GRILI WORKING PAPER NO.1

Netherlands Yearbook of International Law
vol. 50 (forthcoming in 2020)

THE ENEMY OF MY ENEMY

Dutch Non-Lethal Assistance for 'Moderate' Syrian Rebels and the Multilevel Violation of International Law

September/2020

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Dutch Non-Lethal Assistance for 'Moderate' Syrian Rebels and the Multilevel Violation of International Law

by Tom Ruys[1] *and Luca Ferro*[2]

Abstract

Between 2015 and 2018, the Dutch government has supported Syrian rebels fighting the regime of President Bashar al-Assad through a 'non-lethal assistance' (NLA) program. Pertinent questions have been raised regarding the program's compatibility with international law and a joint commission was tasked with developing criteria to evaluate the legality and political expediency of future programs.

This commentary looks in retrospect at the legality of the NLA program. The substantive analysis is divided into three sections: First, it provides an overview of hard-and-fast facts about the program that have come to light following an admirable amount of journalistic scrutiny and parliamentary debate. Second, it takes a helicopter view of the legal landscape, touching upon the relevant primary norms of international law. Third, it applies that legal framework to the Dutch NLA-program, tackling a threefold question: (1) Is the type of *assistance* legally relevant? (2) Is the type of *beneficiary* non-State armed group legally relevant? (3) Is the *aim or purpose* of the assistance programme legally relevant?

While the authors recognize that the program was limited in scope and explicitly designed to stay within (or as close as possible to) the parameters of the international legal framework, they nevertheless conclude that it violated the principle of non-intervention, the prohibition on the use of force and the duty to ensure respect for international humanitarian law. Moreover, it may have led to secondary State responsibility for serious breaches of international law committed by the beneficiary armed groups. This conclusion puts in doubt the legality as a matter of *lex lata* of any such future program, be it lethal or not.

Keywords

Non-lethal assistance; non-State armed groups; non-international armed conflicts; the prohibition on the threat or use of force; the principle of non-intervention; the duty to respect and ensure respect for international humanitarian law

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Introduction: Blowing the lid off the Dutch non-lethal assistance program

On 10 September 2018, reporting by the Dutch newspaper *Trouw* and current affairs television program *Nieuwsuur* caused political uproar in the Netherlands.[3] According to the reports, the Dutch government had for years supported Syrian rebels fighting the regime of President Bashar al-Assad through a 'non-lethal assistance' (NLA) program. The program *as such* did not come as an absolute surprise, even if many details had until then remained classified.[4] More disturbing, however, was the revelation that certain beneficiary groups were labelled as 'criminal organizations with a terrorist intent' by the national Public Prosecution Service. Bizarrely, this resulted in criminal prosecutions of nationals for joining such groups who were, at the same time, materially supported by the Dutch government.[5] In addition, pertinent questions were raised regarding the program's compatibility with international law – an allegation that carries significant weight in the Netherlands as a country that prides itself on a constitutional duty to 'promote the development of the international legal order'.[6] A joint commission was tasked with examining the Syrian NLA-program for the purpose of developing criteria to evaluate the legality and political expediency of future programs.[7]

This commentary looks in retrospect at the legality of the NLA program. It is, moreover, informed by (publicly available) legal advice provided to the Dutch government – both internally and externally, as well as *a priori* and *a posteriori*.[8]

The substantive analysis is divided into three sections: First, we provide an overview of hard-and-fast facts about the program that have come to light following an admirable amount of journalistic scrutiny and parliamentary debate, and summarize the back-and-forth between the Dutch government, the External Advisor on International Law (or *Extern Volkenrechtelijk Adviseur* (EVA)), and members of parliament on the legal issues.

Second, we take a helicopter view of the legal landscape, touching upon the relevant primary norms of international law. These include the principle of non-intervention, the prohibition on the use of force, the duty to ensure respect for international humanitarian law (IHL), and the Arms Trade Treaty (ATT). This section moreover discusses possible secondary State responsibility for supporting non-State armed groups acting in breach of international law and takes a look at the possible legal justifications that might preclude wrongfulness.

Third, we apply that legal framework to the Dutch NLA-program and tackle a threefold question:

1. Is the type of *assistance* legally relevant?

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[3] M Holdert and G Dahhan, Nederland Steunde 'Terreurbeweging' in Syrië, NOS, 10 September 2018, https://nos.nl/nieuwsuur/artikel/2249806-nederland-steunde-terreurbeweging-in-syrie.html; G Dahhan and M Holdert, Hoe de Nederlandse Overheid een Syrische 'Terreurbeweging' Faciliteerde, Trouw, 10 September 2018, https://www.trouw.nl/nieuws/hoe-de-nederlandse-overheid-een-syrische-terreurbeweging-faciliteerde~bd73dd6e/.

[4] The Netherlands, Tweede Kamer der Staten-General, Lijst van Vragen en Antwoorden, Kamerstuk 32623 no. 229, 28 September 2018, question 112.

[5] See, e.g., M Holdert and G Dahhan, Vrijspraak voor Teruggekeerde Syriëganger Driss M, NOS, 27 June 2019, https://nos.nl/nieuwsuur/artikel/2290932-vrijspraak-voor-teruggekeerde-syrieganger-driss-m.html.

[6] See Article 90 of the 2008 Constitution of the Kingdom of the Netherlands.

[7] The Nederlands, Tweede Kamer der Staten-Generaal, Stemming Brief Toetsingskader voor het Leveren en Financieren van Niet-letale Steun aan Niet-statelijke, Gewapende Groepen in het Buitenland, 5 November 2019, TK 19-15-1. The joint commission submitted its advice on 25 June 2020 (CAVV/AIV (n 1)).

[8] Nollkaemper 2013; The Netherlands, Tweede Kamer der Staten-Generaal, Brief van de Minister van Buitenlandse Zaken, Kamerstuk 32623 no. 230, 1 October 2018; The Netherlands, Tweede Kamer der Staten-Generaal, Verslag van een Rondetafelgesprek, Kamerstuk 32623 no. 242, 30 October 2018, at 2-22; Nollkaemper 2018.

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2. Is the type of *beneficiary* non-State armed group legally relevant?

3. Is the *aim or purpose* of the assistance programme legally relevant?

It follows from this outline that the commentary deals with the legality of support from States to non-State armed groups, to the exclusion of inter-State military assistance and the 'intervention by invitation' doctrine.[9] Similarly, it does not intend to take up the legality of multilateral military action against ISIS on Iraqi and Syrian territory.[10] Finally, the clear focus will be on Dutch practice and *opinio juris*, even if the research findings may be extrapolated to other, similar programs in Syria or elsewhere.

1 Caught between a rock and a hard place: Support for the 'moderate' opposition

1.1 Facts and context

Syria has been wracked by deadly conflict since March 2011.[11] The country is left utterly devastated: the war has caused close to 400.000 deadly casualties including 115.000 innocent civilians, led 5.5 million Syrians to desperately seek refuge abroad, and necessitates a reconstruction effort that is currently estimated at between $ 250 and 400 billion.[12] From the very beginning, the involvement of outside Powers was ubiquitous – culminating, among other, in the launch of the US-led, anti-ISIS Operation *Inherent Resolve* in 2014; Russian, pro-Assad airstrikes in 2015; and several Turkish military incursions since 2016.[13]

In Europe, a fragile arms embargo was imposed on Syria on 9 May 2011, which collapsed on 31 May of the same year under heavy French and British pressure.[14] However, from the very beginning an explicit exception was made for so-called 'non-lethal military equipment or … equipment which might be used for internal repression, intended solely for humanitarian or protective use'.[15] That exception was broadened in February 2013 to include 'non-combat vehicles which … provide ballistic protection' as well as 'technical assistance … and other services' if intended solely for the civilian protection and benefit of rebel forces.[16]

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[9] The International Law Association (ILA) Committee on the Use of Force has now also taken up the topic (renamed 'Military Assistance on Request'), see: https://www.ila-hq.org/index.php/committees.
[10] But see: Corten 2018.
[11] International Crisis Group 2020.
[12] Syrian Observatory for Human Rights, Nearly 585,000 People Have Been Killed since the Beginning of the Syrian Revolution, 4 January 2020, http://www.syriahr.com/en/?p=152189; UNHCR, Operational Data Portal, Total Persons of Concern by Country of Asylum, https://data2.unhcr.org/en/situations/syria; J Dahler, The Paradox of Syria's Reconstruction, Carnegie Middle East Center, https://carnegie-mec.org/2019/09/04/paradox-of-syria-s-reconstruction-pub-79773.
[13] For a closer look at the various military actions undertaken in Syria by outside Powers since the second half of 2013, see the bi-annual Digests of State Practice published by the Journal on the Use of Force and International Law at https://www.tandfonline.com/loi/rjuf20. For early reporting and legal analysis, see: Henderson 2014, at 659-664 and Ruys 2014. For an overview of arms transfers to Syrian warring parties, see: De Groof 2013 and Berghezan 2017. For the impact of third-State involvement on the conflict classification, see: Gill 2016 as well as Wallace, McCarthy and Reeves 2017.
[14] EU Council Decision 2013/255/CFSP (31 May 2013), OJ 2013 L 147/14. See also: BBC, EU Ends Arms Embargo on Syrian Rebels, 28 May 2013, https://www.bbc.com/news/world-middle-east-22684948; EU Sanctions Map (2020) Syria. https://www.sanctionsmap.eu/#/main; SIPRI, EU Arms Embargo on Syria, 13 November 2013, https://www.sipri.org/databases/embargoes/eu_arms_embargoes/syria_LAS/eu-embargo-on-Syria.
[15] EU Council Decision 2011/273/CFSP (9 May 2011), OJ 2011 L 121/11, Article 2(1)(b).
[16] EU Council Decision 2013/109/CFSP (28 February 2013), OJ 2013 L 58/8, Article 1. However, they cannot be read as *calling upon* or *ordering* EU Member States to provide such assistance, see: The Netherlands, Tweede Kamer der Staten-Generaal, Plenair Verslag, 29 January 2019, TK 46-30-19 and 21.

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In June 2013, the then Dutch Minister of Foreign Affairs, Frans Timmermans, informed his Parliament that the lapse of the European arms embargo did not undermine the customary principle of non-intervention, which proscribed military support and training for the armed opposition. However, he also noted that the Assad regime's lack of legitimacy – given its history of human rights violations on a massive scale – and the broad (political) recognition of the Syrian opposition meant that 'the supply of military equipment to the [latter], in exceptional cases and under specific conditions, need not be contrary to international law'.[17]

Fast forward to late 2014 and a new power balance in Syria, pitting the reviled regime against the most extremist rebel groups: Jabhat Al-Nusra and ISIS.[18] In the view of the Netherlands, the more 'moderate' opposition needed propping up to 'pose a credible alternative' to both unpalatable sides and provide citizens with a modicum of safety and protection.[19] A fact-finding mission was dispatched to map the risks and opportunities of providing such armed groups with 'non-lethal assistance'.[20] The support was to include solely goods of a *non-military* nature not subject to an export licence.

The resulting NLA program effectively ran from 28 July 2015 until 7 April 2018, costing close to € 28 million,[21] but went into high gear following French and American requests to that effect in the aftermath of the November 2015 terror attacks in Paris and the adoption of Resolution 2249 by the United Nations Security Council (UNSC).[22] Overall, the support encompassed 313 vehicles (ambulances, mini-buses, pick-up trucks – some outfitted to withstand improvised explosive devices, trucks, tractors, skid-steer loaders and motorcycles), 600 tactical vests (without ballistic protection), 243 laptops, as well as communication equipment, cameras, printers, food packages, medical kits, generators, uniforms and winter clothing, mattresses and blankets, and two pre-fab containers.[23] This support went to 22 rebel groups, part of a larger collection of groups vetted by the United States and all of whom supposedly met three criteria: (1) in favour of an inclusive political solution, (2) against cooperation with extremist groups, and (3) fully committed to international humanitarian law. Groups operating in the north were selected directly by the Netherlands or its implementing partners, whereas recipients fighting in the south were chosen upon suggestion by the United Kingdom.[24]

Yet both elements of the program – i.e., the *type* of support and its *recipients* – turned out to be problematic. For example, the current Minister of Foreign Affairs, Stef Blok, qualified at least some elements of the NLA-program as *defensive* support – thereby conceding it was meant to serve a military purpose.[25] Even more damningly, the

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[17] The Netherlands, Tweede Kamer der Staten-Generaal, Brief van de Minister van Buitenlandse Zaken, Kamerstuk 21501-2 no. 1263, 4 June 2013, at 3.
[18] Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic ('Syria Commission of Inquiry'), UN Doc A/HRC/28/69, 5 February 2015, at 5ff.
[19] The Netherlands, Tweede Kamer der Staten-Generaal, Brief van de Ministers van Buitenlandse Zaken, van Defensie en voor Buitenlandse Handel en Ontwikkelingssamenwerking, Kamerstuk 27925 no. 526, 15 December 2014, at 3-5.
[20] The Netherlands, Tweede Kamer der Staten-Generaal, Brief van de Ministers van Buitenlandse Zaken, van Defensie en voor Buitenlandse Handel en Ontwikkelingssamenwerking, 7 April 2015, Kamerstuk 27925 no. 534, at 4.
[21] The Netherlands, Kamerstuk 32623 no. 229 (n 4) questions 85 and 66 (respectively).
[22] Ibid., question 323; UN Security Council, Resolution 2249, UN Doc S/RES/2249, 20 November 2015, at para 5.
[23] The Netherlands, Kamerstuk 32623 no. 229 (n 4) questions 86 and 172; The Netherlands, Tweede Kamer der Staten-Generaal, Lijst van Vragen en Antwoorden, 25 January 2019, Kamerstuk 32623 no. 247, questions 112 and 134; The Netherlands, Tweede Kamer der Staten-Generaal, Brief van de Ministers van Buitenlandse Zaken, van Defensie en voor Buitenlandse Handel en Ontwikkelingssamenwerking, 29 April 2016, Kamerstuk 27925 no. 590, at 6.
[24] The Netherlands, Kamerstuk 32623 no. 229 (n 4) question 20. Two implementing partners were mentioned in the reporting: the American company *Creative Associates International* and Turkish company *Candor*. See also: The Netherlands, Policy and Operations Evaluation Department, Review of the Monitoring Systems of Three Projects in Syria: AJACS, White Helmets and NLA, no 423, August 2018.
[25] The Netherlands (n 16) TK 46-30-19.

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government botched the redacted release of secret documents,[26] accidentally revealing that the vehicles were considered 'essential for combat operations'.[27] Similarly, laptops were employed to select military targets, tactical vests were outfitted with storage compartments for machine guns, and cameras were used to record battles for propaganda purposes.[28] It is similarly clear that, directly or indirectly, communication equipment, military fatigues, sleeping gear, medical kits and food packages are useful to the warfighting effort. Taken together, the real if limited military value of the NLA-program thus became undeniable.

