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CAVV Symposium on Independent Advice on Public International Law

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Abstract

This report provides a summary of a symposium on independent advice on public international law, organized by the Dutch Advisory Committee on Public International Law (CAVV) on the 19th of January 2023 in The Hague. The speakers highlighted the internationally unique character of the CAVV, which is a formal body, established by law, advising the Dutch Government (Cabinet and Parliament) on questions of international law. The CAVV reflects the Dutch traditional culture of broad societal involvement and of compromise. It serves various audiences, such as the Dutch Cabinet and Parliament, the International Law Commission, legal academics, legal practitioners, and the wider public. The CAVV can be said to have an influence on both national and international debates regarding international law. This is illustrated on the basis of a discussion of the CAVV's advisory reports on the protection of the atmosphere, the use of the term 'genocide' by politicians, and the provision and funding of non-lethal assistance to non-state armed groups.

Keyword Independent advice · Advisory Committee on Public International Law · Protection of the atmosphere · Genocide · Non-lethal assistance

1 Introductory Session

On the 19th of January 2023, the Advisory Committee on Public International Law (in Dutch, Commissie van advies voor volkenrechtelijke vraagstukken; hereinafter: CAVV) organized a symposium with the goal of bringing together its members, academics and professionals in the field to discuss the CAVV's work.

The afternoon started with an introduction by René Lefeber, head of the international law division of the Dutch Ministry of Foreign Affairs, followed by two members of the CAVV: the departing chair Larissa van den Herik and the incoming

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chair Cedric Ryngaert. The opening focused on the special position and relevance of the CAVV. The speakers highlighted some of the unique features of the CAVV, and emphasized the special position of the CAVV as a standing independent body that consists of experts appointed by Royal Decree. Another distinctive characteristic of the CAVV is that the Dutch Minister of Foreign Affairs is obliged by law to inform Parliament of his or her position on an advisory report requested by him/her or issued by the CAVV of its own volition within three months of its receipt.¹

The speakers highlighted that the CAVV is unique. Examples of similar bodies do exist in other countries, yet they are usually more informal, and are not constituted on the basis of a statute, which the CAVV is.² The speakers indicated that the CAVV is typically Dutch. Its formal position within the Dutch system demonstrates the importance that the Netherlands attaches to international law, as is also represented in Article 90 of the Dutch Constitution, which requires the Government to promote the development of the international legal order. Furthermore, Dutch advisory committees and councils, such as the CAVV but also the Advisory Councils on International Affairs and on Migration (both present at the symposium), can be regarded as a reflection of the Dutch traditional culture of broad societal involvement and of compromise. The working methods of the CAVV also recognize the importance of compromise as it operates on the basis of consensus.

The speakers further discussed the functioning of the CAVV. The reports of the CAVV are usually requested by the Cabinet, but Parliament has become more active in requesting them as well over the past few years. These reports are not limited to providing recommendations for the Dutch Government regarding items on the agenda of the International Law Commission (hereinafter: ILC). They also relate to additional questions that the Government or Parliament may have on the interpretation or application of international law. The *Report on non-lethal assistance to non-state armed groups* is an example of such a report requested by the Dutch Parliament.

Lastly, the speakers highlighted the importance of understanding the impact of the CAVV on the development of international law. Whereas measuring impact is challenging, it is undeniable that the CAVV's practice has had an influence on both national and international debates, as would be exemplified throughout the panels of the day. First, because the Government is required to respond to advisory reports, the CAVV is able to influence the Dutch law-setting agenda either by contributing to the formation of the Government's opinion, or by planting a seed for the long term. In the past, it has even been the case that a report by the CAVV has led to a shift in the Government's position. An example of this can be found in the *CAVV/AIV Report on autonomous weapon systems*.³ Therefore, both directly and indirectly, the CAVV has an influence on the Dutch Government's position. Secondly, CAVV reports are

¹ Art. 24 of the Advisory Bodies Framework Act of 3 July 1996 (Bulletin of Acts and Decrees 1996, 378).

² Advisory Committee on Public International Law Act (Bulletin of Acts and Decrees 1998, 219).

³ CAVV and Advisory Council on International Affairs (AIV), No. 38, Advisory report on autonomous weapon systems: the importance of regulation and investment, The Hague, April 2022.

used on a regular basis by the Dutch courts, including the Dutch Supreme Court, as an aid for the application and interpretation of international law. The Government reactions to the CAVV reports are treated as an expression of *opinio juris* as to the current status of international law. Thirdly, domestically, CAVV reports also feed into public debate, as they are regularly cited by academics, practitioners and in the media. As such, the reports play a role in many lively discussions in society. Lastly, they also have an international impact. Prof. René Lefeber has shared several CAVV reports with foreign colleagues, which has triggered the envy of many states that do not have similar bodies. Additionally, when the CAVV assists the Dutch Government in its reactions to the work of the ILC, it contributes to the application and development of international law more generally. This would also be further discussed during the symposium.

