system can also exist within a specific area of international law, for example the international law of the sea. This is also the case within other areas of international law, such as international environmental law<sup>3</sup> and international humanitarian law.<sup>4</sup>

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<sup>3</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996 (I), p. 242, para. 29; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, ICJ Reports 2010, Separate Opinion of Judge Cançado Trindade, para. 197; *Iron Rhine (Belgium v. the Netherlands)*, Award, ICGJ 373 (PCA 2005), 24 May 2005, Permanent Court of Arbitration, para. 58.

<sup>4</sup> J.C. van den Boogaard, 'Principles of International Humanitarian Law: A New Framework' in *Making and Shaping the Law of Armed Conflict*, edited by Sandesh Sivakumaran and Christian R. Burne, Lieber Studies, Volume 10, Oxford University Press, 2024, pp. 63-74; Elliot Winter, 'Pillars not Principles: The Status of Humanity and Military Necessity in the Law of Armed Conflict', *Journal of Conflict and Security Law*, Volume 25, Issue 1, Spring 2020, pp. 1-31; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996 (I), p. 242, paras. 29 and 78.

## II. Functions of general principles of law and their relationship with other sources of international law

According to the government, the existence of general principles of law as a source of international law follows from their inclusion as such in Article 38 of the ICJ Statute and is justified by the function that they perform or can perform in practice. This function is partly the same as that of rules of treaty law and customary international law, namely prescribing or prohibiting certain conduct. Nonetheless, general principles of law have a number of characteristics that the other main sources of international law generally lack. First, the term 'general principle of law' is in itself an indication that it usually concerns a norm that has a higher level of abstraction than other norms (rules of treaty law or customary law) and, moreover, forms the basis for them.<sup>5</sup>

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.

The government would point out in this regard that, according to the CAVV, the ILC fails to explain the difference between rules and principles. The government agrees with the CAVV's observation that it can sometimes be difficult to distinguish between general principles of law and rules of customary international law. Often they simply overlap. In such cases, it is unnecessary to try to make that distinction. The government also understands that, in legal language, important rules are sometimes referred to as 'principles'. Consequently, a rule may sometimes be referred to as a 'principle' because it is regarded as particularly important, even though it does not in other respects have the characteristics of a general principle of law. An example is the proportionality rule of international humanitarian law, which is often referred to as the 'principle' of proportionality but is clearly a rule. Nonetheless, it can be argued that it is in fact based on a broader principle of proportionality in international law. An example of a norm of international law that is both a rule and a principle of law is the principle of distinction in international humanitarian law. This is certainly a rule,<sup>6</sup> but it is also a general principle of law as it forms the basis for a large number of other specific rules of international humanitarian law on the distinctions to be made when conducting military operations.<sup>7</sup>

The government agrees with the ILC and the CAVV that the sources of international law listed in Article 38, paragraph 1 (a) to (c) of the ICJ Statute are not in a hierarchical relationship with one another. As rules are based on general

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<sup>5</sup> *Delimitation of Maritime Boundary in the Gulf of Maine Area*, Judgement, ICJ Reports 1984, pp. 246 and 288-290: 'In the Chamber's opinion, the association of the terms "rules" and "principles" is no more than the use of a dual expression to convey one and the same idea, since in this context "principles" clearly means principles of law, that is, it also includes rules of international law in whose case the use of the term "principles" may be justified because of their more general and more fundamental character.'; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports 1951, p. 12.

<sup>6</sup> See Article 48 of Additional Protocol I (AP I) to the Geneva Conventions of 1977.

<sup>7</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996 (I), paras. 61 and 434; Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, International Committee of the Red Cross (ICRC), 2005, Rule 1 on pp. 3-8 and Rule 14 on pp. 46-50.

principles of law, conflicts seldom occur between a rule of treaty law or customary international law and a general principle of law within a specific area of international law. Where rules and principles exist in parallel, it is logical that the most clearly laid down version of the rules is applied. This is usually a treaty rule or a rule of customary international law. The function of general principles of law as an instrument for the interpretation of rules can also resolve a potential conflict between such a principle and a rule of treaty law or customary international law.

In the government's view, the nature of general principles of law is closely related to their functions, and the discussion of the positioning and functions of such principles is closely related to the methodology for identifying them.

That brings the government to the functions of general principles of law. In draft conclusion 10, the ILC identifies two main functions of general principles of law. First, general principles of law are mainly resorted to when other rules do not resolve a particular issue. And, second, general principles of law contribute to the coherence of the international legal system. The ILC gives two examples of how general principles of law can make these contributions: they play a role in interpreting and complementing other rules of international law, and they may serve as a basis for primary rights and obligations, as well as for secondary and procedural rules.