In addition, all three of the abovementioned selection criteria for recipient groups appear to have been violated even if the beneficiaries' identity remains somewhat shrouded in mystery.[29] First, the definition of 'moderate' armed groups hinged on their formal adherence to an inclusive political solution in Syria – evidenced, for example, by signing the 2015 Riyadh-declaration.[30] Nevertheless, some signatories – such as Ahrar al-Sham – had a 'clear jihadist and Salafist background' and were known to have collaborated with terrorist and jihadist groups.[31] They were therefore still considered too radical for inclusion in the program. One former key official bluntly confessed that not all signatories would effectively carry out commitments made in Riyadh if given the chance – exposing the condition's lack of utility.[32] Second, and similarly, certain beneficiary groups were found to have joined military alliances with more extremist groups. The government riposted that while ad hoc cooperation may indeed have occurred on Syria's complex battleground, such was the result of purely pragmatic considerations – not a sign of shared ideology.[33]

Third, several recipient groups were accused of committing grave violations of international human rights and humanitarian law.[34] Former Chief Prosecutor of the Yugoslav Tribunal and former member of the Commission of Inquiry on Syria, Carla Del Ponte, noted that *all* parties in the conflict had committed international crimes, of which the Netherlands was well-aware given its seat on the UN Human Rights Council from 2015 to 2017 (under whose auspices the Commission was founded). Consequently, she argued that the Dutch may have been complicit in war crimes.[35] Publicly, the government only commented it had taken the former accusations seriously, albeit found them difficult to verify. It had moreover started a dialogue with the accused and provided 'a few commanders with human rights training'.[36] In a handful of cases, the allegations (may) have led the government to cease its support.[37]

Finally, and linked to the foregoing, the puzzling discrepancy between terrorism definitions as employed by the Ministry of Foreign Affairs (MFA) and Public Prosecution Service (PPS) caused serious legal and political headache for

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[26] M Holdert and G Dahhan, Blok Openbaart Per Abuis Staatsgeheimen over Syrische Strijdgroepen, NOS, 22 November 2011, https://nos.nl/nieuwsuur/artikel/2260287-blok-openbaart-per-abuis-staatsgeheimen-over-syrische-strijdgroepen.html.

[27] The Netherlands, Kamerstuk 32623 no. 247 (n 23) question 22.

[28] Ibid., questions 30 and 41. See also: Dahhan and Holdert (n 3).

[29] The standard government reply invoked (1) the risk of human casualties, (2) obligations towards allies, and (3) the involvement of national intelligence services to stonewall repeated requests for more concrete information. See, for example: The Netherlands, Tweede Kamer der Staten-Generaal, Lijst van Vragen en Antwoorden, Kamerstuk 32623 no 272, 6 September 2019, question 2.

[30] The declaration called for a Syrian State with a civil character and respect for democratic principles including human rights and the rule of law. The Netherlands, Kamerstuk 32623 no. 229 (n 4) questions 151 and 265; France, Ministry for Europe and Foreign Affairs, Final Statement of the Conference of Syrian Revolution and Opposition Forces Riyadh, 10 December 2015, https://www.diplomatie.gouv.fr/en/country-files/syria/news/article/final-statement-of-the-conference-of-syrian-revolution-and-opposition-forces.

[31] The Netherlands, Kamerstuk 32623 no. 229 (n 4) question 265; The Netherlands, Tweede Kamer der Staten-Generaal, Lijst van Vragen en Antwoorden, Kamerstuk 32623 no 267, 14 June 2019, question 21.

[32] The Netherlands, Kamerstuk 32623 no. 242 (n 8), at 8-9.

[33] The Netherlands, Kamerstuk 32623 no. 229 (n 4) questions 147-8 and 346.

[34] Ibid., question 119; The Netherlands, Kamerstuk 32623 no. 247 (n 23) question 47.

[35] M Holdert and G Dahhan, 'Onderzoek Nodig naar Steun aan Gewapende Oppositie Syrië', NOS, 12 September 2019, https://nos.nl/nieuwsuur/artikel/2250081-onderzoek-nodig-naar-steun-aan-gewapende-oppositie-syrie.html.

[36] The Netherlands, Kamerstuk 32623 no. 229 (n 4) question 274; The Netherlands, Kamerstuk 32623 no. 247 (n 23) question 61.

[37] The Netherlands, Kamerstuk 32623 no. 242 (n 8), at 4-5.

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the government, exemplified by the prosecution of Driss M. for joining Jabhat al-Shamiya – one of the (likely) NLA-receivers.[38] The government explained that while the MFA primarily relied on international terrorism lists of the UN and EU, the PPS determined whether an accused belonged to a *specific* part of a *specific* group which, at a *specific* time, could be qualified as criminal with terrorist intent.[39] The two assessments applied different criteria and their outcome may, therefore, vary.[40]

In the end, the Dutch NLA-program was of minimal scope and impact but resulted in major political backlash whereby the Minister was forced to twice defend against a vote of no confidence.[41] Perhaps this is the logical and admirable consequence of a strong rule of (international) law in the Netherlands and a healthy parliamentary system. Indeed, Minister Blok lamented that while assistance was provided by a large number of countries, many of whom going far beyond non-lethal assistance,[42] its legality under international law was not debated elsewhere.[43] The reader is free to decide on the persuasiveness of that argument – but it is precisely to that *legal* debate we now turn.

1.2 Jousting by the Dutch political and legal elite

Back in June 2013 (after the European arms embargo's collapse[44]), the EVA to the Foreign Minister, Professor André Nollkaemper, sent a letter to the government. He opined therein that the non-intervention principle not only prohibited arms deliveries to Syria but proscribed the provision of 'other forms of support' too.[45] He acknowledged the schism between the principle and the practice of (Western) States, but nevertheless contradicted the argumentation of his Foreign Minister two weeks earlier. In Nollkaemper's view, relying on the Syrian government's lack of legitimacy and the widespread political recognition of the Syrian opposition could not provide a lawful work-around. As a result, he argued that the position set out by the Foreign Ministry was 'not without its international legal risks'.[46]

Even more problematically, the EVA was not consulted on the legality of the Syrian NLA-program and, since May 2015, could have only provided advice in that capacity at the explicit request of the government.[47] According to the

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[38] This discrepancy complicated prosecutions in at least six criminal cases. M Holdert and G Dahhan, Vervolging Syriëgangers Belemmerd door Steunprogramma BuZa, NOS, 28 February 2019, https://nos.nl/nieuwsuur/artikel/2273861-vervolging-syriegangers-belemmerd-door-steunprogramma-buza.html. Driss M. was ultimately acquitted due to a lack of evidence, allowing the Hague Court of Appeal not avoid issuing judgment on Jabhat al-Shamiya's terrorist character. Holdert and Dahhan (n 5).

[39] The Netherlands, Tweede Kamer der Staten-Generaal, Brief van de Minister van Buitenlandse Zaken, Kamerstuk 32623 no. 268, 20 June 2019.

[40] There have been other examples of clashing domestic interpretations. For example, in 2015, the British Crown Prosecution Service dropped the criminal case against Swedish national Bherlin Gildo, accused of attending a 'terrorist training camp', after it became clear the UK had been supporting the same rebel group. See: R Norton-Taylor, Terror Trial Collapses after Fears of Deep Embarrassment to Security Services, The Guardian, 1 June 2015, https://www.theguardian.com/uk-news/2015/jun/01/trial-swedish-man-accused-terrorism-offences-collapse-bherlin-gildo; and, more generally, Greene 2017.

[41] Minister Blok easily survived both motions, likely because he was dealing with the fallout of decisions taking by his predecessors – and was the one who actually shut down the NLA-program. NOS, Minister Blok Houdt Vertrouwen Kamer ondanks Fouten bij Steun Syrische Rebellen, 29 January 2019, https://nos.nl/artikel/2269685-minister-blok-houdt-vertrouwen-kamer-ondanks-fouten-bij-steun-syrische-rebellen.html.

[42] For a succinct overview, including helpful reference list, see: Van Veen 2019. See also (n 13); Humud and Blanchard 2020; and Hersch 2014.

[43] The Netherlands (n 16) TK 46-30-21.

[44] See text accompanying (n 14-17).

[45] Nollkaemper 2013, at 3.

[46] Ibid., at 4. Strangely, one would expect the EVA to advise first. See also: The Netherlands, Rapport Commissie-Davids, 12 January 2010, https://www.rijksoverheid.nl/documenten/rapporten/2010/01/12/rapport-commissie-davids, at 273.

[47] The Netherlands, Kamerstuk 32623 no. 229 (n 4) question 354. The Netherlands, Tweede Kamer der Staten-Generaal, Brief van de Minister van Buitenlandse Zroundtabaken, Kamerstuk 35000-V no 70, 6 May 2019.

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government, Nollkaemper's views were known through his June 2013 letter and duly considered in the decision-making process, which included multiple rounds of internal legal advice.[48] Nevertheless, the Dutch Parliament hosted a roundtable discussion on 27 September 2018, at which Nollkaemper presented his assessment in his capacity as a scholar rather than as the EVA.[49]

Generally, he concluded that the NLA-program went well beyond a hypothetical brush with international law, which had possibly been violated. First, he dismissed the *legal* (as opposed to *de facto*) relevance of distinguishing between lethal and non-lethal or military and non-military goods: 'The question is whether [the goods] are employed in the context of armed actions. … The non-intervention principle prohibits providing active support to groups whose purpose is the overthrow of a government.'[50] Second, he (somewhat confusingly) noted that the duty to respect and ensure respect for international humanitarian law prohibited the provision of support if it would lead to large-scale human rights violations.[51] Third, he strongly resisted the argument that the prohibitions would not apply if the assistance was meant to (help) defeat a regime committing atrocities – arguing *that* was the more realistic view and juxtaposing it to the more idealistic proponents of regime change.[52] Fourth, he restated that supporting terrorist armed groups was proscribed by positive international law also.[53]

Whereas Nollkaemper propagated a strict interpretation of the law,[54] government lawyers espoused a (slightly) broader approach. They agreed that arms deliveries and other lethal support would violate the prohibition on the use of force, the principle of non-intervention, the obligation to (ensure) respect for international humanitarian law, EU arms export legislation and the Arms Trade Treaty, but, conversely, opined that 'humanitarian, civil or medical assistance would *probably* be in line with international law'.[55] It was moreover thought impossible to judge *a priori* whether providing non-lethal assistance, as a general category, was compatible with international law and would therefore have to be decided on a case-by-case basis. Given that the envisaged policy was the supply of civil (or non-military), non-lethal support, the risk of legal exposure was judged to be low.[56] This concise evaluation was then supplemented by recalling the context in which the NLA-program was set up: a battle between the brutal Assad regime and die-hard terrorist organizations, mass casualties amongst Syrian civilians, a paralyzed UN Security Council, the large-scale political recognition of the Syrian opposition, and the explicit exception to the European arms embargo for non-lethal assistance.[57] While these latter arguments are certainly appealing on a *human* (and thus

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[48] The Netherlands, Kamerstuk 32623 no. 229 (n 4) question 354; The Netherlands, Kamerstuk 32623 no. 247 (n 23) question 164.

[49] The Netherlands, Kamerstuk 32623 no. 242 (n 8), at 5. For his written intervention, see: Nollkaemper 2018. From the sources in the latter, it appears that at least part of the legal opinion on the topic more broadly is based on an article by one of the authors of this commentary, i.e.: Ruys 2014.

[50] Nollkaemper 2018, at paras 7-8, 10 and 23; The Netherlands, Kamerstuk 32623 no. 242 (n 8), at 5-6. He reiterated that politically recognizing the opposition has no legal consequences.

[51] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949), 75 UNTS 31 ('First Geneva Convention'), (Common) Article 1; Nollkaemper 2018, at paras 12-13.

[52] Nollkaemper 2018, at paras 16-18; The Netherlands, Kamerstuk 32623 no. 242 (n 8), at 6-7.

[53] Nollkaemper 2018, at para 15.

[54] This has not always been the case. For example, the authors were very surprised to hear Nollkaemper in 2018 (The Netherlands, Kamerstuk 32623 no. 242 (n 8), at 18-19) apparently disavow an expansive position he strongly defended as recently as 2015 (Nollkaemper 2015) and which buttressed the decision to expand military action against ISIS to Syria by the Netherlands and Belgium. See: Ruys, Ferro and Haesebrouck 2019, at 139-40.

[55] The Netherlands, Kamerstuk 32623 no. 230 (n 8), at 2. The same applied for military training, except for a possible violation of international arms trade law. The compatibility of other types of training with international law was thought to be dependent on the nature of said training.

[56] This interpretation seems to be shared by other States, see Nowak 2018, at 72-5; Ferro and Verlinden 2018, at 22-9 and 37-41.

[57] The Netherlands, Kamerstuk 32623 no. 230 (n 8), at 2.

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political) level, their value for the *legal* analysis is minimal – if not zero. That much will be clear from the following sections.

2 Questions of legality

The debate on the international legality of the NLA-program in the Netherlands was primarily devoted to the question whether the principle of non-intervention had been violated – a question on which expert opinion was divided. It will therefore start off this commentary's legal analysis also. But given its factual background, the prohibition on the use of force will feature heavily as well. An ancillary debate pertains to the possible (in)direct responsibility of the Netherlands for violations of IHL through material support for those carrying out transgressions, although such concerns were quickly (if carelessly) dismissed. These two legal frameworks will be tackled consecutively, briefly and in the abstract, before applying them to the NLA-program as such.

2.1 *Aiding rebels aiming to overthrow a* de jure *government: A prohibited intervention, use of force, or act of aggression?*

There is a clear-cut legal question at the heart of what is often a confused and conflated legal debate: Does international law allow one State to assist rebel forces embroiled in armed conflict with the *de jure* government of another State? The answer may, simply, be no – which would shut down the debate neatly and irrevocably. It is far more likely, however, that the answer is a qualified no, triggering the more complicated follow-up question: Under what conditions does international law allow the provision of aid to rebel armed forces?

The answer can (partially) be found in international case law. Strictly humanitarian aid escapes condemnation as a prohibited intervention if provided 'without discrimination to all in need'.[58] Conversely, training and arming rebels carrying out forcible acts of civil strife *certainly* violates Article 2(4) of the UN Charter. An intermediate category of assistance encompasses, for example, providing rebels with funds, which *undoubtedly* constitutes 'an act of intervention in the internal affairs' of the beleaguered State.[59] The Dutch NLA-program mostly (but not exclusively) appears to fall in that in-between category, the legality of which can therefore best be determined by further untangling the non-intervention principle from its big brother, the prohibition on the use of force.

According to the International Court of Justice (ICJ), the principle of non-intervention 'involves the right of every sovereign State to conduct its affairs without outside interference' – a right which is 'part and parcel of customary international law'.[60] The Court continued:

> A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices,

[58] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, ICJ, Merits, Judgment, 27 June 1986 ('*Nicaragua*'), paras 242-3. Similarly, see: ICRC 2019, Rule 55: Access for Humanitarian Relief to Civilians in Need. Important guiding principles of humanitarian aid are: *humanity* ('saving human lives and alleviating suffering'), *impartiality* ('solely on the basis of need'), *neutrality* ('must not favour any side') and *independence* (autonomy from 'objectives that any actor may hold'), see: Annex to UN General Assembly, Resolution 46/182: Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations, UN Doc A/RES/46/182, 19 December 1991, para 2; UN OCHA, Financial Tracking Service, Criteria for Inclusion of Reported Humanitarian Contributions into the Financial Tracking Service Database, and for Donor / Appealing Agency Reporting to FTS, September 2004, https://fts.unocha.org/sites/default/files/criteria_for_inclusion_2017.pdf, at 2.
[59] *Nicaragua*, para 228.
[60] Ibid., para 202.