The Introductory speeches were followed by two panels. The first panel discussed the institutional setting of the CAVV from a domestic, international and comparative perspective. The second panel adopted a more substantive perspective, taking a closer look at three different CAVV reports through the eyes of the ILC, Dutch politicians and the media respectively.

2 Panel 1. The Institutional Setting: A Domestic, International and Comparative Perspective

The first panel was introduced and chaired by Guido den Dekker, a member of the CAVV. Three topics were at the centre of this discussion: the contribution of the CAVV to Dutch debates and the Dutch Parliament, a comparison between the CAVV and the German *Wissenschaftlichen Dienste* (hereinafter: GWD), and how members of the ILC view the role of the CAVV.

2.1 The Contribution of the CAVV to Dutch Debates: A Perspective from the Dutch Parliament

The Dutch MP Roelien Kamminga [VVD (People's Party for Freedom and Democracy)] discussed the contribution of the CAVV to Dutch parliamentary debates. Over the last few years, Parliament has increasingly turned to the CAVV for advice. According to Ms. Kamminga, this is because Parliament seeks to be more effective, which means that all relevant instruments must be used to improve debates with the Cabinet. This includes the use of advisory bodies. Additionally, she highlighted the increasing relevance of international law in today's world that impacts the work of Parliament. The added value of the CAVV, as an advisory body on international law, is its independence and its neutrality, rather than bringing a party-focused perspective. Ms. Kamminga praised the CAVV for providing independent advice that can be used as a starting point for debate.

According to Ms. Kamminga, it is important to make a clear distinction between fact-finding and advisory committees, and to separate the two functions. The CAVV as an advisory committee should not engage in fact-finding. Rather, it should remain

an advisory body that stands at the forefront of international discussion. Ms. Kamminga highlighted the importance of proper timing, also in respect of the responses to the CAVV reports. She noted that politicians are not always in a position to read such reports, due to their busy schedules. Therefore, it has added value for the CAVV to introduce the reports in Parliament. This allows the CAVV to have an even more solid basis for promoting and informing debates and thus to contribute to policy setting.

Ms. Kamminga concluded that advisory committees such as the CAVV have paved the way for more topics to be discussed in Parliament that are relevant to international law. The importance of these reports is a reflection of larger trends in politics: over the last few years, international law and treaties have become more relevant to national policy. Ms. Kamminga highlighted that, as a result, advisory bodies are becoming more important in assisting both the Government and Parliament in their adherence to international law. The existence of bodies like the CAVV keeps Dutch political institutions on their toes. Alongside the ministries, Ms. Kamminga complimented the CAVV for having become a trusted agent for relevant and useful input in debates, especially in the politically fragmented landscape of the Netherlands.

2.2 The Contribution of the CAVV to the Work of the ILC

For the second discussion, the panel continued with Patricia Galvão Teles from the ILC (in her personal capacity) on the contribution of the CAVV to the ILC. She gave an assessment of the work of the CAVV on ILC projects, and of the way in which the Dutch Government presents the advice of the CAVV to the ILC. For example, she pointed out that there have been some inconsistencies with the Government's annexing of CAVV reports in their responses to the ILC. In this regard, she noted that the CAVV's impact on the ILC is usually indirect, since the CAVV reports are not transmitted independently to the ILC, but rather as part of the Dutch Government's comments. She suggested that the CAVV's reports could be made more visible within the Dutch Government's reaction.

With regard to the CAVV's impact, Ms. Galvão Teles noted that the contributions of the CAVV have considerable merit when it concerns identifying legal issues that are more problematic. When the CAVV takes a position on these issues, it is potentially influential. This may be the case regarding the ILC's ongoing work on the immunities of state officials from foreign criminal jurisdiction. She also suggested that a symbiotic relationship exists between the ILC and CAVV: in some reports, e.g., on aggression and peremptory norms, the CAVV refers to the ILC's work.

Ms. Galvão Teles considered that the CAVV's influence could be even greater if it were to strengthen its visibility. She suggested that the website could be improved to become more accessible and complete in English, and that the reports could be categorized thematically and chronologically to allow stakeholders to have quicker access to relevant reports. She also cordially invited the CAVV to have more

informal interactions with ILC members in Geneva. Prof. Lefeber welcomed all of these points of advice.

