Advisory Committee on Public International Law

Advisory Council on International Affairs

The provision and funding of “non-lethal assistance” to non-State armed groups abroad

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Introduction

On 9 October 2018 the House of Representatives of the States General passed the following motion:

> 'The House,
>
> having heard the deliberations,
> noting that the provision of "non-lethal assistance" (NLA) in Syria involved a new form of aid in which the government provided assistance to armed groups that were not part of regular armed forces;
> requests the Advisory Committee on Issues of Public International Law (CAVV) and the Advisory Council on International Affairs (AIV) to produce a joint advisory report on a framework for assessing the provision and funding of non-lethal assistance to non-State armed groups abroad;
>
> requests the CAVV and the AIV, *inter alia* as a basis for the report, to study the NLA programme in Syria and include the facts and findings of that study when formulating the assessment framework;
>
> requests the CAVV and the AIV to include in their report the role of advice on international law, including the extent to which it is made public and the scope for taking account of dissenting views;
>
> and requests the government to cooperate fully by providing access to documents and participating in discussions,
>
> and proceeds to the Order of the Day.'

On 9 April 2019 the chairs of the CAVV and the AIV, Ms Van den Herik and Mr De Hoop Scheffer, met the members and registrar of the Permanent Committee on Foreign Affairs of the House of Representatives to discuss the question of whether and, if so, how the CAVV and the AIV could accede to this request.

At this meeting, the chairs of the CAVV and the AIV jointly indicated that these advisory bodies were prepared to produce an advisory report on the legal issues connected with the provision of "non-lethal assistance" (NLA) to non-State armed entities during armed conflict under international law. The chairs explicitly stated in this connection that a retrospective fact-finding investigation did not come within the remit of either body. The Permanent Committee on Foreign Affairs expressed understanding for this position.

In its procedural meeting of 12 September 2019 the Permanent Committee decided to omit any further elaboration in the request for advice to the CAVV and the AIV. On 5 November 2019 the House of Representatives decided to 'request advice on a framework for assessing the provision and funding of "non-lethal assistance" to non-State armed groups abroad.' This request was contained in a letter from the President of the House of Representatives of the same date. When confirming receipt of the request for advice, the CAVV and the AIV notified the President of the House of Representatives that they would take the frameworks as set out jointly by their chairs during the meeting on 9 April 2019 as the starting point for this advisory report.

In line with this approach, this advisory report addresses two legal questions, namely: (I) how does "non-lethal assistance" to non-State armed entities relate to key principles of international law, in particular the principle of non-intervention and the prohibition of the use of force, and (II) under what conditions can "non-lethal assistance" to non-State armed entities result in (co-) responsibility in relation to violations of international humanitarian law and human rights committed by such entities? In answering these questions, the CAVV and the AIV have made use of public sources only, in accordance with their usual working methods. The advisory report concludes with a section (4.2) that identifies elements for an assessment framework for the government and parliament.

Such an assessment framework cannot replace the political judgment that must be accounted for by government vis-à-vis parliament. It does, however, provide guidance, determined by legal parameters, of how to make that political judgment. The consideration of the international situation required for this purpose must necessarily include evaluations of political and strategic factors.

— Chapter 2

The concept of “non-lethal assistance” and relevant rules of international law: the prohibition of the use of force and the principle of non-intervention

This advisory report addresses the permissibility of providing “non-lethal assistance” to foreign non-State armed groups. The starting point for the report is the wording of the request for advice, which refers to “non-lethal assistance” (NLA) – an expression commonly used in political discourse. This expression is generally understood (with some variation) to mean the provision of assistance (in the form of equipment and intelligence) that cannot be directly used to kill. However, as “non-lethal assistance” is not presently a term of art in international law, the classification as such does not have any legal implications. This advisory report distinguishes between different forms of assistance, ranging from the direct deployment of a state’s military units to support armed groups in another state to the provision of humanitarian aid. Four categories of assistance are defined on the basis of the actual content and circumstances of the assistance and the legal standards governing assistance, for which purpose the case law of the International Court of Justice (ICJ) serves as the starting point. This overview is then used to determine the category into which “non-lethal assistance” as referred to in the request for advice falls or could fall.