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> which must remain free ones. The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly obvious in the case of an intervention which uses force, *either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State*.[61]

Consequently, supporting subversive armed activities in another State is considered a coercive interference in its internal affairs and, thus, a prohibited intervention. Put differently: The aid for armed bands abroad, whose *purpose* is the violent change of government, *ipso facto* amounts to intervention – whether or not the assisting State shares that specific objective. This moreover holds true regardless of the type of support that is provided.[62]

Additionally, the Court noted that 'participating in acts of civil strife' abroad breaches the prohibition on the use of force when the *acts referred to* involve a threat or use of force.[63] This echoes the excerpt above, and implies that buttressing forcible rebel activities in another State can constitute an (indirect) use of force. However, the Court then pivoted to the *acts of assistance* themselves, holding that arming and training rebels (or otherwise providing them with 'military support'[64]) undoubtedly involved the threat or use of force against the embattled State as opposed to, for example, merely supplying them with funds.[65] The question at stake was thus whether the aid provided by the United States to the Nicaraguan *contras* involved a threat or use of force – not whether that was true for the supported acts.[66]

The prohibition on the use of force further operates irrespective of the *motive* of the intervening State.[67] Specifically, the majority view (among States and scholars) remains that so-called unilateral humanitarian interventions absent proper Security Council authorization are not allowed.[68] Similarly, there is no exception to the prohibition on intervention for humanitarian purposes. Indeed, the International Court of Justice explicitly considered whether there might be a

> a practice illustrative of belief in a kind of general right for States to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another State, whose cause appeared particularly worthy by reason of the political and moral values with which it was identified.[69]

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[61] Ibid., para 205 (emphasis added).
[62] Ibid., paras 241-2 and 292(3). Confirming that the supporting party need not aim at regime change: *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*, ICJ, Merits, Judgment, 19 December 2005 ('*Armed Activities*'), para 163. But see (n 58).
[63] *Nicaragua*, para 228 (emphasis added); Annex to UN General Assembly, Resolution 2625 (XXV): Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN Doc A/RES/2625(XXV), 24 October 1970, at 2.
[64] *Armed Activities*, para 161.
[65] See (n 61); *Nicaragua*, para 228. By contrast, the Court asserted (in paras 195 and 247) that the mere 'provision of weapons or logistical or other support' would not qualify as an 'armed attack' triggering the right of self-defence. While this *obiter dictum* has come under blistering attack, both by members of the judiciary and scholars, it appeared to accurately reflect State practice at the time (Gray 2018, at 137-9; Ruys 2010, at 415-18). In addition, the ICJ did not overturn its holding in the 2005 *Armed Activities* case (paras 146-7). An 'armed attack' can, however exist in case State officials participate alongside the armed bands or when these bands operate on the State's instructions, directions or under its (effective, or even overall) control, see: ILC 2001, 47-9; *Nicaragua*, paras 109 and 115; and compare with: ICTY, *Prosecutor v Dusko Tadić*, Judgement, 15 July 1999, Case No. IT-94-1-A, para 137.
[66] *Nicaragua*, paras 116 and 238.
[67] See also text accompanying (n 193).
[68] ILA 2018, at 20-4.
[69] *Nicaragua*, para 206.

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However, it found that States did not justify their conduct by 'reference to a new right of intervention or a new exception to the principle of its prohibition' and thus concluded that no such right or exception existed.[70]

Finally, it has been argued that breaches of international law might legally warrant (proportionate) counter-measures, including providing support to rebel armed groups.[71] One way of conceptualizing that argument is to exclude the application of the non-intervention principle when external pressure is applied for the purpose of upholding international obligations.[72] However, that argument cannot hold for aid that constitutes a threat or use of force as it violates a separate norm of international law and can moreover never be the appropriate method to ensure respect for human rights.[73] And, in any case, the interference would have to be strictly tailored to that outcome to avoid a prohibition snapback. In addition, while the legality of so-called third-party countermeasures in response to breaches of *erga omnes* norms was left open by the International Law Commission's (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA)(Article 54) and remains contested, such countermeasures cannot in any case affect the prohibition on the use of force, humanitarian obligations or other peremptory norms (Article 50(1)).[74]

2.2 Facilitating freedom fighters' faux pas: (In)direct State responsibility?

In August 2014, more than a year before the actual start of the Dutch NLA-program, the UN Commission of Inquiry on Syria unequivocally condemned non-state armed groups (in addition to government forces) for committing

> massacres and war crimes, including murder, execution without due process, torture, hostage-taking, … enforced disappearance, rape and sexual violence, recruiting and using children in hostilities and attacking protected objects. Medical and religious personnel and journalists were targeted. Armed groups besieged and indiscriminately shelled civilian neighbourhoods, in some instances spreading terror among civilians through the use of car bombings in civilian areas.[75]

Such condemnations had become woefully common following seven predecessor reports carrying a similar message.[76] Moreover, in early 2015 the Commission warned that the involvement of outside Powers permitted the warring parties to continue their armed struggle. Driving the message home entirely, it further found that 'the support given to the so-called "moderates" ha[d] ultimately consolidated the dominance of extremist groups such as ISIS and Jabhat Al-Nusra'.[77]

These facts potentially trigger three additional legal instruments: the 2013 Arms Trade Treaty, the 2008 EU Council Common Position on arms export (amended in 2019), and (Common Article 1 of) the 1949 Geneva Conventions.[78] First,

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[70] Ibid., para 207.

[71] Ibid., paras 169-70 and 257-69.

[72] Such matters do not belong to the *domaine réservé*, the collection of a State's competences not qualified by freely accepted international obligations, enjoying the protection of the non-intervention principle: *Nicaragua*, para 205; *Nationality Decrees Issues in Tunis and Morocco*, ICJ, Advisory Opinion, 8 November 1921, at 23-4.

[73] *Nicaragua*, para 268.

[74] ILC 2001, at 129-35; Jamnejad and Wood 2009, at 379-80 *Nicaragua*, paras 248-9.

[75] Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc A/HRC/27/60, 13 August 2014, summary.

[76] For all reports, see: https://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/Documentation.aspx.

[77] 2015 Syria Commission of Inquiry Report, at paras 116ff.

[78] First Geneva Convention, (common) Article 1; Arms Trade Treaty (2013), 52 ILM 988; EU Council Common Position 2008/944/CFSP of 8 December 2008 defining Common Rules Governing Control of Exports of Military Technology and Equipment (17 September 2019) OJ 2019 L 239/16. The Netherlands is party to both international treaties and legally bound by the Common Position. As for its responsibility under the European Convention on Human Rights, the NLA-program does not appear to trigger the jurisdictional clause of Article 1 under

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the Arms Trade Treaty outlaws the transfer of (certain) conventional weapons if they '*would be used* in the commission of' genocide, crimes against humanity or war crimes.[79] When those strict conditions do not apply, each export must nevertheless be checked against the overriding (or preponderant) risk they '*could be used* to commit or facilitate', among other, serious IHL or human rights violations.[80] At the EU level, the Council Common Position confirms the obligations of the Arms Trade Treaty. It further specifies that Member States shall deny an export licence in case of a 'clear risk' that the weapons *might be used* for internal repression or serious violations of IHL, or would provoke or prolong armed conflicts.[81] However, these instruments apply only in case of arms transfers, meaning their application *in casu* is more limited (but see section 3 below).

On the other hand, Common Article 1 (CA1) prescribes that the 'High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances'.[82] According to the authoritative ICRC Commentary,[83] this duty pertains to 'the entire body of international humanitarian law binding upon a particular State' as well as the guarantees contained in Common Article 3 for all parties to a non-international armed conflict.[84] In addition, both negative and positive obligations flow from its second limb (the obligation to ensure respect), meaning States must *abstain* from encouraging, aiding or assisting in IHL violations as well as *act* to stop ongoing transgressions and prevent foreseeable ones.[85] This negative obligation as a primary rule of international law can nevertheless be interpreted through the lens of Article 16 ARSIWA.[86]

Article 16, as international custom, prescribes that a State which aids or assists another State

> in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (*a*) that State does so with knowledge of the circumstances of the internationally wrongful act; and (*b*) the act would be internationally wrongful if committed by that State.[87]

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either the territorial or personal model of jurisdiction, see: Jackson 2016, at 820-1; Mauri 2019, at 256-68; *Tugar v Italy*, ECmHR, No. 22869/93, 18 October 1995, at 3-4. However, in 2019 the *Oberverwaltungsgericht* of Münster found that Germany had not fulfilled its positive obligations arising from the right to life (albeit under the German Basic Law) by allowing the United States to make use of the Ramstein Air Base (as an information hub and relay station) for likely unlawful drone strikes in Yemen. While the Court thus accepts the right's extraterritorial application, the connection between the assistance and violation is much more tentative for the Dutch NLA-program. Moreover, the outlier judgment is currently under appeal. See, generally: Beinlich 2019.

[79] ATT, Article 6(3) (emphasis added). For the treaty's scope of application, see Article 2.

[80] ATT, Article 7(1)(b)(i) and (ii) (emphasis added).

[81] EU Council Common Position 2008/944/CFSP, Articles 2(1)(bb), (2) and (3). For its scope, see Articles 1(1) and 12 referring to the more detailed EU Common Military List (17 February 2020) OJ 2020 C 85/1. See also: User's Guide to Council Common Position 2008/944/CFSP Defining Common Rules Governing the Control of Exports of Military Technology and Equipment ('EU User's Guide'), COARM 153 CFSP/PESC 683, 16 September 2019.

[82] See also: ICRC 2019, Rule 144.

[83] See, for example: Statutes of the International Red Cross and Red Crescent Movement (1986), https://www.icrc.org/en/doc/assets/files/other/statutes-en-a5.pdf, Article 5(2)(g).

[84] ICRC 2016, at paras 126 and 131-2. See also: ICRC 2019, Rule 139; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, Advisory Opinion, 9 July 2014, para 158.

[85] ICRC 2016, at paras 153-73. See also: Ruys 2014, at paras 20-5.

[86] ICRC 2019, Commentary to Rule 144, at note 15 (but see: ICRC 2016, at para 160); Crawford 2012, at 16-17. Many authors prefer to look at Article 16 ARSIWA as the *lex generalis* to a more specific Common Article 1 for two reasons: First, because the scope of CA1 is broader as it also encompasses a positive obligation (one which is clearly not covered by Article 16) and a prohibition on 'encouragement' of IHL violations (which is conceptually distinct from 'aiding and assisting', see: Aust 2011, at 388-9; *Nicaragua*, paras 220 and 255-6). Second, they argue that the conditions of Article 16 are too strict and have been attenuated for complicity in IHL violations through CA1 (ICRC 2016, at paras 159-61; Brehm 2008, at 385-6; Aust 2011, at 389; Dörmann and Serralvo 2014, at 734-5). However, to the extent that the latter concern derives from the intent-requirement for responsibility under Article 16 ARSIWA (as opposed to knowledge under CA1), it is, perhaps, unnecessary. Compare, for example, to ICRC (2013) Arms Trade Treaty, ICRC Statement, Diplomatic Conference, 21 March 2013, https://www.icrc.org/en/doc/resources/documents/statement/2013/03-21att-arms-availability-statement.htm.

[87] ILC 2001, at 65; *Bosnian Genocide*, para 420.

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For the purposes of this commentary, there are three main points of contention. The first relates to the knowledge (awareness-based) versus intent (purpose-based) debate: Does it suffice that a State is fully cognizant it is supporting the commission of IHL violations, or is it necessary to additionally evidence that the support was provided with that specific ambition? Strikingly, most commentators appear to agree that the subjective element – however one would define it – is met in case of (virtual or near) certainty by the assisting State that its aid will facilitate an internationally wrongful act – largely defanging the debate *in casu*.[88]

A second issue troubling Article 16 ARSIWA is whether such a rule applies not only to cooperation between States but also to the relationship between States and non-State armed groups. In the 2007 *Bosnian Genocide* case, the ICJ interpreted Article III(e) of the Genocide Convention – declaring that complicity in genocide would be punishable also – along the lines of Article 16 ARSIWA *even though* the factual background consisted of a State (the Federal Republic of Yugoslavia) assisting a non-State armed group (the Army of the Republika Srpska). According to the Court, a primary obligation not to aid or assist in violations of international law (or, put differently, be complicit therein) can and should be interpreted 'in a sense not significantly different from that of those concepts in the general law of international responsibility'.[89] This is true to the extent that the recipient entity is equally bound by the rule at stake.[90] Hence, by force of Common Article 1, a State must refrain from aiding a non-State armed group, embroiled in conflict, in violating the latter's obligations under Common Article 3 – applied along the lines of Article 16 ARSIWA.[91]

The causal link between the provided assistance and the prohibited act, the so-called nexus element, poses a third and final obstacle. Indeed, the assisting State will only be responsible 'to the extent that its own conduct has caused or contributed to the internationally wrongful act'.[92] The ILC holds that the material aid must not have been 'essential to the performance of the internationally wrongful act, it is sufficient if it contributed significantly to that act'.[93] Aust consequently argues that 'the support must have made some difference for the main actor in carrying out its deed', without thereby constituting a *conditio sine qua non*.[94] Moynihan adds that there is a '*de minimis* threshold: aid that assists in a remote and indirect or minimal way is not a sufficient basis for responsibility'.[95] The nexus element nevertheless remains underdeveloped, euphemistically labelled as 'normative and case-specific'.[96]

However, in its Articles on the Responsibility of International Organizations (ARIO) the ILC suggests that a peacekeeping mission may not provide logistic or 'service' support to government forces involved in IHL or human

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[88] Nolte and Aust 2009, at 14-15; Crawford 2013, at 408; Jackson 2015, at 160; Lanovoy 2016, at 237; Moynihan 2016, at 11-22; Ferro 2016, at 147-8; David, Turp, Wood and Azarova 2019, at 67-8. While the matter is yet to be conclusively determined by (international) case law, it has been left open (at the least) by the International Court of Justice in *Bosnian Genocide* (compare paras 421-2 and 432).

[89] *Bosnian Genocide*, para 420.

[90] Ibid., paras 242ff; ILC 2001, at 66(1) and (6); Human Rights Committee, General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, UN Doc CCPR/C/GC/36, 30 October 2018, para 63 jo. Goodman, Heyns and Shany 2019, at 4; Jackson 2015, at 214-15.

[91] See (n 84). In 2013, Austria argued that should 'supplied arms be used by armed opposition groups in Syria in the commission of internationally wrongful acts, the States who had supplied these arms and had knowledge of these acts would incur State responsibility for their aid and assistance in the commission of such acts'. It thereby applied Article 16 ARSIWA directly, rather than use it to interpret Common Article 1. See: J Borger, The Austrian Position on Arms Embargo in Syria – Official Document, The Guardian, 15 May 2013, https://www.theguardian.com/world/julian-borger-global-security-blog/interactive/2013/may/15/austria-eu-syria-arms-embargo-pdf. Conversely, the Netherlands ((n 4) question 257; Nollkaemper 2013, at 2) found that no clear international norm existed on the complicity of States for actions of non-State actors. On the separate yet related discussion on complicity as a ground for attribution, compare: Lanovoy 2017; Plakokefalos 2017.

[92] ILC 2001, at 66(2), approvingly quoting the opinion of the UN Legal Counsel.

[93] Ibid., at 66(5)-7(10), confirmed by ILC 2011, at 66(4) and Crawford 2013, at 405. Moreover, the wrongful act must have actually been committed.

[94] Aust 2011, at 210-19 (quote at 215).

[95] Moynihan 2016, at 9-10. She moreover astutely refers to the link between the nexus and mental elements.