Lastly, Ms. Galvão Teles discussed whether the CAVV could serve as a model for such bodies in other states. She recognized that, in theory, the CAVV is a useful body for any state. However, in practice, the conditions are not always conducive in other states, as one would need an active academic community that is sufficiently specialized in questions of public international law. She therefore agreed that the CAVV is, in this sense, a very Dutch institution and congratulated the Netherlands on its existence.

2.3 A Comparative Perspective: Independent Advice on Public International Law in Germany

During the third part of the first panel, Roman Schmidt-Radefeldt, Director of the GWD, provided a comparative perspective on advising the German Government and Parliament on questions of international law.

Mr. Schmidt-Radefeldt began with some general remarks on the question of ‘advice’ by emphasizing the importance of independence for advisory bodies. He also pointed out the risk of advising from an ‘ivory tower’ which goes along with professional authority, but might be considered too academic by politicians. In Germany, the GWD is working in a field of tension between academic freedom, political accountability and administrative constraints. As the academic workbench for Parliament, the GWD is heavily involved in politics—similar to the CAVV in the Netherlands. In contrast, the GWD reports are often requested by opposition parties to gain parliamentary control: rather than using them as an academic foundation for political debates, like the CAVV reports, they are used as an opposition tool.

As a result, most attention to international law in Germany’s *Bundestag* is focused on possible breaches of international law by the Government. In the eyes of Mr. Schmidt-Radefeldt, this gives a distorted view of what international law is or can do in political debates. In practice, the advice that is requested by German MPs often relates to ‘political hot potatoes’, reflecting how they see the law as an instrument of politics. Further confirmation of this are the tight deadlines on which the GWD has to work—it must usually wrap up its reports in just a few days, in contrast to the months that the CAVV usually has. Another contrast with the CAVV is that the *Bundestag* does not publish the GWD reports in English. In response to a question, Prof. Schmidt-Radefeldt explained that, while publication in English is indeed called for, there are not enough resources available to the GWD to be able to do this on its own.

Lastly, Mr. Schmidt-Radefeldt reflected on how to measure the impact of bodies like the GWD and the CAVV. His remarks aligned with the introductory speeches of the day. Both can have an impact on Government institutions, the media, academic writings and the courts. Such an impact can vary greatly: Mr. Schmidt-Radefeldt explained how GWD reports can also be misused to launch political debates by taking the reports out of context. This has caused political crises in the past, which subsequently led to discussions on the political responsibility of the GWD. Again,

this highlights the careful balancing act that must be performed between academic freedom and political accountability.

At the end of this first panel, some interesting questions were raised regarding the relation between politics and advisory bodies. Ms. Kamminga highlighted that both Parliament and committees like the CAVV have a responsibility to ensure the optimal functioning of advisory processes. The responsibility of Parliament consists of formulating questions in a clear manner and to ensure that it seeks advice from the appropriate committee. On the other hand, advisory bodies should decline certain requests, if such requests do not fall within their mandate. Mr. Schmidt-Radefelt confirmed this, but also emphasized that the tension between politics and legal advice will always exist, as advisory reports are usually requested as a result of political events.

3 Panel 2. A Substantive View: A Closer Look at Three CAVV Advisory Reports

The second panel of the day was chaired by Bibi van Ginkel, a member of the CAVV. This panel discussed three different CAVV reports. These were the *Report on the ILC's Draft Guidelines on the protection of the atmosphere*,⁴ the *Report on the use of the term 'genocide' by politicians*,⁵ and the *Report on the provision of 'non-lethal assistance' to non-state armed groups*.⁶ These reports illustrate what can and cannot be done by the CAVV as an independent advisory body, something that the panelists reflected on as well. The panelists also shared their own perspectives and ideas on what lessons can be drawn from these reports.

3.1 Report: The Protection of the Atmosphere⁷

The first CAVV report concerned the Draft Guidelines on the protection of the atmosphere,⁸ as adopted by the ILC. Johan Lammers, a member of the CAVV and one of the leading authors of this report, started with some brief background information. The ILC, established by the UN General Assembly in 1947, is mandated to promote the progressive development of international law and its codification. The ILC decided in August 2013 to include the topic 'protection of the atmosphere' in its programme of work. The Commission embarked on this topic relatively late.

⁴ CAVV, No. 34 Advisory report on the ILC's Draft Guidelines on the protection of the atmosphere, The Hague, June 2019.

⁵ CAVV, No. 28 Advisory report on the scope for and the significance and desirability of the use of the term 'genocide' by politicians, The Hague, March 2017.