The provision of assistance to *unarmed* opposition movements and other *unarmed* entities or persons is disregarded in this advisory report.[1] The term ‘non-State’ is taken to refer to groups that are not part of the state. Groups that constitute the armed wing of a political opposition movement regarded by the Netherlands as the legitimate representative of the people (or a section of the people) are, however, categorised as non-State *armed* groups. The recognition of such status is of a purely political character and has no legal relevance.

A fundamental principle of interstate relations is that of non-intervention.[2] This principle stems from the principle of the sovereign equality of states. The international prohibition of the use of force, as contained in Article 2 (4) of the UN Charter, is also a fundamental rule of international law. A serious breach of the prohibition of the use of force can be classified as aggression and a violation of *jus cogens* (peremptory law). Section 2.1 deals with these legal standards, as interpreted in particular by the International Court of Justice, and section 2.2 discusses state practice on “non-lethal assistance”.

— 2.1 The prohibition of the use of force and the principle of non-intervention, as interpreted by the International Court of Justice

A key question about assistance provided to a non-State armed group abroad is whether it infringes the principle of non-intervention and possibly also the prohibition of the use of force. With reference to these norms, as interpreted by the International Court of Justice in the *Nicaragua* case, four categories of assistance can be distinguished,[3] namely:

(1) Direct deployment of a state’s military units to assist non-State armed entities abroad. Military deployment of this kind constitutes, in principle, a violation of the prohibition of the use of force, as laid down in Article 2 (4) of the UN Charter, and hence also, by definition, a violation of the principle of non-intervention.

(2) The arming (provision of weapons and related materials) and training of non-State armed entities abroad, as well as the provision of other

assistance to non-State armed entities in a manner that contributes directly to the use of force by such entities. In keeping with the ICJ's case law, in particular the *Nicaragua* judgment and the *Armed Activities* judgment,[4] such assistance breaches the prohibition of the use of force, as contained in Article 2 (4) of the UN Charter, and hence also, by definition, the principle of non-intervention.

(3) Other forms of assistance, such as financial aid, intelligence sharing and logistical assistance, to non-State armed entities abroad. Assistance of this kind violates the principle of non-intervention if it involves coercion in relation to matters in which a state is permitted to decide freely.

(4) Humanitarian assistance. This concerns the provision of essential relief supplies for basic necessities such as food and potable water, as well as clothing, sleeping places and shelter. It also includes the provision of medical care and medicines. As noted by the CAVV in its advisory report on humanitarian assistance, such assistance should be provided "in accordance with two principles, namely the principles of humanity and impartiality. [...] The principle of humanity requires that the assistance should be exclusively humanitarian in nature and may not serve any other purpose. It should be offered without promoting political opinions or religious beliefs and without pursuit of profit. Humanitarian assistance may not be used to gather sensitive information of a political, economic or military nature that is irrelevant to disaster relief. The principle of impartiality is based partly on the criteria of non-discrimination and proportionality, under which relief may be provided on the basis of need alone and priority may not be given to certain groups of people on improper grounds. [...] The principles of neutrality and impartiality require that humanitarian assistance be provided without taking sides in hostilities or engaging in controversies of a political, religious or ideological nature. Providing assistance to civilians who are affiliated with one party to a conflict does not necessarily violate the principles of neutrality and impartiality."[5] Moreover, a state in whose territory assistance is provided must consent, although an exception may possibly exist on the grounds of necessity where consent has been refused arbitrarily.[6]

As noted, "non-lethal assistance" is not a term of art in international law. The question of how the Dutch NLA programme in Syria should be characterised and how specific forms of assistance should be classified is therefore not dependent on whether or not the assistance provided is "lethal"; the same consideration applies to whether the Dutch NLA programme as such is compatible with the rules of international law. Assistance to armed entities abroad that does not involve the deployment of Dutch military units may fall into categories (ii), (iii) or (iv). As noted above and as is also apparent from the CAVV's advisory report on humanitarian assistance, the provision of humanitarian assistance must meet specific conditions in order to be classified as such. What is less clear is the difference between category (ii) (assistance that also violates the prohibition of the use of force) and category (iii) (assistance that only violates the principle of non-intervention).