[96] Aust 2011, at 230. See also: De Wet 2018, at 299-301.

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rights violations and must 'cease its participation … completely'.[97] A similar example is that of an international organization directly financing a project involved in human rights violations.[98] Further guidance can be found in arms export legislation. Article 7 ATT prohibits a weapons transfer in case they could be used to facilitate a serious IHL or human rights violation. Commentators again turned to Article 16 ARSIWA for its interpretation, arguing that 'facilitation … should involve a significant contribution to the illegal act even if the assistance only contributed in a minor way to the actual harm suffered'.[99] Moreover, such weapons 'may be one or more steps removed of the actual violation'.[100] Similarly, the User's Guide to the EU Council Common Position warns that a wide variety of equipment can be used repressively, including innocuous items such as body armour and communications equipment. Still according to the guide, consideration should go to what extent the material would allow an 'increase in operational performance'.[101] Finally, the (customary) international criminal law on aiding and abetting, showing obvious similarities, confirms the (*de facto*) *de minimis* threshold and does not require that the aid must be specifically directed towards the commission of a crime.[102]

Admittedly, the image that emerges is rather pixelated. Moreover, caution is required when importing standards from other fields of (international) law. Regardless, it appears that the nexus element casts a wide net, bringing various kinds of material assistance that have a more-than-minimal effect on the commission of the wrongful act under the scope of Article 16 ARSIWA and, therefore, the negative obligation of Common Article 1. Any unease with such an understanding may be offset by reminding of the strict application of the mental element as described above. It is therefore surprising that of the few domestic courts to have taken up such issues – especially in the context of arms transfers to Saudi Arabia used to commit atrocities in Yemen – some seem to insist upon (or, rather, *assume*) a direct link (requirement) between the aid provided and violations carried out. For example, a Canadian Justice interpreted Common Article 1 as requiring 'evidence of a substantial risk that [weaponized light armoured vehicles] will be used to commit a violation of [IHL]', which was not born out in the case before her by the history of the impugned exports to Saudi Arabia.[103] However, based upon the foregoing, it is submitted that is an overly restrictive reading.

Finally, as noted above, Common Article 1 of the Geneva Conventions also entails a positive obligation, meaning States must 'take proactive steps to bring violations of the Conventions to an end and to bring an erring Party to a conflict back to an attitude of respect for the Conventions'.[104] The obligation is to be carried out with due diligence, which is heavily dependent on 'the capacity to influence effectively' the action of States likely to commit wrongful acts.[105] While that capacity may be determinative in case of a party to an armed conflict that is highly dependent upon foreign

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[97] ILC 2011, at 66(6).
[98] G Gaja, Special Rapporteur, Third Report on Responsibility of International Organizations, 57th Session of the ILC, UN Doc A/CN.4/553, 13 May 2005, at para 28. See also Lanovoy 2016, at 98-9.
[99] Casey-Maslen et al 2016, at 255.
[100] Ibid. One of the examples is providing weapons to round up people, later executed using different means.
[101] EU User's Guide (n 81), at 49, 77 and 97.
[102] Cryer, Robinson and Vasiliev 2019, at 355-9; Ventura 2019, at 16-19; Aksenova 2016, at 103-12.
[103] *Daniel Turp v The Minister of Foreign Affairs*, Canada, Federal Court, Reasons and Judgment, 2017 FC 84, 24 January 2017, para 72. A similar reasoning was followed by British judges in *Campaign Against Arms Trade v The Secretary of State for International Trade* (High Court of Justice, Judgment, [2017] EWHC 1726 (QB), 10 July 2017, para 59), which concerned the application of Europeans arms export legislation. A direct link requirement finds more support in the text of the provision at stake. See, generally: Ferro 2019, at 521-32.
[104] ICRC 2016, at para 164.
[105] *Bosnian Genocide*, para 430.

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military assistance, it is substantially less so for a non-State actor receiving limited and/or noncrucial assistance in a haphazard manner.[106]

3 The legal framework in action

3.1 Non-lethal assistance: What's in a name?

Having briefly summarized the international legal framework applicable to third-State support for non-State armed groups, the first question that needs to be confronted is to what extent the type of goods and equipment provided – and, particularly, the supposedly 'non-lethal' nature thereof – impacts the legality of the Dutch assistance programme.

3.1.1 A carte blanche for 'non-lethal assistance'?

As discussed above, in the *Nicaragua* case the ICJ famously distinguishes between 'mere supply of funds', which it qualifies as a breach of the non-intervention principle but not the prohibition on the use of force, and the 'arming and training' of the *contras*, found to contravene both norms. In another (less well-known) *dictum*, the Court further notes how the US breached the principle of non-intervention by providing 'financial support, training, supply of weapons, intelligence *and logistic support*' to the *contras*, thus clearly adopting a broad construction of the principle. These forms of support are contrasted to 'strictly' humanitarian aid, which does not constitute a prohibited intervention but must in turn be limited to 'prevent and alleviate human suffering' and be given without discrimination to all in need.[107]

The term 'non-lethal assistance' is nowhere found in the *Nicaragua* judgment.[108] More generally, non-lethal assistance is not an established legal category or term of art in international law.[109] Better known to international lawyers is the more limited category of 'non-lethal weapons', which indeed plays a prominent role in international human rights law, and, to lesser extent, in IHL.[110] A useful definition is found, for instance, in the UK Manual on the Law of Armed Conflict, which refers to 'weapons that are explicitly designed and developed to incapacitate or repel [individuals], with a low probability of fatality or permanent injury, or to disable equipment, with minimal undesired damage or impact on the environment'.[111] Obvious examples include tear gas or plastic bullets.

The reference to 'non-lethal' 'weapons' is telling in and of itself: an object can be 'non-lethal' in nature, but still qualify as a 'weapon' or 'military equipment'. This view is corroborated, for instance, by UN Security Council Resolution 1970,

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[106] ICRC 2016, at para 167; Ferro 2019, at 514-5 (in particular note 64). Genuinely third (or non-involved) States have executed this positive obligation mostly through diplomatic protests and certain collective measures including multilateral sanctions. ICRC 2019, Commentary to Rule 144.

[107] *Nicaragua*, paras 228 and 242-3.

[108] The Court's reference to relevant US legislation underpinning support to the *contras* provides few additional clues either, as it defines 'humanitarian assistance' as 'the provision of food, clothing, medicine, and other' and excludes 'the provision of weapons, weapon systems, ammunition, or other equipment, vehicles, or material which can be used to inflict serious bodily harm or death' (ibid., para 97 and again at para 243).

[109] Occasional references can be found in some national legislation, for instance in 10 U.S.C. § 2557, which provides for a broad negative definition, encompassing all supplies that are 'not a weapon, ammunition, or other equipment or material that is designed to inflict serious bodily harm or death'.

[110] See, for example, the Basic Principles on the Use of Force and Firearms by Law Enforcement Personnel, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Havana (Cuba), 27 August-7 September 1990, paras 2-3.

[111] United Kingdom Ministry of Defence 2004, at para 6.18.1.

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which provided for a qualified exception to the embargo on 'arms and related materiel' to Libya vis-à-vis 'non-lethal military equipment intended solely for humanitarian or protective use'.[112] And while no similar UN arms embargo was put in place with respect to Syria, the one adopted by the EU contains a similarly worded exception with respect to 'non-lethal military equipment … intended solely for humanitarian purposes or protective use', in addition to a separate exception for 'non-combat vehicles fitted with materials to provide ballistic protection' destined for the SNCOR and 'intended for the protection of civilians'.[113] Surely, such carve-outs only make sense if 'non-lethal military equipment' ordinarily falls within the scope of an arms embargo to begin with.

It is therefore submitted that the mere fact that certain equipment is non-lethal, in that it is not designed to inflict serious bodily harm or death, is insufficient to conclude that the provision thereof cannot give rise to an *indirect* use of force in the sense of Article 2(4) UN Charter.[114] Conversely, however, this does not bring us much further in determining which *specific* non-lethal goods are problematic under Article 2(4) and which are not. To shed further clarity on this matter, cautious excursions into other sub-domains of international law may prove helpful, having regard to the principle of systematic integration.[115] Two candidates in particular merit closer scrutiny, namely the law of neutrality as it applies to *international* armed conflicts, on the one hand, and arms control law, on the other.

3.1.2 'War material' and contraband: Drawing lessons from the law of neutrality

Starting with the former, it is clear that the prohibitions against indirect force and against intervention in non-international armed conflicts have much in common with the duties of non-participation and impartiality with respect to international armed conflicts under neutrality law.[116] Indeed, the *Nicaragua* case's threefold distinction between the provision of arms, funding and humanitarian assistance is strongly reminiscent of the basic rules of neutrality law. Thus, Article 6 of Hague Convention XIII (1907) forbids 'the supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of war-ships, ammunition, or war material of any kind whatever'.[117] This rule is echoed, in virtually identical terms, in the 1928 Pan-American Neutrality Convention,[118] which further adds a prohibition to grant loans or open credits for a belligerent during the duration of war.[119] Finally, Article 70 of the 1977

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[112] UN Security Council, Resolution 1970, UN Doc S/RES/1970, 26 February 2011, at para 9(a).

[113] EU Council Regulation 36/2012 (18 January 2012) OJ 2012 L16/1 (as amended).

[114] The Dutch MFA acknowledged that it was impossible to say categorically that non-lethal assistance was compatible with international law. Rather, this had to be determined per item. The Netherlands, Kamerstuk 32623 no. 230 (n 8), at 2.

[115] Vienna Convention on the Law of Treaties (1969), 1155 UNTS 331, Article 31(3)(c) ('VCLT').

[116] It is worth recalling that violations of the prohibition of (indirect) use of force or intervention in the context of a non-international armed conflict (NIAC), or breaches of neutrality law in the context of an international armed conflict (IAC), do not automatically render the third (supporting) State a party to the pre-existing NIAC/IAC. In the IAC scenario, a distinction must indeed be made between ordinary violations of neutral duties, on the one hand, and systematic or substantial violations resulting in loss of neutral status and 'co-belligerency', on the other (e.g.: United States, Department of Defense, Law of War Manual, June 2015 (as updated), at para 15.4.1; Oppenheim 1912, at para 358 at 439:, restated in Lauterpacht 1952, at § 358). With respect to a NIAC, reference can be made to the 'support-based' approach applied by the ICRC to determine when multinational forces become a party to a pre-existing NIAC. According to Ferraro (2013, at 585), who developed the approach, 'War-sustaining activities such as financial support, or the delivery of weapons/ammunition to a party to the conflict, should be regarded as a form of indirect involvement in hostilities that has no effect on the multinational forces' status under IHL. A distinction must therefore be drawn between the provision of support that would have a direct impact on the opposing party's ability to conduct hostilities and more indirect forms of support which would allow the beneficiary only to build up its military capabilities.' Examples that would meet the test include the transportation of the supported State's armed forces to the front line or providing planes for refuelling jet fighters involved in aerial operations. In its 2016 Commentary on Common Article 3 GC, the ICRC (2016, at para 446) similarly states that '[o]nly activities that have a direct impact on the *opposing* Party's ability to carry out military operations would turn multinational forces into a Party to a pre-existing non-international armed conflict.'

[117] Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War (1907), 15 LNTS 436.

[118] Convention on Maritime Neutrality (1928), 135 LNTS 187, Article 16(a) prohibits the delivery 'to the belligerent, directly or indirectly, or for any reason whatever, [of] … munitions or any other war material'.

[119] Ibid., Article 16(b).

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First Additional Protocol expressly confirms that relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall not be regarded as interference in the armed conflict or as unfriendly acts.[120] This threefold rule is further reflected in relevant State practice.[121]

Given the obvious parallels, the construction of war material under the law of neutrality might be used to shed light on the substantive scope of indirect use of force in the sense of the *Nicaragua* case. The link between the two concepts finds support in, among other, the 1928 Convention on Duties and Rights of States in the Event of Civil Strife which explicitly uses the same concept of war material featuring in the 1907 Hague Convention XIII in connection with the prohibition of support to non-State actors involved in a non-international armed conflict.[122] Interestingly, the (admittedly non-binding, nor uncontroversial) 1975 Wiesbaden resolution of the *Institut de droit international* on non-intervention in civil wars similarly contains a prohibition on the supply of 'weapons or other *war material*'.[123]

An authoritative definition, in conventional law or elsewhere, of 'war material' is unfortunately lacking.[124] Some texts use slightly different terminology, such as 'war-related goods and services',[125] yet without shedding further light on the precise scope either. Unsurprisingly, relevant literature tends to focus first and foremost on the supply of arms and ammunition,[126] as the archetypical examples of 'war material'. Yet, others seem to suggest that such are the *only* goods covered by the prohibition. Thus, Bothe, while acknowledging that the underlying rationale of the rule is to ensure that neutral States 'abstain from any act which might have an impact on the outcome of the conflict',[127] subsequently states as follows:

> As to the definition of war materials which may not be supplied to the parties to the conflict, the problem must be distinguished from that of the definition of contraband. There is apparently no state practice to the effect that the rule of neutrality prohibiting supply covers more than weapons *stricto sensu*, that is material which is capable of being used for killing enemy soldiers or destroying enemy goods. Non-proliferation regimes in the field of arms control usually cover related materials (technology, construction plans etc.).[128]

The statement calls for some observations. First, Bothe's argument that the question of State supply of 'war materials' must not be conflated with the right of belligerent States to seize cargo transported by sea that qualifies as 'contraband' is only partly convincing. On another view, the two rules are – or originally were – two sides of the same coin. As Seidl-Hohenveldern explains:

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[120] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (AP I) (1977), 1125 UNTS 3. As Bothe (2014, at 561-2) explains, humanitarian assistance must be guided by the needs of those *hors de combat*, rather than provide a military advantage to one party. See also Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (1907), https://ihl-databases.icrc.org/ihl/INTRO/200?OpenDocument, Article 14.

[121] E.g., US Law of War Manual (n 116), at para 15.3.2.1ff; Germany, Ministry of Defence, Humanitarian Law in Armed Conflicts – Manual, August 1992, at para 1110.

[122] The 1928 Convention on Duties and Rights of States in the Event of Civil Strife (134 LNTS 45) was ratified by 18 American States (including the United States). See, in particular, Article 1.

[123] Institut de droit international, 'The Principle of Non-Intervention in Civil Wars', Resolution of 14 August 1975, Article 2(2)(c) (emphasis added). Note: this prohibition equally applies to assistance for the *de jure* authorities.

[124] See also Ferro and Verlinden 2018, at 40-1.

[125] US Law of War Manual (n 116), at para 15.3.2.1.

[126] See, for example: Oppenheim 1912, at para 349, at 350.

[127] Bothe 2014, at para 1110 at 561. See also infra note 141.

[128] Bothe 2014, at para 1112 at 563.