⁶ CAVV, No. 35 Advisory report on the provision and funding of 'non-lethal assistance' to non-state armed groups abroad, The Hague, June 2020.

⁷ CAVV, No. 34 Advisory report on the ILC's Draft Guidelines on the protection of the atmosphere, The Hague, June 2019.

⁸ Official Records of the UNGA, Seventy-third Session, Supp. No. 10, Chapter VI, A/73/10, pp. 157–200.

There had already been important legal developments before the ILC included this topic on its agenda, such as the adoption of the Geneva Convention on long-range transboundary air pollution,⁹ the Vienna Convention for the Protection of the Ozone Layer¹⁰ with its Montreal Protocol on Substances that Deplete the Ozone Layer¹¹ and the UNFCCC¹² with its Kyoto Protocol.¹³

Mr. Lammers noted that when the ILC began its work on this project, it greatly restricted its scope in doing so. The Commission's work was not to interfere with relevant political negotiations, such as questions concerning the liability of states and their nationals. The project was also not intended to fill gaps in existing treaties. The outcome of its work was a set of twelve Draft 'Guidelines' instead of Draft 'Articles', adopted in 2018 on first reading. These Guidelines were very broadly formulated and were based on the perspective that the atmosphere was a 'single global unit', which must be treated as such. The ILC prescribed an obligation of due diligence to protect the atmosphere and to ensure that environmental impact assessments were undertaken where necessary. Interrelationships with other rules of international law, such as trade and investment law, the law of the sea and international human rights law, were to be considered.

In its report on the ILC study, the CAVV applauded the fact that the ILC had taken up the important issue of the protection of the atmosphere as a 'global single unit'. The CAVV also noted that, on the one hand, the ILC stated that the protection of the atmosphere was important and belonged on the international agenda, while, on the other hand, it appeared to be divided on whether this was a matter of international *politics* or international *law*. This double mindset was also somewhat visible in the Draft Guidelines. The Guidelines were meant to provide assistance to states in addressing critical questions regarding the atmosphere, but in practice they have been only moderately helpful. The limits that the ILC set upon itself during the drafting of the Guidelines cannot be sufficiently explained, and it was regrettable that the ILC took such a cautious approach. The effect of this was that certain terminology of the Draft Guidelines was not as convincing as it could have been: the ILC chose to use the concept of 'a pressing concern of the international community as a whole' with the intention of presenting a factual observation. It deliberately refrained from using the concept of a 'common concern of humankind', as it considered that, while there was some support for it in several international instruments and the literature, the legal consequences of the concept remained unclear. In the same vein, the ILC remained very vague on what the current status of the atmosphere entailed in international law. The Draft Guidelines were essentially not as relevant as they could have been, according to Mr. Lammers, as was also noted in the CAVV report.

⁹ Geneva Convention on long-range transboundary air pollution (1979), UNTS, vol. 1302, p. 217.

¹⁰ Vienna Convention for the Protection of the Ozone Layer (1985), UNTS, vol. 1513, p. 293.

¹¹ The Montreal Protocol on Substances that Deplete the Ozone Layer (1987), UNTS, vol. 1522, p. 3.

¹² UN Framework Convention on Climate Change (1992), UNTS, vol. 1771, p. 107.

¹³ Kyoto Protocol to the UN Framework Convention on Climate Change (1997), UNTS, vol. 2303, p. 162.

The Dutch Government formulated a reaction to the report, as is required by law, although it did not agree with the substance thereof. Instead, the Government concurred with the restraints that the ILC had imposed upon itself, its position being that policy development was best left to international negotiation in the political sphere. Additionally, the Government did not mind that the ILC had failed to clarify the international legal status of the atmosphere. It agreed, however, with the CAVV that the terminology of a ‘common concern of mankind’ was preferable to a ‘pressing concern of the international community as a whole’. Mr. Lammers noted that the preference for the latter terminology was also mentioned in the letter to the UN Secretary-General. The CAVV report, even though the latter did not fully reflect the official position of the Dutch Government, was annexed to the letter of the Dutch Government.

According to Michael Wood, there are lessons to be learned from this—in his words—‘uninteresting’ ILC study, about this ‘uninteresting’ topic. He considered that the CAVV is a very Dutch institution, in that it shows the Dutch tendency to ask expert committees to advise on (international legal) issues that seem to be too controversial for the Government. In contrast, in the UK, such issues would tend to be avoided altogether.

He explained that the restrictions placed on the topic by the ILC had been insisted upon by those members opposed to the topic, as the price for a consensus on taking it up.