The CAVV takes a positive view of the functions mentioned by the ILC in draft conclusion 10, but expresses hesitancy about the function of general principles of law serving as a basis for primary rights and obligations as well as for secondary and procedural rules. Its hesitancy is due to the often abstract wording and general nature of general principles of law, as this can result in a lack of clarity about what conduct is actually required, prohibited or permitted. The CAVV also points out that, almost without exception, the general principles of law cited as examples by the ILC also exist as rules of customary international law and treaty law.

As regards the former argument, the government submits that the inclusion of the words 'may serve' in draft conclusion 10, paragraph 2, when read in conjunction with the commentary to this draft conclusion, suggests that the function of a principle of law depends on its nature and scope, and hence also on the specificity of the principle. The principles underlying the Convention on the Prevention and Punishment of the Crime of Genocide are an example of principles of law that prohibit certain conduct. Such principles can form a basis for primary rights and obligations. The government endorses the CAVV's suggestion that the ILC should provide further criteria that would allow the content and scope of a general principle of law and the function it fulfils to be determined. Although general principles of law also often exist as rules of customary international law and treaty law, this does not detract from the fact they serve as a source of primary norms, particularly since this subsidiary function must be viewed in the light of their associated principal function, namely, promoting the coherence of international law.

The CAVV expresses concern that, at the time of the establishment of the Permanent Court of International Justice, the authors of Article 38 of the ICJ Statute did not provide for the possibility of acting as a legislator. A commonly voiced concern about general principles of law is their intangible nature and the possibility that they could circumvent the rule that States can be bound only if they have expressed their consent by signing a treaty or expressing acceptance of the fact that they are bound (*opinio juris*). In the government's opinion, the solution lies in a clearer analysis by the ILC of the methodology for identifying general principles of law derived from the international legal system.

### **III. The methodology for identifying general principles of law**

The CAVV devotes a separate section of its advisory report to the ILC's draft conclusion 2, which provides that 'for a general principle of law to exist, it must be recognized by the community of nations'. The government agrees with the CAVV that it would have been better if the ILC had referred here to 'the 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.

As regards the identification of general principles of law derived from national legal systems, the CAVV considers the requirement of transposition to be too strict and instead advocates for transposability. The ILC links the requirement of transposition of general principles of law with terms such as 'compatibility', 'applicability' and 'suitability' for application within the international legal system. According to the CAVV, these terms are indicative of a requirement of transposability rather than transposition. As the ILC also argues that transposition does not take place automatically and does not require an express act, the CAVV considers that an assessment of transposability and a thorough statement of reasons should be sufficient. The government agrees with the CAVV on this point.

As regards the identification of general principles of law formed within the international legal system, the CAVV notes that the requirement that a general principle of law must be intrinsic to the international legal system needs more explanation. 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 to be explained at more length. The government also considers it important for the ILC to specify how general principles of law that are not intrinsic to the international legal system (as referred to in draft conclusion 7, paragraph 2) are formed. The government therefore endorses the CAVV's recommendation that a more extensive taxonomy of general principles of law formed within the international legal system formed is desirable, on the basis of which a more refined system of categorisation and methodology can be established.

## **3. Conclusion**

Although the CAVV observes that the ILC's draft conclusions offer added value by specifying the methodology for identifying general principles of law within the meaning of Article 38 of the ICJ Statute, it considers that added value to be limited. In the CAVV's opinion, this is because the project fails to distinguish sufficiently clearly between, above all, general principles of law and rules of customary international law. The CAVV regards this distinction as insufficiently clear because the ILC states that, as a source of international law, they have the same weight and partly the same functions and that the methodology requires an analysis of existing rules of international law.

The government considers that the distinction between general principles of law and other sources of international law is apparent from the specific nature of general principles of law. The distinction is also apparent from the different functions that general principles of law can fulfil. As regards their function of being able to serve as a basis for a primary obligation, the government agrees with the CAVV's recommendation that further criteria should be provided to allow the content and scope of a general principle of law and the function it fulfils to be determined.

The government considers that the methodology presented by the ILC in the draft conclusions serves as a good starting point. However, some elements require further explanation, for example the criteria for establishing that a general principle of law is intrinsic to the international legal system. Another point still requiring attention is how to establish whether states have consented to the formation of principles of law and to their content, a matter which is regulated in relation to the creation of customary international law by the requirements of the existence of state practice and a corresponding *opinio juris*.