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> In theory, neutral citizens may trade with the enemy while the neutral State itself must not supply to a belligerent State 'war material of any kind' (Art. 6). However, the neutral citizen risks having his goods destined for one belligerent being taken by the other belligerent as 'contraband'. This notion originally meant war material of any kind.[129]

A similar link is made in the 2015 US Law of War Manual.[130] The understanding of 'contraband' may accordingly provide clues to interpret the concept of 'war materials'. Interestingly, contrary to the elusive notion of war materials, the concept of contraband was tackled in considerable detail by States in the 1909 London Declaration concerning the Laws of Naval War.[131] In line with the writings of Grotius and others,[132] the Declaration distinguishes between three categories of goods. First, articles 'exclusively used for war' are regarded as absolute contraband (Articles 22-23), which is always subject to seizure if destined for a belligerent party. Second, articles 'susceptive of use in war as well as for purposes of peace' qualify as 'conditional contraband' (Article 25). Conditional contraband is liable to capture 'if it is shown to be destined for the use of the armed forces or of a government department of the enemy State, unless in this latter case the circumstances show that the goods cannot in fact be used for the purposes of the war in progress' (Article 33).[133] Finally, goods that 'are not susceptible of use in war' are free articles that may not be declared contraband of war (Article 27).

The London Declaration usefully provides illustrative list of goods for each of the three categories, while indicating that States may add additional lists of goods to the categories of absolute and conditional contraband, subject, however, to notification (Articles 23, 25). While some examples are no longer of relevance in modern times in light of the changed nature of the battlefield, it is striking that the concept of 'absolute contraband' is not limited to arms and ammunition, but includes other items such as gun-mountings, as well as other non-lethal equipment such as 'clothing and equipment of a distinctively military character' (Article 22(6)) or 'armour plates' (Article 22(9)).[134] In turn, the illustrative list of 'conditional contraband' includes 'vehicles of all kinds available for use in war' (Article 24(5)), in addition to several items that would nowadays never be regarded as 'dual-use', but would even seem to qualify as humanitarian support.[135] This holds true in particular for 'foodstuffs' (Article 24(1)).

The distinction between absolute and conditional contraband has not consistently been upheld, however, in State practice[136] and the 1994 San Remo Manual, for instance, refers to a single category of contraband encompassing goods

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[129] Seidl-Hohenveldern 1986, at 205.

[130] US Law of War Manual (n 116), at para 15.12: 'Although neutral States must not provide war-related goods and services to belligerents, neutral persons are not prohibited from such activity by the law of neutrality. The law of neutrality's rules on neutral commerce and the carriage of contraband have sought to balance the right of neutral persons to conduct commerce free from unreasonable interference against the right of belligerent States to interdict the passage of war materials to the enemy.'

[131] Declaration concerning the Laws of Naval War (1909), https://ihl-databases.icrc.org/ihl/INTRO/255. Note: The Declaration was signed by Austria-Hungary, France, Germany, Italy, Japan, the Netherlands, the Russian Federation, Spain, the United Kingdom and the United States, but never ratified and accordingly never entered into force. Most of the rules were nonetheless believed to correspond to established practice and decisions of national prize courts.

[132] See Oppenheim 1912, at paras 391ff.

[133] Article 34 further specifies that '[t]he destination referred to in Article 33 is presumed to exist if the goods are consigned to enemy authorities, or to a contractor established in the enemy country who, as a matter of common knowledge, supplies articles of this kind to the enemy. ...'

[134] According to Oppenheim, '[t]hat absolute contraband cannot ... be restricted to arms and ammunition only ... becomes obvious, if the fact is taken into consideration that other articles ... can be as valuable and essential to a belligerent for the continuance of the war.' Oppenheim 1912, at para 393.

[135] According to Oppenheim, it was especially controversial whether or not 'foodstuffs, horses ... , coal and other fuel, money and the like, and cotton' could conditionally be declared contraband (ibid., at para 394). The list included in the London Declaration reflected a compromise between the Powers of the time.

[136] See: US Law of War Manual (n 116), at para 15.12.1.1.

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'destined for territory under the control of the enemy and which may be susceptible for use in armed conflict'.[137] As Seidl-Hohenveldern rightly observes, '[p]ractice in the First and Second World Wars has interpreted this notion so extensively as to cover any goods which by the widest stretch of imagination could indirectly benefit the armed forces of the enemy.'[138] Ultimately then, Bothe is ostensibly right in resisting a simple one-on-one analogy between the concepts of 'war material' and 'contraband'. By contrast, the traditional understanding of 'absolute contraband' at the very least provides indirect support to the view that – contrary to what Bothe suggest – 'war material' cannot be limited exclusively to 'lethal' equipment.

Leaving aside the possible nexus with the concept of contraband, Bothe's interpretation of war material appears excessively narrow. Other scholars, such as Lauterpacht, ostensibly take a broader view.[139] Likewise, in his work on the law of neutrality, Castrén stresses that 'it suffices for a State to refrain from delivering to belligerents material which has, *exclusively or at least mainly, a military purpose*'.[140] Others in turn put the emphasis on whether the supplied goods and equipment are capable of influencing the outcome of the armed conflict.[141]

3.1.3 What impact of arms control law?

Keeping in mind the principle of systemic integration (Article 31(3) VCLT), there is again merit in attempting to clarify the concept of war material in light of contemporary arms control arrangements. The relevance of this branch was implicitly recognized by the Dutch authorities, which repeatedly stressed that they would only provide 'civilian' goods, not subject to a license requirement under existing rules on the exportation of arms.[142] Conversely, there can be little doubt that goods and equipment covered by the Arms Trade Treaty and by the United Nations Register of Conventional Arms[143] *ipso facto* qualify as arms, the provision of which to a non-State armed group gives rise to an indirect use of force.

The ATT covers eight categories of conventional arms (Article 2), as well as the ammunition/munitions used for these arms (Article 3), and the parts and components enabling their assembly (Article 4). For the description of the categories, the ATT refers back to the UN Register of Conventional Arms (Article 5(3)). Most relevant for the purposes of the Dutch NLA-program is the inclusion of 'armoured combat vehicles' (Article 2(1)(b)), which includes 'vehicles, with armoured protection and cross-country capability … designed and equipped to transport a squad of four or more infantrymen'.[144] A more detailed list can be found in the EU's own Common Military List.[145] Among the items worth mentioning are:

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[137] San Remo Manual on International Law Applicable to Armed Conflicts at Sea (1994), https://ihl-databases.icrc.org/ihl/INTRO/560, Article 148; US Law of War Manual (n 116), at para 15.12.1.
[138] Seidl-Hohenveldern 1986, at 205.
[139] Oppenheim 1912, at para 349 (referring to 'arms, ammunition, vessels and military provisions'). Also, the direct military use of certain metals means their supply by a neutral State may be unlawful (para 739, note 3).
[140] Castrén 1954, at 474 (emphasis added).
[141] Oppenheim 1912, at para 294, at 654 ('Since neutrality is an attitude of impartiality, it excludes such assistance and succor to one of the belligerents as is detrimental to the other'); Von Heinegg 2007, at 565 (neutral States are 'especially prohibited from assisting one party in a manner that could lead to a temporal, spatial or other widening of the conflict'); Ferro and Verlinden, at 41 (the duty of neutrality 'certainly proscribes assistance to the belligerent parties that has a direct and effective impact on their war-waging ability').
[142] The Netherlands, Kamerstuk 27925 no. 534 (n 20), at 4.
[143] See: https://www.unroca.org/about.
[144] See: https://www.unroca.org/categories.
[145] For the latest version (at the time of writing), see: EU Common Military List (n 79).

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- 'ground vehicles and components therefor, specially designed or modified for military use' (ML6(a)), including ground vehicles modified by adding 'armoured protection of vital parts' or 'mountings for weapons (note 2);

- Vehicles equipped with a certain level of ballistic protection and that meet several cumulative requirements, including that they be designed or modified for off-road use (ML6(b));

- Armoured plates as well as 'body armour or protective garments', meeting certain technical specifications (ML13), and

- Imaging or countermeasure equipment designed for military use, including 'infrared or thermal imaging equipment' (ML15(d)).

Apart from the abovementioned military goods (reminiscent of the concept of 'absolute contraband' as consisting of articles 'exclusively used for war'), arms control law also seeks to restrict the trade in 'dual-use' goods, i.e., items, including software and technology, which can be used for both civil and military purposes (this category in a sense resembles the notion of 'conditional contraband' as encompassing goods 'susceptive of use in war as well as for purposes of peace'). While hard conventional law is mostly lacking in this domain, the Wassenaar Arrangement[146] does provide an intergovernmental forum, bringing together 42 participating countries (including e.g., Russia and the United States), which periodically revisits a 'List of Dual-Use Goods and Technologies and Munitions List' for national export control purposes.[147] The latter list in turn informs the periodically updated EU Dual-Use Regulation,[148] which contains in annex an elaborate and highly technical overview of dual-use goods, including some that also feature on the Common Military List (e.g. Annex I, DU 1A005 'body armour and components'), as well as many others that do not.

Whether the Dutch NLA-program encompassed military or dual-use goods in the sense of the abovementioned instruments is difficult to assess on the basis of the available information. Most problematic would appear to be the provision of pick-up trucks outfitted to withstand improvised explosive devices[149] and used to transport fighters, as well as of metal bars to be mounted on pick-up trucks and capable of carrying heavy guns.[150] Other sensitive items include uniforms,[151] tactical vests for M-16s and AK47s (but reportedly without body armour)[152] and heat cameras.[153] IF the goods concerned were to feature on any of the abovementioned lists of military or dual-use goods (which is uncertain), there can be little doubt that their delivery to 'moderate' rebel groups *prima facie* constitutes an indirect use of force in the sense of Article 2(4) UN Charter. If some of the goods would additionally be covered by the ATT, that might additionally entail a breach of the Arms Trade Treaty, prohibiting the transfer of conventional arms if the State has knowledge that the arms or items would be used in the commission of crimes against humanity or war crimes.

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[146] See https://www.wassenaar.org/.
[147] Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, Public Documents, Volume II, List of dual-Use goods and Technologies and Munitions List, December 2019, https://www.wassenaar.org/app/uploads/2019/12/WA-DOC-19-PUB-002-Public-Docs-Vol-II-2019-List-of-DU-Goods-and-Technologies-and-Munitions-List-Dec-19.pdf.
[148] EC Council Regulation 428/2009 (5 May 2009), OJ 2009, L 134/1 (as amended).
[149] The Netherlands, Kamerstuk 32623 no. 229 (n 4) question 86.
[150] Ibid., question 378; The Netherlands, Tweede Kamer der Staten-Generaal, Brief van de Minister van Buitenlandse Zaken, Kamerstuk 32623 no. 227, 26 September 2018.
[151] The Netherlands, Kamerstuk 32623 no. 229 (n 4) questions 133 and 172
[152] Ibid., question 30; The Netherlands, Kamerstuk 32623 no. 247 (n 23) questions 30, 41 and 112
[153] The Netherlands, Kamerstuk 32623 no. 229 (n 4) question 378; The Netherlands, Kamerstuk 32623 no. 227 (n 150), at 2.

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Strikingly, in the debates before the Dutch Parliament, the government consistently emphasized that goods and equipment such as heat cameras, metal rods to be mounted on trucks, or tactical vests without body armour were not included in the relevant lists of military or dual-use goods subject to export control,[154] seemingly to absolve them of any legal responsibility. Be that as it may, if the relevant goods' inclusion on the aforementioned lists sufficiently demonstrates that they come within the ambit of the prohibition against indirect use of force, the converse does not hold true. Indeed, it is recalled that the lists of goods and equipment in Annexes I and IV of the EU's Dual Use Regulation are not exhaustive.[155] Rather, Article 4 of the Regulation contains a catch-all clause covering other goods that 'are or may be intended, in their entirety or in part, for a military end-use'.

In the present case, as was explained above,[156] the Dutch authorities were fully aware of the risk that some of the equipment would be used for military purposes. Indeed, by admitting that the support was meant to ensure that the rebels could stand their ground and defend the territory under their control, the Dutch government equally accepted its (partially) military purpose. In the margin, it is worth observing that while items such as uniforms or tactical vests are absent from the EU's Common Military List or the Dual-Use Regulation, the 1909 London Declaration included 'clothing and equipment of a distinctively military character' in the list of *absolute* contraband (Article 22(6)). Military uniforms are also routinely covered by arms embargos imposed by the UN Security Council.[157] In short, an item's absence from a national or European export control list cannot serve as a fig leaf to circumvent the international prohibition enshrined in Article 2(4) UN Charter.

3.1.4 Concluding thoughts on the nature of the goods supplied

In the end, there are strong indications that the Dutch non-lethal assistance effectively entailed an indirect use of force in contravention of Article 2(4) of the UN Charter.[158] The authors do not contest that this infringement may have been (far) less grave than in case of other countries providing lethal equipment to Syrian rebels. Yet, even a small-scale breach cannot simply be cast aside as an innocent flirt with the supposedly 'grey areas' of the law.

Furthermore, little doubt can exist that part of the NLA-program infringed the – substantively broader – principle of non-intervention.[159] Indeed, as is clear from the *Nicaragua* judgment, this principle is not limited to the supply of arms and funding, but forbids even the provision of logistic support (with the exception of strictly humanitarian aid) to non-State armed groups embroiled in a NIAC.[160] The *Institut*'s 1975 Wiesbaden Resolution (predating *Nicaragua*) in turn prohibits the provision of 'financial or economic aid likely to influence the outcome' of the conflict (Article 2(2)(d)), while permitting that 'which is not likely to have any substantial impact' (Article 3(b)). Taken together, it appears that, at the very least, the vehicles, laptops and communication equipment delivered by the Dutch government constituted a prohibited intervention. A broader reading, equally defensible on the basis of the *Nicaragua*

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[154] The Netherlands, Kamerstuk 32623 no. 227 (n 150), at 2; The Netherlands, Kamerstuk 32623 no. 247 (n 23) questions questions 2, 39, 41 and 135; The Netherlands, Kamerstuk 32623 no. 229 (n 4) questions 122, 203, 216 and 378.

[155] In addition, it is obvious that a single State or regional organization (such as the EU) cannot single-handedly narrow the scope of the prohibition on the use of force by drafting its own list of military or dual-use goods.

[156] See text accompanying (n 25-28).

[157] This is illustrated *inter alia* by the fact that the sale of uniforms is often addressed in the context of UN arms embargoes. See, e.g., Report of the Panel of Experts on Somalia pursuant to Security Council Resolution 1425 (2002), UN Doc S/2003/223, 25 March 2003, at 6 and 8; Final Report of the Panel of Experts Established Pursuant to Resolution 1973 (2011) concerning Libya, UN Doc S/2013/99, 9 March 2013, at para 54.

[158] For a more generous appraisal of the NLA-program, see Marchal 2017, at 13 (finding it 'fairly easy' to conclude that the program did not breach Article 2(4), as it expressly steers clear from (threatening) military force).

[159] Again, for a different interpretation, see Marchal 2017, at 13 (suggesting that the Dutch assistance lacked the 'coercive' dimension to be considered a breach of the non-intervention principle).

[160] *Nicaragua*, paras 242-3.

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acquis, would qualify all non-humanitarian assistance to organized armed groups as such – possibly encompassing the NLA-program in its totality.