He noted that there was some lack of clarity within the ILC about the status of this specific CAVV report, which was sent to the UN Secretariat as an annex to the Dutch Commentary. In these Comments, the UN Secretary-General was ‘invited to take note’ of the CAVV report, which was a strange thing to do, as the usual practice is that states only communicate their own views on an ILC study to the UN. Because of this, the report was instead treated as part of the Dutch Commentary, giving the false impression that it was part of the official Dutch viewpoint. Either way, the report itself did not exert much influence. While the ILC did adopt the terminology of a ‘common concern of mankind’ (instead of a ‘pressing concern of the international community as a whole’) on second reading, this had been the principal point in many states. Comments to the Draft Guidelines adopted on first reading and the CAVV could hence not be credited with that.

Sir Michael Wood considered that this topic of the protection of the atmosphere was not a usual one for the ILC to take on. He pointed out that it was the Special Rapporteur who pushed for it, despite strong opposition within the ILC. The main reason for this resistance was that the topic was being dealt with in other forums, by people with much more substantive expertise. As such, the Draft Guidelines were not particularly illuminating in Sir Michael Wood’s view. Additionally, in its Commentary, the ILC provided that the Guidelines have no legal binding effect, and the Commission itself remained somewhat divided on this issue.

On a more general note, Sir Michael Wood observed that CAVV reports qualify as doctrine under Article 38(1)(d) ICJ Statute.¹⁴ Additionally, the Dutch Government’s

¹⁴ Statute of the International Court of Justice (1945), UNTS, vol. 33, p. 933.

mandatory reactions to the reports generally provide insights into the *opinio juris* of the Netherlands concerning these issues, as Prof. Van den Herik added.

Sir Michael Wood went on to question why a CAVV report should routinely be issued regarding the text of the first reading by the ILC, instead of earlier during the ILC discussion. According to him, the second reading often does not allow for many changes compared to the first reading (although there are exceptions to this). Mr. Lammers added that there have occasionally been reactions to ILC projects in earlier stages. Moreover, the Comments by states did lead to some changes in the second reading of the Draft Guidelines on the protection of the atmosphere, even if the CAVV report added to the Dutch Commentary was not the official viewpoint of the Government.

3.2 The Use of the Term ‘Genocide’ by Politicians¹⁵

André de Hoogh, a member of the CAVV, provided some context on the CAVV report on the use of the term ‘genocide’ by politicians, which was drafted at the request of the Dutch Parliament. It was done against the background of atrocities committed by certain terrorist organizations such as IS against ethnic and religious groups in Iraq and Syria. This raised the question of who can determine whether genocide or crimes against humanity have been committed, and more specifically whether this should always be done by a court of law?

The formulation of the request is important for the CAVV, as Larissa Van den Herik emphasized in response to a question on the mandate of the CAVV. This mandate only extends to general questions of international law. Questions that are too concrete, and would imply an evaluation of the facts, fall outside the scope of the CAVV’s mandate. The CAVV is not a fact-finding body. This aligns with Ms. Kamminga’s comments in the first panel.

In this report specifically, the request consisted of two parts. First, generally, how to determine whether genocide or crimes against humanity have been committed and whether this determination can be made outside of courts of law. The second part was more specific, and pertained to the question of whether these crimes were being committed in certain situations. This second question was not answered in the report, because it would have entailed assessing the concrete situation on the ground. Therefore, the CAVV drafted its advice based on the first question, and it was left to Parliament to decide its own stance on the second question.

Mr. De Hoogh explained that the first general question could be interpreted in different ways. If the question was who can *punish* the commission of genocide or crimes against humanity, then the answer would be that it must indeed be a court of law that established this. However, the question of *whether* genocide or crimes against humanity are being committed entailed a different issue. The prohibition on committing such acts is imposed on states, which are primarily responsible for adhering to this rule.

¹⁵ CAVV, No. 28 Advisory report on the scope for and the significance and desirability of the use of the term ‘genocide’ by politicians, The Hague, March 2017.

Fundamentally, international law establishes a system whereby states stand in horizontal relationships to each other based on their sovereign equality. In the absence of any higher authority, it is in principle for states to create international law together. In such a system, one state cannot make decisions that are binding on another state. This was the crux of the problem, according to Mr. De Hoogh: making a determination would be one thing, but in principle it is not possible to bind other states to make that determination. Still, states could have viewpoints which may lead to further actions in the case of violations. A government could take a position and make formal claims that another state is violating international law. In reality, this does not often happen in public, and instead is usually done through diplomatic means. In this respect, it was noted that in practice the current structure may be less horizontal than we consider in theory, as there have been international 'higher' courts, such as the ICC, that have established the concepts of genocide and crimes against humanity, and whose interpretations have been authoritative for situations like these. Mr. De Hoogh agreed to a certain extent, but also pointed out that such courts, while incredibly important, do not always have jurisdiction. Hence, it is key that states can make their own determinations and act on the horizontal level.