Finally, as set out above in Section 2.2, it is submitted that the 'non-lethal' nature of the equipment provided to a group (State or non-State) that is known to commit widespread IHL or human rights violations or core crimes, does not automatically shield the supporting State from being found 'complicit' to such violations in the sense of Article 16 ARSIWA, nor does it exclude a possible breach of Common Article 1 of the Geneva Conventions. While, again, noting the limited scope of the NLA-program as compared to that of other involved States, it is nevertheless difficult to deny that the goods had a more-than-minimal effect on the commission of wrongful acts. Indeed, even if the aid was one or more steps removed from the actual violations, it also seems to have genuinely facilitated the latter by increasing the armed group's operational capacity and performance.[161] Crucially, as the Netherlands was fully aware of credible information that all parties to the conflict were committing atrocities, the authors therefore agree with Carla Del Ponte's assessment that the support may have rendered the Netherlands complicit in war crimes and, moreover, led it to fail in its duty to ensure respect for IHL.[162]

On the latter point, the program also resulted in increased leverage over the recipient armed groups – triggering the due diligence obligation to take all necessary steps to stop IHL violations and prevent future ones. Here it is worth remembering that the government started a dialogue with some of the accused and provided several commanders with human rights training. In a few cases, such concerns may have even led the government to cease support.[163] Consequently, the government at least took some steps to use its leverage to tilt beneficiary armed groups towards respect for international law – or cut ties with them altogether, when that proved to be impossible.

Having examined the nature of the Dutch support to Syrian armed groups, our next section turns to the beneficiaries of that support, asking in particular whether the legal assessment is informed by the identity of the addressees.

3.2 Assistance to whom? Moderate rebels versus extremist and terrorist groups

An important 'selling point' of the Dutch government in justifying the NLA-program before parliament consisted in the fact that the armed groups receiving support were carefully vetted and selected in consultation with key allies such as the US and the UK. The chosen beneficiaries were supposedly 'moderate armed opposition groups' 'defending the opposition's territory against attacks from [the] Assad [regime] and extremist groups such as ISIS'.[164] Three main criteria guided the selection process: no cooperation with extremist groups, a commitment to an inclusive political solution to the conflict, and a commitment to international humanitarian law.[165] The above criteria were clearly of considerable importance from a policy and operational perspective, and contributed to securing political support for the NLA-program and increasing its legitimacy. Yet, does the vetting process influence the legality of the assistance under international law? We leave aside for now the apparent failure to consistently apply and verify these criteria – a problem already noted above in Section 1.1 (see also below Section 3.3 on the role of monitoring). Instead, for the sake of the argument, we proceed from the vetting process as presented by the government.

On the one hand, it is clear that if assistance was provided only to armed groups showing adequate regard for international humanitarian law – that is, groups not engaged in serious and widespread violations of IHL or in crimes

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[161] See text accompanying (n 93-102).
[162] See text accompanying (n 34-35).
[163] See text accompanying (n 36-37).
[164] The Netherlands, Kamerstuk 32623 no. 229 (n 4) question 133.
[165] Ibid., question 20.

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against humanity – that would strongly reduce, and arguably eliminate, the legal exposure under Common Article 1 of the Geneva Conventions. Inasmuch as applicable, it would similarly appear to rule out any breach of the Arms Trade Treaty and exclude State 'complicity' for internationally wrongful conduct on the part of the supported group. The foregoing observations would arguably not be affected by isolated instances of war crimes committed by individual members of the group receiving assistance, as long as the overall conduct of the group effectively reflected a genuine commitment to IHL.

On the other hand, does it matter that the groups assisted are supposedly 'moderate rebels', rather than 'terrorist' groups? Surely, the prohibition of indirect use of force and the principle of non-intervention are not confined in scope to cover exclusively aid to terrorist groups. This much is clear, for instance, from the 1970 Friendly Declarations Resolution which prohibits 'assisting … in acts of civil strife *or* terrorist acts in another State', or which bans assisting or financing 'subversive, terrorist *or* armed activities directed towards the violent overthrow of the regime of another State, or [interference] in civil strife in another State'. The text clearly illustrates that assistance to terrorist groups is merely part of a broader category of prohibited conduct, a point that is confirmed in various other UNGA resolutions.[166]

In a similar vein, the relevant findings of the ICJ in the *Nicaragua* case were in no way confined to assistance to 'terrorist' groups. This is altogether unsurprising, having regard to the fact that the international community has hitherto failed to agree on an overarching and authoritative definition of international terrorism.[167] The lack of consensus in this context (reminiscent of the cliché that 'one man's terrorist is another man's freedom fighter') is reflected in the fact that States tend to adopt different lists of terrorist groups, and that even at the domestic (and EU) level different approaches are used to determine whether groups qualify as 'terrorist' groups for purposes of imposing sanctions (or 'restrictive measures'), on the one hand and to identify such groups for purposes of criminally prosecuting terrorist offences, on the other hand (as the Dutch example illustrates all too well).[168]

At the most, then, the fact that assistance is provided to certain 'terrorist' groups is an aggravating factor that may potentially result in additional legal exposure for the State concerned under existing UN Security Council resolutions[169] or conventional instruments in the counter-terrorism realm (such as the Terrorism Financing Convention).[170] Yet, assistance to 'moderate' rebels, even to groups committed to compliance with IHL, is undoubtedly just as contrary to the prohibition on the use of force and/or the non-intervention principle.

Another interesting issue relates to the political recognition of the Syrian National Council (SNC) by the Netherlands (in 2012) as the 'legitimate representatives of the Syrian people'.[171] Does this recognition alter our assessment relating to the prohibition on the use of force and the non-intervention principle? In a letter to the House of Representatives, the Dutch Foreign Minister seemed to suggest it could:

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[166] See, e.g., Article 3(g) of the Annex to UN General Assembly, Resolution 3314 (XXIX): Definition of Aggression, UN Doc A/RES/3314(XXIX), 14 December 1974.

[167] The lack of such definition was acknowledged by the Dutch government. The Netherlands, Kamerstuk 32623 no. 229 (n 4) questions 11 and 87. Generally, see: Saul 2005.

[168] See text accompanying (n 38-40).

[169] Reference can be made to UNSC counter-terrorism resolutions of a general nature (e.g., Res 1373(2011) or 1624(2005)), as well as those prohibiting arms supplies to entities linked to Al Qaeda (e.g., Res 2083(2012)).

[170] However, the ICJ recently held that convention is not applicable to 'the financing by a State of acts of terrorism': *Application of the International Convention for the Suppression of the Financing of Terrorism and of the Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russian Federation)*, ICJ, Preliminary Objections, Judgment, 8 November 2019 ('*Application of ICSFT and CERD*'), para 59.

[171] The Netherlands, Kamerstuk 32623 no. 229 (n 4) question 1.

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> The cabinet understands that, in case the legitimacy of the regime in power decreases and that of the armed opposition increases, the duty of non-intervention is under pressure. … The lack of legitimacy of the Assad regime and the broad recognition of the [Syrian Opposition Council (SOC)] as the legitimate representative of the Syrian people have led the government to conclude that the supply of military equipment to the SOC, in exceptional cases and under specific conditions, need not be contrary to international law.[172]

Upon closer scrutiny, however, a negative answer is in order.[173] Even if one accepts – for the sake of the argument – that the prohibition for third States to provide arms and assistance only applies to the non-State party to a NIAC, and such assistance to the *de jure* authorities is permitted, two hurdles remain. First, similar to recognitions by (most) other countries, the Dutch recognition of the SNC was of a political nature, rather than a legal one, and mostly sought to strengthen its legitimacy and political standing in reaction to the atrocities committed by the Assad regime.[174] Indeed, the Dutch MFA expressly confirmed that this recognition had no international legal implications,[175] and, specifically, did not alter the fact that the Assad regime remained the formal representative of the Syrian State (even if diplomatic relations were severed in 2012).[176] In sum, at no point did the Dutch government pretend that the SNC constituted the *de jure* government of Syria.

Second, even if the Dutch government would have wished to proceed to a fully-fledged *legal* recognition of the SNC as the new Syrian government, such act would of itself have been unlawful. Indeed, as one of the authors has argued elsewhere,[177] the recognition of de jure governments is not a purely discretionary act. Rather, government status is a legal concept, which presupposes that an individual or group of individuals claiming to be the government of a State exercise effective control over all or most of the State's territory and is likely to continue to do so.[178] Premature recognition of a new *de jure* government, absent such effective control, is a tortious act against the lawful government in breach of international law. This position, has long been accepted position in legal doctrine[179] – notwithstanding occasional challenges (e.g., in the context of the ongoing political crisis in Venezuela).[180]

Clearly, little would remain of the purpose and relevance of the prohibition of indirect use of force and the non-intervention principle if third States could circumvent its scope simply by unilaterally recognizing a different government. Whether the situation would be different if the recognition were to stem from the UN Security Council is a different matter altogether, which need not entertain us here, however, since the Council made no such pronouncement at any point during the Syrian civil war.

The interim conclusion must therefore be that the identity of the beneficiaries of the Dutch NLA programme does not render the aid lawful under the prohibition on the use of force and/or the non-intervention principle. A final caveat is in order, however. The prohibition on the use of force and the non-intervention principle exclude third-State support for non-State armed groups that are active in another country. Yet, it may occur that third States provide support to

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[172] The Netherlands, Kamerstuk 21501-2 no. 1263 (n 17), at 3-4. Interestingly, there was some support among States and scholars that the transfer of arms to the Syrian Opposition Council would be lawful if the SOC were to be/become the *de jure* government of Syria, see: 'Syria: France backs anti-Assad coalition', *BBC News*, 13 November 2012; https://www.bbc.com/news/world-middle-east-20319787; Schmitt 2014, at 151; Akande 2013.
[173] This was also the position of Nollkaemper (2013, at 3-4). In a similar vein, see: Marchal 2017, at 8-15.
[174] Further, see: Talmon 2013.
[175] The Netherlands, Kamerstuk 21501-2 no. 1263 (n 17), at 3. In a similar vein: CAVV/AIV (n 1), 5.
[176] The Netherlands, Kamerstuk 32623 no. 229 (n 4) question 1.
[177] Ruys 2014, at 37-9.
[178] Ibid.
[179] Lauterpacht 1947, at 95; American Law Institute (1990) Restatement of the Law – Third. The Foreign Relations Law of the United States, at para 203; Wiesbaden resolution (n 123), Article 2(2)(f).
[180] See, e.g., Janik 2019.

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other entities operating in a State plagued by civil strife. In particular, it is recalled that, in addition to the NLA-program, the Dutch authorities also provided assistance (esp. financial assistance in the amount of EUR 10 million) to the so-called White Helmets.[181] The White Helmets were (and are) a group comprising an estimated 4,000 volunteers and staff operating throughout Syria, engaged in activities such as civilian rescue operations after aerial bombardments, fire response, etc. – activities that apparently come under the rubric of 'civil defence' as understood in international humanitarian law.[182] Having regard to the fact that this group took no direct part in hostilities in Syria, and assuming that it was not involved in 'acts harmful to' the warring parties (in the sense of Article 65 AP I), it is fair to conclude that assistance to this group (inasmuch as it was not diverted to armed groups, see Section 3.3) was not covered by the prohibition on the use of force or the non-intervention principle and/or was covered by the 'humanitarian' exception identified in, among other, the *Nicaragua* case. Obviously, such assistance would raise no objections either under Common Article 1.

3.3 Objectives and oversight of the NLA-program

A final point that merits attention relates to the purported objective of the aid and the concomitant monitoring efforts. In particular, apart from emphasizing the supposedly 'civilian' nature of the provided goods and equipment, the Dutch government stressed that the overarching purpose of the NLA-program was to 'strengthen the position of the moderate armed opposition' in order to 'improve their negotiating position … in Geneva'.[183] The support provided aimed at enabling these groups 'to hold out against extremist groups and the [Assad] regime, providing room for stabilisation and giving people an alternative'.[184] By contrast, it 'did not have an offensive aim'.[185] To this end, unequivocal supply conditions were drafted and imposed on the beneficiaries of the support. Specifically, such conditions were introduced for the transfer of vehicles:

> The anticipated outcome in providing these vehicles is to increase the capacity and protection of fighters by providing necessary vehicles. The equipment is provided under the condition that it is only used for transportation, frontline improvement and logistical communication.[186]

Furthermore, the support to 'moderate armed opposition forces' in the North of the country and the support to groups operating along the southern border appeared to be underpinned by somewhat different objectives. In the South, the focus was on 'border protection', specifically 'to prevent the smuggling of weapons and drugs and to avoid border crossings by extremist organisations'.[187] Conversely, 'with the armed groups falling outside the border protection programme and that received vehicles, it was agreed that no guns would be mounted on those vehicles'.[188]

An oversight system was also introduced, of which the purpose was threefold: (1) to monitor the possible commission of war crimes and crimes against humanity by the groups concerned; (2) to ensure that the goods and equipment would not fall into the wrong hands (e.g., by being diverted to, or recaptured by, extremist groups), and; (3) to verify that the goods were not otherwise used in contravention of the agreed supply conditions. Apart from imposing

[181] The Netherlands, Review of the Monitoring Systems of Three Projects in Syria (n 24), at 23-5.
[182] See Article 61 AP I for an overview of civil defence tasks and a definition of 'civil defence organizations'.
[183] The Netherlands, Kamerstuk 32623 no. 229 (n 4) question 191.
[184] Ibid.
[185] The Netherlands, Kamerstuk 32623 no. 247 (n 23) question 1.
[186] Ibid., question 4.
[187] The Netherlands, Review of the Monitoring Systems of Three Projects in Syria (n 24), at 26. See also: The Netherlands, Kamerstuk 32623 no. 229 (n 4) question 108.
[188] The Netherlands, Kamerstuk 32623 no. 229 (n 4) question 87. Note: the statement appears to suggest *a contrario* that groups within the border protection programme were allowed to mount heavy guns on the supplied vehicles.

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written supply conditions and insisting that goods were intended for civilian use, the Dutch government relied on monitoring by the implementers/subcontractors who had field officers conducting field visits to inspect the provision of equipment and goods. They reportedly used photo and video footage, often with GPS and time-stamps, to verify their presence and delivery. The use of vehicles was controlled not on the basis of license plates, but the vehicle identification number.[189]

The question again arises to what extent the above objectives and conditions, and the concomitant monitoring efforts, impact the legal analysis. Clearly, it is common practice in export control law to impose upon the purchasers of dual-use goods end-user requirements, and to demand the signing of an end-user certificate, in which the purchaser undertakes to use the goods and equipment concerned solely for certain civilian purposes. Can such practice play a role at the level of State responsibility under international law? One analogy that comes to mind is the reliance on 'diplomatic assurances' in the human rights domain. In particular, it is not uncommon for States to request and rely on 'diplomatic assurances' that a person that is extradited will not face the death penalty, suffer torture or inhuman treatment. Such assurances have repeatedly been accepted by human rights bodies.[190] Yet, the practice of securing such assurances has also been criticized by human rights NGOs as a fig leaf meant to secure 'plausible deniability' and human rights treaty bodies have similarly questioned the reliability of such practices, even where follow-up procedures are introduced.[191]

Returning to the case at hand, it is recalled at the outset that the prohibition on the use of force and the non-intervention principle in principle pay no regard to the motive invoked to justify conduct that comes within the scope of the respective norms.[192] Thus, the 1974 UNGA Definition of Aggression reminds us that '[n]o consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression' (Article 5).[193] On the other hand, it could be argued that the initial scope of application of both prohibitions ought to be construed in a functional manner, having regard to the object and purpose of the norms concerned. In particular, the prohibition on the use of force could be said *not* to cover acts that do not affect the 'territorial integrity or political independence' of another State, and that do not otherwise contravene the purposes of the UN Charter. Along the same lines, aid that does *not* as such support a non-State armed group in its non-international armed conflict with the State or otherwise 'interfere in civil strife' could be said not to qualify as coercive action covered by the non-intervention principle.