In this specific case, Mr. De Hoogh noted that the Dutch Parliament likely wanted to know if it was itself in a position to make a determination on the commission of genocide or crimes against humanity by another state. It is technically possible for a state to determine that another state has committed these crimes, outside of a court of law. This would usually be done by the Government of such a state, but in theory a Parliament could also make such a determination. Such a determination by a national Parliament would not necessarily generate international impact. However, the Parliament could ask its Government to concur publicly and indicate measures to hold the violating state to account. It is vital in such a situation where a state alleges that another state is violating or has violated international law that there is impactful support for this on the international level. Such support must preferably come from the UN Security Council or General Assembly, or a specialized body like the Human Rights Council. Notably, however, in relation to the Uyghurs, the Human Rights Council has recently refused even to open a debate.

In the situation that a state has made the determination, possibly through its Parliament, that another state is violating or has violated international law, what would be the next step? The last CAVV report on the legal consequences of a serious breach of a peremptory norm¹⁶ went into detail on a number of these issues. The most important effects are that there would be a duty not to recognize a situation created by a serious breach as being lawful and thereby not to render aid or assistance. The question remained, however, whether states would be allowed to take countermeasures in such situations. Countermeasures are controversial, as they are rather primitive in nature, but according to Mr. De Hoogh, they could prove effective in pressuring the violating state to restore the lawful situation.

¹⁶ CAVV, No. 41 Legal consequences of a serious breach of a peremptory norm: the international rights and duties of states in relation to a breach of the prohibition of aggression, The Hague, November 2022.

As regards this CAVV report on the use of the term genocide by politicians, the Dutch MP Sjoerd Sjoerdsma [D66 (the Progressive Liberal-Democrat Party)] noted that it is unusual for politicians to ask for reflections such as these. In this case, the report had been requested not because of confusion regarding the term ‘genocide’, but to encourage the Dutch Government to take action in such situations: the Government often shied away from labelling a given situation as such, and waited for a court order as its basis to act. Mr. Sjoerdsma emphasized that a state could also make its own determination of a commission of genocide or crimes against humanity by another state on the basis of available scientific evidence, and act accordingly.

Mr. Sjoerdsma explained that the Dutch Parliament’s request for this CAVV report found its origins in concerns over the (alleged) genocide in Darfur (Sudan). Such situations beg the question of how genocide can be prevented. A distinction can be made between genocides in the distant past, and genocides that have recently occurred or are ongoing. The recognition of these events is essential for both preventing such abhorrent crimes from being committed again, and to ensure that survivors and victims are being heard.

Mr. Sjoerdsma considered that the CAVV report has contributed to a policy change. Both the Dutch Government and Parliament agree with the CAVV that states, and not only a court of law, can make a determination of genocide or crimes against humanity, as long as such a determination is based on sound evidence.

In this regard, the question was raised of what would happen if Parliament made a determination that genocide was committed by another state, but a court of law took a different view. Would the authority of the court then be weakened, bearing in mind that, for the general public, (national) courts and Parliaments are both considered as authorities of the state? According to Mr. De Hoogh, there have not been many prosecutions for genocide; therefore, the problem may not actually exist. Additionally, when Parliament takes a position, it will determine the responsibility of a foreign *state*, while a court of law will establish the (criminal) responsibility of the *individual* before it. Mr. Sjoerdsma added to this that the benefit of early action would outweigh the damage to the legitimacy of courts. He also believed that the chances of such damage would be limited anyway.

Finally, evidence is an important factor for the determination of genocide, in particular who would collect such evidence, and how to ensure that it is reliable and sufficient. Dr. De Hoogh considered that we should first of all be careful in using and defining ‘genocide’ too broadly, because this will devalue the concept. For example, with respect to the crimes allegedly committed against the Uyghurs and the Ukrainians, genocidal intent may not necessarily be derived from the alleged perpetrators’ rhetoric. These crimes could nevertheless constitute crimes against humanity. Mr. Sjoerdsma added that establishing facts is very important, especially to gain recognition. He recommended using fact-finding commissions in this respect. He noted, however, that fact-finding reports may end up being blocked from international debate, e.g., by the Human Rights Council, as it did with the report on the Uyghurs.