But even if such a teleological reading is adopted, problems remain. First, and most obvious, 'non-offensive' use is not equivalent to 'civilian' use. The stated objective of the NLA-program (to enable the moderate rebels 'to hold out against extremist groups and the regime') clearly brings it within the scope of the prohibition on the use of force and/or the non-intervention principle. Thus, the mere fact that vehicles are supposedly not used for offensive operations, but rather for defensive purposes, does not exclude their military use. Quite the contrary, transporting troops, 'frontline improvement' and 'logistical communication' all fall squarely within the scope of military operations. The agreed supply conditions are accordingly insufficient to exclude liability for indirect use of force and/or unlawful intervention. One might be more positively disposed towards the assistance provided to groups in

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[189] The Netherlands, Review of the Monitoring Systems of Three Projects in Syria (n 24), at 26-7; The Netherlands, Kamerstuk 32623 no. 229 (n 4) question 87.
[190] For relevant examples, see: the European Court of Human Rights' Factsheet on 'Death Penalty Abolition', last updated March 2019, https://www.echr.coe.int/Documents/FS_Death_penalty_ENG.pdf.
[191] See, for example: Amnesty International 2017; UN Committee against Torture, Concluding Observations on the Fifth Periodic Report of the United Kingdom, UN Doc CAT/C/GBR/CO/5, 24 June 2013, para 18.
[192] See text accompanying (n 67-68).
[193] For an example from neutrality law, see Article 16(a) of the 1928 Pan-American Neutrality Convention (n 118).

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the South, aimed at preventing criminal activities and border crossings by extremist groups. Yet, here too it seems plausible that the support simultaneously strengthened the position of the moderate rebels vis-à-vis the Assad regime, and could accordingly 'influence the outcome' of the conflict (to paraphrase the *Institut*'s Wiesbaden resolution).

Second, even assuming that the Dutch government would have insisted that the goods and equipment provided were to be used exclusively for (genuinely) civilian purposes, obtaining formal confirmation to this end from the beneficiary hardly serves as a *carte blanche*. Rather, even in such circumstances the Dutch government would remain under a due diligence obligation to ensure compliance with the end user requirement. Three obligations can be tentatively discerned: (1) an obligation to examine whether the supply conditions would in all likelihood be complied with (based on the group's prior conduct, the nature of the goods and the assurances obtained), (2) adequate verification efforts and (3) remedial action, especially in the form of a termination of the assistance when violations come to light.

Due to the confidential nature of certain information, including the names of the groups receiving support, as well as the monitoring reports themselves, the extent to which these obligations were properly implemented remains difficult to assess. Official documents do suggest that the government undertook substantive efforts in good faith, both at the vetting stage and at the monitoring stage, to ensure that the selection criteria and supply conditions were respected – or at least to mitigate the risk of non-compliance. An internal report by the MFA concluded that the monitoring system of the NLA-program was 'adequate'.[194] At the same time, the report clearly acknowledges the challenges to effective monitoring in the extremely volatile and dangerous setting of the Syrian civil war: '[c]onstant monitoring is impossible in a warzone context, and commanders sometimes actually restrict access for the staff of implementing organisations'.[195] The report also warns of the risk of 'bias of the implementers', while regretting the absence of 'wider coordination' or 'exchange of information' with other 'donor countries'.[196] Especially with respect to groups operating in southern Syria, the report noted that the Dutch MFA did not receive full access to information from the implementer and (different) lead donor, although it participated in monthly meetings and received quarterly reports.[197] Ultimately, the report finds that the risk of goods falling into the hands of extremist organisations could not be excluded, particularly not with respect to the NLA destined for South Syria, which could be used 'as auxiliary material in military operations'.[198] Yet, this risk had been 'accepted at the political level'.[199]

Furthermore, in response to questions from MPs, the MFA acknowledged that 'the risks that non-lethal goods would become part of the battle' were known, and that it was never excluded that certain goods would be used in contravention of the supply conditions.[200] The MFA also acknowledged that it knew of some incidents where supplied goods had fallen in the hands of 'extremists'.[201] It moreover recognized that while laptops had been supplied for

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[194] The Netherlands, Review of the Monitoring Systems of Three Projects in Syria (n 24), at 11-12.

[195] Ibid., at 26. See also ibid., at 10 ('Implementing a programme remotely in a conflict zone such as Syria is inherently accompanied by risks of irregularities and/or misappropriation.' Further: 'The safeguards provided by vetting against international watch lists is limited. … As a result, vetting alone cannot exclude extremist organisations from becoming beneficiaries.').

[196] Ibid., at 26

[197] Ibid., at 27-8. See also: ibid., at 11 ('Financing programmes through a lead donor can inhibit the MFA's information position. It should not be assumed that the lead donor will always be forthcoming').

[198] Ibid., at 11-12 and 25-7.

[199] Ibid., at 25.

[200] E.g., The Netherlands, Kamerstuk 32623 no. 247 (n 23) questions 1, 14, 23, 40 and 135. See also: The Netherlands, Kamerstuk 32623 no. 229 (n 4) questions 13, 94, 120, 152, 213 and 285.

[201] The Netherlands, Kamerstuk 32623 no. 247 (n 23) questions 21 and 38; The Netherlands, Kamerstuk 32623 no. 229 (n 4) 106

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media/outreach and administration purposes, they had also been used for target selection in combats with ISIS, and that pick-up trucks had been used to transport ammunition.[202]

On some occasions, remedial action was undertaken where the supply conditions were found to have been breached or where the risk of non-compliance was deemed too high.[203] Thus, when it was found that vehicles supplied as part of the NLA programme were modified with iron bars capable of being equipped with heavy guns, the government reached out to the implementer and modifications of the vehicles were 'immediately ceased'.[204] At the same time, it was clear that goods and equipment that had been supplied could not possibly be recovered from the conflict zone where a beneficiary violated the agreed conditions.[205] As mentioned above, at least one well-placed Dutch official claimed the government also ended its support to several groups after determining they no longer met the criteria set out.[206]

Mutatis mutandis, similar observations can be made in respect of the Netherlands' legal exposure under Common Article 1 and on account of complicity for grave breaches of IHL (see Section 2.2). Indeed, as mentioned above (see Section 3.2), liability under the aforementioned rules can be excluded where aid is provided only to armed groups committed to compliance with IHL. Yet, formal adherence to IHL hardly provides conclusive evidence to this end – as the MFA acknowledged.[207] Rather, it can at best provide but one indication to be considered, together with other indicia, such as past conduct or the fact that a group's commanders have received proper IHL training. Adequate monitoring and appropriate remedial action in case of non-compliance moreover remain indispensable.

In reality, it was clear that human rights violations and core crimes were committed not only by the Assad regime, but also by various armed groups. These violations were well-documented, and well-known to the Dutch authorities.[208] The internal MFA report moreover notes how monitoring human rights violations proved particularly challenging, having regard to the 'negative incentive to report such abuses' and without constant and independent field presence.[209] In the end, then, neither the (well-intentioned) objectives nor the (substantial) oversight efforts can fully serve to remedy the Dutch NLA-program's vices – at least as far as its international legality is concerned.

Epilogue

This paper has sought to test the Dutch NLA-program against the applicable legal framework under international law. It was argued that neither the 'non-lethal' character, nor the fact that the goods and equipment provided were absent from the EU's Common Military List and the Annexes to the EU's Dual-Use Regulation suffice to exclude breaches of the prohibition on the use of force or the non-intervention principle. Neither were such breaches excluded on account of the fact that assistance was provided solely to 'moderate' rebels, recognized as the 'legitimate representatives of the Syrian people'. In addition, even if the Dutch government acted diligently in vetting the beneficiaries and in

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[202] The Netherlands, Kamerstuk 32623 no. 247 (n 23) questions 43, 44 (it is unclear whether this was deemed to come within the scope of (permitted) frontline improvement activities under the supply conditions) and 134.
[203] But see, e.g., The Netherlands, Kamerstuk 32623 no. 247 (n 23) question 60.
[204] Ibid., questions 71 (see also: ibid., questions 56 and 140). Elsewhere, it is reported that Dutch funding was no longer used for iron bars. The Netherlands, Kamerstuk 32623 no. 230 (n 8), at 2.
[205] The Netherlands, Kamerstuk 32623 no. 229 (n 4) question 209; The Netherlands, Kamerstuk 32623 no. 247 (n 23) question 101 (confirming that no goods were reclaimed). At most, after the cessation of the NLA programme in the North, the Dutch MFA managed to reach out the 'implementer' to make sure that several vehicles that had not yet been delivered, were supplied to a humanitarian organization. The Netherlands, Kamerstuk 32623 no. 247 (n 23) question 99.
[206] The Netherlands, Kamerstuk 32623 no. 242 (n 8), at 4-5.
[207] The Netherlands, Kamerstuk 32623 no. 229 (n 4) question 282.
[208] The Netherlands, Kamerstuk 32623 no. 247 (n 23) question 156.
[209] The Netherlands, Review of the Monitoring Systems of Three Projects in Syria (n 24), at 26-7. See also text accompanying (n 36-37).

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imposing and monitoring supply conditions, the latter did not exclude all military use, but only 'offensive' use. Finally, it cannot be excluded that the Netherlands incurred secondary State responsibility to the extent that its conduct contributed to human rights and IHL violations carried out by the allied armed groups. And while the Dutch undertook steps to monitor and ensure the groups abided by their obligations under international law, it is unclear whether that sufficiently discharged its positive obligations under Common Article 1.

In addition, we previously dismissed the idea that the NLA-program, given its humanitarian undertone and inspiration on account of the atrocities committed by the Assad regime, could be justified as a permissible 'humanitarian intervention' or as a form of lawful '(third-party) countermeasure'.[210] Strikingly, neither argument was as such put forth by the Dutch government in support of the program – nor, for that matter, are the authors aware of any other State having explicitly invoked either doctrine to justify assistance to Syrian rebel groups – be it lethal or non-lethal. It is further noteworthy that the impermissibility under extant law of unilateral humanitarian intervention was confirmed in a recent study by an Expert Group set up by the Dutch MFA, with the 'great majority' moreover finding that a new exception of this nature was 'not advisable' either.[211] For the sake of completeness, other justifications such as, for instance, the consent[212] of the territorial State or Chapter VII UNSC authorization were equally off the table.[213] And while the MFA took the view that arms transfers to rebel groups could potentially be justified as a form of collective self-defence to protect Iraq against attacks from ISIS[214] (the same legal justification that was also invoked to justify the Netherlands' participation in Operation *Inherent Resolve*[215]), it acknowledged that such argument was valid only inasmuch as the goods and equipment supplied were to be used exclusively against ISIS – *quod non*.[216]

While the present authors accordingly believe the NLA programme contravened the Netherlands' obligations under international law, two final observations seem in order.

First, it is undoubtedly true that the Dutch program absolutely paled in comparison to similar programs by Assad's other Western and Middle-Eastern enemies, including the United States, United Kingdom, France, Saudi Arabia, Qatar and Turkey, that provided – either openly or clandestinely – arms, military training and/or intelligence to Syrian rebel groups. The Netherlands did take a variety of steps to steer as close as it deemed possible to the applicable international legal framework. As mentioned above, it limited its deliveries to civil and non-military assistance (albeit including all items for which no export licence was required), relied upon a multi-party vetting process of beneficiaries, and installed an extensive third-party monitoring process including regular review and (sporadic) proactive interventions. Importantly, once the bombshell media reports were aired, the government was forthcoming in answering hundreds of parliamentary questions and providing full transparency – uniquely providing insight into the scope and implementation of the NLA program. One might accordingly argue that instead of opting for an

[210] See Section 3.3.

[211] The Netherlands, Export Group Established by the Minister of Foreign Affairs, Humanitarian Intervention and Political Support for Interstate Use of Force, December 2019, https://www.rijksoverheid.nl/documenten/rapporten/2019/12/19/humanitarian-intervention-and-political-support-for-interstate-use-of-force, at ix.

[212] In the sense of Article 20 ARSIWA.

[213] In this sense: The Netherlands, Kamerstuk 32623 no. 229 (n 4) question 56.

[214] Ibid., question 61.

[215] Note: inasmuch this argument is premised on the assumption that the right of self-defence extends to cross-border attacks by non-State armed groups, specifically when the State from whose territory to operate is 'unable or unwilling' to prevent such attacks, it is not without controversy either. See, generally: ILA 2018, at 16-17; Corten 2016. For the Dutch 'Article 51 report' to the UN Security Council, see UN Doc. S/2016/132.

[216] The Netherlands, Kamerstuk 32623 no. 229 (n 4) question 61. Also ibid., question 56.

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excessively 'legalist' (or even 'fetishist') approach, credit must be given where credit is due, both on account of the government's transparency and its effort to limit the potential transgression of the law.

While there is merit in this position, this is also a double-edged sword. Thus, it was only after the media reports laid bare the true nature of the NLA-program, that a government under pressure decided to put all its cards on the table. More importantly, the government also deliberately sought to explore the outer boundaries of the international legal framework and, in so doing, according to the authors, ultimately crossed those very boundaries. The government's effort to beef up the position of the moderate rebels vis-à-vis both extremist groups as well as the Assad regime, while simultaneously maintaining that it was not in any way 'intervening' in the conflict between those rebels and the regime (or at least maintaining an aura of plausible deniability), put it in a catch-22 position from the very start.

Perhaps the main takeaway from this incident is that the international legal framework, at least as it stands today, provides little to no room for support to opposition groups fighting for the violent overthrow of a *de jure* government – especially when they are equally accused of committing atrocities (even if on a smaller scale than the opposing party). Indeed, all the admirable precautions taken by the Dutch authorities ultimately does not alter the conclusion that they committed limited but real violations of international law on multiple levels. In the end, a law-abiding State intent upon impacting the outcome of a brutal and deadly civil war can and should stick towards exerting the maximum amount of diplomatic pressure on the warring parties – making full use of the United Nations' arsenal – and restrict its assistance to that which is strictly humanitarian.

Second, a critic might object that this paper presents an overly 'conservative' picture of the international legal framework governing third-State support to non-State armed groups. Did not, for instance, the EU explicitly exclude 'non-lethal military' equipment from its arms embargo, ostensibly signalling the conviction of the combined EU membership that such aid must be deemed permissible? The authors are very much aware of an increasing body of recent State practice brazenly disregarding this classical understanding of non-intervention – oftentimes involving actual arms transfers, rather than non-lethal support. Against this background some have suggested that legal doctrine should 'provide meaningful and feasible criteria to frame this practice, rather than simply excluding it by referring to outdated doctrines'.[217]

It may be that we are witnessing an erosion of the non-intervention principle, in time greenlighting the provision of an intermediate category of assistance that is neither strictly humanitarian (clearly lawful) nor qualifies as an indirect use of force (clearly unlawful). Even so, it cannot be said that this supposedly emerging trend suffices to overturn the existing customary *lex lata*. Indeed, in order for such legal change to take place, this would require a practice that is sufficiently general and consistent, as well as overt – all the more so if the trend is to alter our understanding of a norm having a peremptory character, such as the prohibition on the use of force. What is more, it would have to be accompanied with the required *opinio juris*[218] – an element that is hitherto lacking. The ambiguous position of the Dutch government is a case in point. Indeed, never did the Dutch government unequivocally state that its NLA-program was fully in line with international law. Its lawyers merely emphasized the limited risks under international law and, when pressed, retreated to a favourite safe haven: the legality depends on a case-by-case assessment.[219] Importantly, in its advice dated 25 June 2020 solicited by the Dutch parliament, the CAVV/AIV joint commission

[217] For controversial practice, see: Nowak 2018, at 72-5 (quote at 75); Ferro and Verlinden 2018, at 22-9; and (n 13).
[218] ILC 2018, at 135-40 (conclusion 8 and 9).
[219] See text accompanying n 55-57.