3.3 The Provision and Funding of Non-Lethal Assistance to Non-State Armed Groups¹⁷

Rosanne van Alebeek, a member of the CAVV, observed that the CAVV's report on the provision and funding of non-lethal assistance to non-state armed groups demonstrated the challenge of advising on international law while the rules are in a state of flux. From 2015 to 2018, the Dutch Government provided non-lethal assistance (NLA) to non-state armed groups in Syria, at a time of humanitarian disaster and amidst grave concerns for the country's stability. This NLA Programme generated fierce debates in the Netherlands, which resulted in it being shut down in 2018.

In October 2019, the CAVV and the AIV were requested to jointly provide advice on the general legal framework of the NLA Programme and to investigate the facts of the specific situation. The formulation of the questions thus included the (political) context of a concrete situation. As mentioned before, however, the CAVV is not mandated nor equipped for fact-finding, and therefore it limited itself to setting out the general framework. Ms. Van Alebeek considered that it would therefore have been better to involve the CAVV in the early stages of setting up the programme. While this did not happen with the NLA Programme in 2015, the request for advice in 2018 was nevertheless expedient as legitimate questions as to the international legal framework arose from the political debates in 2018, and clarifying this framework was necessary for decision-making on similar programmes in the future.

The framework set out in the CAVV report included the rules regarding the prohibition of intervention and the use of force, as well as state obligations in relation to possible violations of international humanitarian law and human rights committed by entities to which these states provide assistance. Ms. Van Alebeek clarified that the CAVV does not have a role in the progressive development of the law, like the ILC does. Prof. Lammers agreed that the CAVV limited itself to what the law is at a given moment, though depending on the subject it may note an ongoing shift.

In its report, the CAVV stated that it is problematic to aid non-state armed groups that look to overthrow a state's current government, but it also noted that there seems to be a shift towards more acceptance of states providing (non-lethal) assistance to armed groups. However, the development of exceptions is still ongoing, and for now the principle remains that even in such situations, other states may not provide assistance that entails the use of force. The report formulated parameters that should be taken into account if the Dutch Government had the aim to devise a policy based on a new understanding of the law. *If* an exception to the non-intervention principle, or a more liberal interpretation, was envisaged then the CAVV and AIV cautioned that it is of the utmost importance that strict parameters are set: such an exception should be strictly limited to certain situations, satisfying the following cumulative conditions, namely, first, when fighting a dictatorial regime that is violating human rights on a large scale; second, limited to certain groups, namely those groups capable of protecting the civilian population from those violations by the regime; third,

¹⁷ CAVV, No. 35 Advisory report on the provision and funding of 'non-lethal assistance' to non-state armed groups abroad, The Hague, June 2020.

applying only to certain forms of assistance, namely assistance for the benefit of the civilian population; and fourth, assistance should never contribute directly to the use of force.

After the CAVV presented its report to the Dutch Parliament, the latter still insisted on ascertaining the facts surrounding the past NLA Programme. It therefore adopted another motion in November 2020 which asked the Government to establish a new, independent Committee that would investigate the NLA Programme, including the facts and figures of the groups that received support, the internal decision-making processes, the vetting procedures, the monitoring of the programme etcetera.¹⁸ This Committee of Inquiry regarding the NLA Programme in Syria, better known as the ‘Cammaert Committee’, started its work in March 2021 and published its report in December 2022.¹⁹ Comparing the two reports, Ms. Van Alebeek pointed out that, as far as the analysis of the legal framework is concerned, there is no meaningful difference between the two reports. However, there are differences in other respects. First, the CAVV report, unlike the Cammaert report, was written with non-legal professionals in mind and hence tries to provide formulations that are as succinct and to the point as possible. Second, the Cammaert report, unlike the CAVV report, investigated the situation in Syria specifically, since it was in the position to do so as a fact-finding body consisting of more than just legal experts, and drew conclusions on the legality under international law of the NLA Programme in Syria.

Ms. Van Alebeek observed that advising the Government or Parliament on rules of international law that are in a state of flux is a challenge. Determining the (il)legality of something is not always helpful, or even opportune. The CAVV sketched the parameters within which an exception can *possibly* be developed and advised caution in relaxing the law too much. But Ms. Van Alebeek underlined that, ultimately, the question whether an exception is desirable, and whether the Netherlands wants to push for such an exception, is a political and societal debate. Unfortunately, the report did not kick-off a fundamental debate on the choices to be made in this regard, but it was rather used to both vindicate and criticize the government’s past actions. Ms. Van Alebeek considered that upon the delivery of the report, Parliament did not seize the opportunity that it had to exert influence on the shaping of future policies.

Mr. Sjoerdsma responded that this last observation is partially right, because parliamentary discussions tend to revolve around breaches of international law committed by the Government. However, he disagreed that Parliament has not made sufficient use of its influence to push for better policies.

Ghassan Dahhan, a journalist for the newspaper Trouw, elaborated on this last point regarding breaches. He noted that, generally, the relationship between

¹⁸ Committee of Inquiry regarding the non-lethal assistance (NLA) programme in Syria [Cammaert Committee], see <https://www.commissiecammaert.nl/en>.

¹⁹ Rapport Commissie van onderzoek NLA-programma in Syrië, The Hague, December 2022 [Cammaert Report], see https://mcusercontent.com/8795e574084ed9c62291ff664/files/ab43c6bc-271b-cb33-1778-4d86b5179343/Rapport_Onderzoek_NLA.pdf.

journalists and the Ministry of Foreign Affairs is a difficult one, and that this becomes even clearer in situations like that of the NLA Programme.

Mr. Dahhan noted that in the early summer of 2018, journalists of different media outlets decided to investigate the NLA Programme. While it was publicly known that the Dutch Government provided support to non-state armed groups in Syria, it remained unclear to which groups and why. The journalists found that the criteria for selection to receive aid from the Netherlands, as developed in the NLA Programme, were somewhat divorced from reality. For example, the non-state armed group should have no operational cooperation with any extremist group if it wanted to qualify for Dutch assistance. In practice, however, virtually all groups cooperated with extremists, in one way or another. Another example was the condition that the non-state armed group should not commit any human rights violations during its actions. Again, in practice, all groups committed such violations.

Despite the conditions set out in the NLA Programme, the Dutch Government provided assistance to many of these non-state armed groups. Therefore, the conditions set out in the NLA Programme were in practice not determinative for decisions to provide assistance, leading to a situation in which it was no longer clear which groups were eligible for assistance and on what grounds. Even so, Mr. Dahhan conceded that it is of course not realistic to expect things to go completely 'clean' in chaotic situations like in Syria. Thus, the question before him and his fellow journalists was not whether it was justified for the non-state armed groups to cooperate with extremists or to act contrary to human rights, but whether and how it was justified for the Dutch Government to provide aid through the NLA Programme.

This is where Mr. Dahhan considered that the media is most important. The critical publications on the NLA Programme were possible precisely because the Dutch Government was not transparent about the fact that the non-state armed groups benefiting from the programme failed to meet the set conditions. Had the Ministry of Foreign Affairs instead been honest and transparent from the outset, then the NLA Programme would not have been set up (like this) in the first place.

4 Concluding Reflections

Catherine Brölmann, a member of the CAVV, provided some final reflections on the Symposium. She emphasized the importance which the Netherlands ascribes to the CAVV, through its strong formal embedding as an independent body, and its operative structure which reflects the proverbial Dutch culture of compromise. She also recalled the comments on the impact of the CAVV, not only on parliamentary debates and judicial decisions, but also on policies and decisions of the Government, which is obliged to engage in detail with the advisory reports.

Ms. Brölmann identified some key themes of the day. First, the discussions bore out that the relation between the legal and political dimension appears to be closer in international law than in national law. The CAVV must find a balance here: staying too close to politics and society means losing independence, but keeping too much distance means losing relevance.

Second, a contrasting relation is visible between law and facts. The mandate of the CAVV is emphatically prospective rather than retrospective (even if the CAVV's main focus is to identify currently applicable international law rather than to progressively develop the law). This may pose a challenge, as it means that the CAVV has to limit itself primarily to setting out the framework of a legal issue in the abstract, while not entering into past facts. Still, a legal analysis may in turn lead to more retrospective discussions. To this may be added that, as emerged in the discussions of the day, fact-finding has its own challenges.

Third, the importance of language cannot be overstated, according to Ms. Brölmann. Most CAVV reports are translated into English, which importantly ensures better accessibility. Even more important is the *framing* of the discussion. The choice of words is vital, as the use of a particular term may entail both political and legal implications. The complexity of framing facts as particular legal categories through the use of particular words was markedly visible in each of the reports discussed during the second panel.

Fourth, the CAVV serves many audiences, such as Members of Parliament, fellow academics, Government officials, the press and the broader public. As such, these are different stakeholders, with differing relations to the CAVV and with, on occasion, differing responses to a particular advisory stance.

Fifth, the CAVV contributes to international law-making via the Dutch legal order. As such it provides expert advice on the application, interpretation and creation of international law. That said, the engagement of the Government remains vital for its work.

Ms. Brölmann concluded that, over the decades, the CAVV has established itself as a strong, independent advisory body whose reports strengthen the quality of the Government's positions on international law.

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