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similarly concludes – in our view correctly – that 'there does not as yet appear to be a generally accepted *opinio juris*' in support of the provision of 'non-lethal assistance'.[220]

Furthermore, for those favouring a loosening of the legal framework *de lege ferenda*, the case of the Dutch NLA program – given the openness of the dialogue between the government and parliament – presents a unique and insightful experiment into how the legal framework could be shaped. Yet, it also undeniably illustrates the challenges involved, that is, the difficulty – against the background of a complex and ever-evolving conflict – of identifying items of a purely (?) 'civilian' nature, to distinguish between 'moderate' and 'extremist' groups, or to monitor compliance with the supply conditions – challenges that contributed to the government's decision to pull the plug on the NLA program. In fact, the Dutch experience raises doubts as to the *feasibility* of creating a workable intermediate category of support that would escape the *Nicaragua* categorization. Last but not least, as always, those favouring evolutions *de lege ferenda* would be wise to consider the precedential impact of the suggested change. The risk of creating a novel precedent that would easily lend itself to abuse and/or contribute to conflict escalation is explicitly acknowledged in the advice of the CAVV/AIV joint commission.[221] It is precisely for this reason that the joint commission urges the Dutch authorities to be extremely cautious when it comes to contributing to a new legal ground for intervention.[222] In the end, in a time when non-international armed conflict is the dominant form of conflict and we are witnessing a remarkable resurgence of proxy warfare, should the law truly embrace the permissibility of 'non-lethal' support to non-State armed groups in countries such as Syria, Libya, Yemen et cetera? Those inclined to answer in the positive would do well to consider the body of literature from international relations theory and political science on the impact of third-State intervention in non-international armed conflicts.[223]

If, ultimately, third-State support tends to prolong and intensify such conflicts, and increase the risk of spill-over effects, without improving the lives of civilians affected by the conflict, then perhaps government officials should think twice before openly undercutting the non-intervention principle through a (so-called) non-lethal assistance program again.

[220] CAVV/AIV (n 1), 9. The advice observes, on the one hand, that a number of States have openly provided non-lethal (and at times) lethal support to Syrian non-State groups. On the other hand, it notes that a number of States have condemned such support, whereas western States have in turn condemned Russian 'non-lethal assistance' to rebels in eastern Ukraine as a breach of the non-intervention principle. The advice finds a lack of an explicit legal justification for the provision of non-lethal assistance coupled with a lack of a clear and unequivocal approval on the part of the international community. No firm position is taken on the (in-)compatibility of the Dutch NLA program with international law.

[221] Ibid.

[222] Ibid. Note: although the advice would appear to discourage the creation of a novel precedent, it does identify specific criteria that could be employed, in terms of the type of situation (limited to struggles against dictatorial regimes engaged in serious human rights violations), the type of non-State armed group receiving support (groups that have control over a certain area; that are capable of protecting the civilian population against human rights violations, and; which themselves act in accordance with IHL and human rights law), and the type of support (humanitarian support, support for the preservation of public order, border control and the guarding of prisoners). As explained above, however, whether such criteria are ultimately workable is most doubtful.

[223] For a rare legal analysis also looking into this literature, see Bultrini 2019.

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Reference list

Books and contributions to edited volumes

- Oppenheim LFL (1912) International Law: A Treatise, Volume 2: War and Neutrality. Longmans, London.
- Lauterpacht H (1947) Recognition in International Law. Cambridge University Press, Cambridge.
- Oppenheim LFL and Lauterpacht H (1952) International Law: A Treatise, Volume 2: Disputes, War and Neutrality. Longmans, London.
- Castrén E (1954) The Present Law of War and Neutrality. Annales Academiae Scientiarum Fennicae, Helsinki.
- United Kingdom Ministry of Defence (2004) The Manual of the Law of Armed Conflict. Oxford University Press, Oxford.
- Saul B (2005) Defining Terrorism in International Law. Oxford University Press, Oxford.
- Von Heinegg H (2007) 'Benevolent' Third States in International Armed Conflicts: The Myth of the Irrelevance of the Law of Neutrality. In: Schmitt MN and Pejic J (eds) International Law and Armed Conflict: Exploring the Faultlines. Martinus Nijhoff, Leiden.
- Aust HP (2011) Complicity and the Law of State Responsibility. Cambridge University Press, Cambridge.
- Corten O (2012) The Law against War. Hart Publishing, Portland.
- Ruys T (2010) 'Armed Attack' and Article 51 of the UN Charter. Cambridge University Press, Cambridge.
- Crawford J (2013) State Responsibility: The General Part. Cambridge University Press, New York.
- Bothe M (2014) The Law of Neutrality. In: Fleck D (ed) The Handbook of International Humanitarian Law. Oxford University Press, Oxford.
- Jackson M (2015) Complicity in International Law. Oxford University Press, Oxford.
- Casey-Maslen S, Clapham A, Giacca G and Parker S (2016) The Arms Trade Treaty: A Commentary. Oxford University Press, Oxford.
- Aksenova M (2016) Complicity in International Criminal Law. Hart Publishing, Oxford.
- Lanovoy V (2016) Complicity and Its Limits in the Law of International Responsibility. Hart Publishing, Oxford.
- Corten O (2018) The Military Operations Against the 'Islamic State' (ISIL or Da'esh) – 2014. In: Ruys T, Corten O and Hofer A (eds) The Use of Force in International Law: A Case-Based Approach. Oxford University Press, Oxford.
- Gray C (2018) International Law and the Use of Force, 4rd edn. Oxford University Press, Oxford.
- Cryer R, Robinson D and Vasiliev S (2019) An Introduction to International Criminal Law and Procedure, 4rth edn. Oxford University Press, Oxford.

Electronic copy available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3594286

- Ventura MJ (2019) Aiding and Abetting. In: De Hemptinne J, Van Sliedregt E, Cupido M, Ventura MJ and Yanev L (eds) Modes of Liability in International Criminal Law. Cambridge University Press, Cambridge.

Journal articles

- Seidl-Hohenveldern I (1986) International Economic Law: General Course of Public International Law. Receuil des Cours 198.
- Brehm M (2008) The Arms Trade and States' Duty to Ensure Respect for Humanitarian and Human Rights Law. Journal of Conflict & Security Law 12:359-387.
- Jamnejad M and Wood M (2009) The Principle of Non-Intervention. Leiden Journal of International Law 22:345-381.
- Nolte G and Aust HP (2009) Equivocal Helpers – Complicit States, Mixed Messages and International Law. International & Comparative Law Quarterly 8:1-30.
- Ferraro T (2013) The Applicability and Application of International Humanitarian Law to Multinational Forces. International Review of the Red Cross 95:561-612.
- Talmon S (2013) Recognition of Opposition Groups as the Legitimate Representative of a People. Chinese Journal of International Law 12:219-253.
- Dörmann K, Serralvo J (2014) Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations. International Review of the Red Cross 96:707-736.
- Henderson C (2014) The Provision of Arms and 'Non-Lethal' Assistance to Governmental and Opposition Forces. UNSW Law Journal 36:642-681.
- Hersch SM (2014) The Red Line and the Rat Line – Seymour M. Hersh on Obama, Erdoğan and the Syrian Rebels. London Review of Books 36:21-24.
- Ruys T (2014) Of Arms, Funding and 'Non-lethal Assistance' – Issues Surrounding Third-State Intervention in the Syrian Civil War. Chinese Journal of International Law 13:13-53.
- Schmitt MN (2014) Legitimacy Versus Legality Redux: Arming the Syrian Rebels. Journal of National Security & Policy 7:139-159.
- Corten O (2016) The 'Unwilling or Unable' Test: Has It Been, and Could It Be, Accepted? Leiden Journal of International Law 29:777-799.
- Ferro L (2016) 'Brothers-in-Arms': Ancillary State Responsibility and Individual Criminal Liability for Arms Transfers to International Criminals. The Military Law and Law of War Review 54:139-187.
- Gill TD (2016) Classifying the Conflict in Syria. International Law Studies 92:353-380.
- Jackson M (2016) Freeing *Soering*: The ECHR, State Complicity in Torture and Jurisdiction. European Journal of International Law 27:817-830.

Electronic copy available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3594286

- Greene A (2017) Defining Terrorism: One Size Fits All? International & Comparative Law Quarterly 66:411-440.
- Lanovoy V (2017) The Use of Force by Non-State Actors and the Limits of Attribution of Conduct. European Journal of international Law 28:563-585.
- Marchal FJ (2017) De Situatie in Syrië: Rechtmatigheid van Steunen van Rebellen en Non-Lethal-Asssistance. Netherlands Military Law Review. https://puc.overheid.nl/mrt/doc/PUC_83337_11/1/.
- Wallace D, McCarthy A and Reeves SR (2017) Trying to Make Sense of the Senseless: Classifying the Syrian War under the Law of Armed Conflict. Michigan State International Law Review 25: 555-594.
- De Wet E (2018) Complicity in Violations of Human Rights and Humanitarian Law by Incumbent Governments through Direct Military Assistance on Request. International & Comparative Law Quarterly 67:287-313.
- Ferro L and Verlinden N (2018) Neutrality during Armed Conflict: A Coherent Approach to Third-State Support for Warring Parties. Chinese Journal of International Law 17:15-43.
- Nowak C (2018) The Changing Law of Non-intervention in Civil Wars – Assessing the Production of Legality in State Practice after 2011. Journal on the Use of Force and International Law 5:40-77.
- Plakokefalos I (2018) The Use of Force by Non-State Actors and the Limits of Attribution of Conduct: A Reply to Vladyslav Lanovoy. European Journal of International Law 28:587-593.
- Bultrini A (2019) Reappraising the Approach of International Law to Civil Wars: Aid to Legitimate Governments or Insurgents and Conflict Minimization. Canadian Yearbook of International Law 56:144-219.
- Ferro L (2019) Western Gunrunners, (Middle-)Eastern Casualties: Unlawfully Trading Arms with States Engulfed in Yemeni Civil War? Journal of Conflict & Security Law 24:503-535.
- Mauri D (2019) On American Drone Strikes and (Possible) European Responsibilities: Facing the Issue of Jurisdiction for 'Complicity' in Extraterritorial Targeted Killings. Italian Yearbook of International Law 28:249-272.
- Ruys T, Ferro L and Haesebrouck T (2019) Parliamentary War Powers and the Role of International Law in Foreign Troop Deployment Decisions: The US-led Coalition against 'Islamic State' in Iraq and Syria. International Journal of Constitutional Law 17:118-150.

Reports, legal opinions and academic blogs

- International Law Commission (2001) Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries. Yearbook of the International Law Commission II(2):31-143.
- International Law Commission (2011) Draft Articles on the Responsibility of International Organizations, with Commentaries. Yearbook of the International Law Commission II(2):46-105.
- Crawford J (2012) Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories. https://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf.

Electronic copy available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3594286

- Akande D (2013) Would It Be Lawful for European (or Other) States to Provide Arms to the Syrian Opposition? EJIL:Talk! https://www.ejiltalk.org/would-it-be-lawful-for-european-or-other-states-to-provide-arms-to-the-syrian-opposition/.

- De Groof M (2013) Arms Transfers to the Syrian Arab Republic. Groupe de Recherche et d'Information. https://www.grip.org/en/node/1132.

- Nollkaemper A (2013) Wapenleveranties Syrië. https://legacy.gscdn.nl/archives/images/2013D25907.pdf.

- Nollkaemper A (2015) Nader Advies Geweldgebruik tegen ISIL in Syrië. https://www.tweedekamer.nl/debat_en_vergadering/commissievergaderingen/details?id=2015A01952.

- ICRC (2016) Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field – Commentary of 2016, Article 1: Respect for the Convention. https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=72239588AFA66200C1257F7D00367DBD#_Toc452378938.

- Moynihan H (2016) Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism. Chatham House. https://www.chathamhouse.org/sites/default/files/publications/research/2016-11-11-aiding-assisting-challenges-armed-conflict-moynihan.pdf.

- Amnesty International (2017) Diplomatic Assurances Against Torture – Inherently Wrong, Inherently Unreliable. https://www.ohchr.org/Documents/HRBodies/CAT/GCArticle3/AI_Briefing.pdf.

- Berghezan G (2017) Transferts d'Armes aux Groupes Armés de Syrie: Le Rôle de Washington. Groupe de Recherche et d'Information. https://www.grip.org/fr/node/2447.

- International Law Association (2018) Final Report on Aggression and the Use of Force. https://www.ila-hq.org/images/ILA/DraftReports/DraftReport_UseOfForce.pdf.

- International Law Commission (2018) Draft Conclusions on Identification of Customary International Law with Commentaries. Yearbook of the International Law Commission II(2):122-156.

- Nollkaemper A (2018) Position Paper. https://www.tweedekamer.nl/debat_en_vergadering/commissievergaderingen/details?id=2018A03897.

- Beinlich L (2019) Drones, Discretion, and the Duty to Protect the Right to Life: Germany and Its Role in the US Drone Programme before the Higher Administrative Court of Münster. MPIL Research Paper Series No. 2019-22. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3506602

- David É, Turp D, Wood B and Azarova V (2019) Opinion on the International Legality of Arms Transfers to Saudi Arabia, the United Arab Emirates and Other Members of the Coalition Military Involved in Yemen. https://ipisresearch.be/wp-content/uploads/2019/12/191209-Yemen-EN_WEB-2.pdf.

- Goodman R, Heyns C, Shany Y (2019) Human Rights, Deprivation of Life and National Security: Q&A with Christof Heyns and Yuval Shany on General Comment 36. Just Security. https://www.justsecurity.org/62467/human-life-national-security-qa-christof-heyns-yuval-shany-general-comment-36/.

Electronic copy available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3594286

- ICRC (2019) Customary IHL Database. https://ihl-databases.icrc.org/customary-ihl/eng/docs/home.
- Janik R (2019) European Recognition Practice on Venezuela: The Devil in the Details. http://opiniojuris.org/2019/02/08/european-recognition-practice-on-venezuela-the-devil-in-the-details/.
- Van Veen E (2019) Syria: Foreign Interventions and the Revenge of Realpolitik. Clingendael Institute. https://spectator.clingendael.org/nl/publicatie/syria-foreign-interventions-and-revenge-realpolitik.
- International Crisis Group (2020) The Eleventh Hour for Idlib, Syria's Last Rebel Bastion. https://d2071andvip0wj.cloudfront.net/idlib-alert.pdf.
- Humud CE, Blanchard CM (2020) Armed Conflict in Syria: Overview and U.S. Response. Congressional Research Service. https://fas.org/sgp/crs/mideast/RL33487.pdf.
- Commissie van Advies inzake Volkenrechtelijke Vraagstukken (CAVV) and the Adviesraad Internationale Vraagstukken (AIV) (2020), Het leveren en financieren van "niet-letale steun" aan niet-statelijke, gewapende groepen in het buitenland. CAVV Advice no. 35/AIV advice no. 114. https://www.adviesraadinternationalevraagstukken.nl/documenten/publicaties/2020/06/25/niet-letale-steun-aan-niet-statelijke-gewapende-groepen-in-het-buitenland.

Electronic copy available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3594286