In keeping with the *Nicaragua* judgment, the main criterion for concluding that the principle of non-intervention has been violated is whether there has been coercion in relation to matters in which a state is permitted to decide freely. In the words of the ICJ, "intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones."[7] However, the principle of non-intervention has been described as rather imprecise since coercion is not a very clearly defined criterion. Moreover, the ICJ has explicitly held that the above definition applied only to "those aspects of the principle that appear to be relevant to the resolution of the dispute."[8] The *Nicaragua* case concerned a situation involving the use of force and armed insurrection against a sitting government. Even greater uncertainty exists about the contours and content of the principle of non-intervention in situations not involving the use of force, but these fall outside the scope of this advisory report.

However, there is agreement that assistance provided to armed groups with a view to overthrowing a sitting government can be treated as coercion. The motives for providing the assistance are not relevant here. Nor is the question of whether or not the state providing the assistance itself intended to overthrow the sitting government relevant in that context.[9] According to a strict interpretation of the principle of non-intervention, a state should not grant any assistance whatsoever during an armed conflict without consent, even if the assistance is not directly related to the armed struggle.[10] A more flexible interpretation would be that in situations of armed conflict coercion exists only "once a State provides assistance for armed activities against another

state."[11] The key question in determining whether certain assistance is prohibited is then whether the equipment and intelligence are used as part of the armed activities and whether the assistance influences the hostilities. According to this interpretation, it is possible that other forms of assistance might not violate the principle of non-intervention, for example assistance designed to help the armed group to maintain public order in the area under its control or assistance in carrying out border surveillance. The question is how this interpretation relates to the ruling in the *Nicaragua* case. It follows from the latter that assistance in the assumption of public duties such as border control or maintenance of public order by an armed group that intends to overthrow the sitting government constitutes a violation of the sovereignty of the State, as border control and maintenance of public order would appear to be matters in which a State is permitted to decide freely. It is also uncertain whether such a sharp distinction can be drawn in practice between the identity of a group that maintains order in a certain area and the identity of a group that is party to an armed conflict. As any form of assistance is bound to bolster the group's organisational strength and reputation, this will in any event influence the armed conflict and may, in certain circumstances, cause escalation.

Determining whether specific assistance given to a specific group has actually violated the principle of non-intervention or even the prohibition of the use of force at any given time is only possible on a case-by-case basis. As noted in the introduction, the CAVV and the AIV have construed the request in such a way that it comes within their respective mandates. The report therefore centres on the legal question of whether the provision of non-lethal assistance to non-State armed entities during an armed conflict is permissible under international law. Since the CAVV and the AIV are neither equipped nor mandated to carry out fact-finding, it is beyond the scope of this advisory report to apply the legal framework described here to the implementation of the NLA programme in Syria.

The above analysis is largely based on a strict interpretation of the relevant standards by the ICJ in the *Nicaragua* case. Whereas the case law of the ICJ carries very great authority, the *Nicaragua judgment* does not clarify everything. The *Nicaragua judgment* dates from 1986 and the ICJ's interpretation of the law related to the specific circumstances of that case, which did not directly address the question of whether other forms of assistance are permissible. This judgment does not therefore provide all the answers. As already noted, the difference between assistance that violates the prohibition of the use of force and assistance that 'only' violates the principle of non-intervention is not always clear. Moreover, subsequent events can influence the development and state of international law, particularly customary international law. For example, the question has arisen as to whether the principle of non-intervention should be interpreted more flexibly or whether an exception exists or should exist in situations in which armed groups fight against a criminal regime that commits gross violations of international humanitarian law and the human rights of its own people, in order to permit certain forms of assistance to be provided to those armed groups, such as support to the benefit of the civilian population and assistance in maintaining public order in the areas over which the armed groups exercise control.

Dame Rosalyn Higgins, former President of the International Court of Justice, wrote in 2009, with reference to the *Nicaragua judgment*, that

> "the task of the international lawyer over the next few years is surely not to go on repeating the rhetoric of dead events which no longer accord with reality, but to try to assist the political leaders to identify what is the new consensus about acceptable and unacceptable levels of intrusion. […] there are clearly no easy answers, and indeed in so many of these areas international law cannot itself provide the answers; it can only assist in formulating answers when there is a sufficient political consensus to move towards that. But international law is part of and not extraneous to the current debate on the limits and control of intervention."[12]

In the spirit of this observation, the CAVV and the AIV note that the overt provision of "non-lethal assistance" is a new development and could therefore lead to the formation of new customary international law. Indeed, the Nicaragua judgment already provides a basis for this. In this judgment, the ICJ held as follows:

> "206. […] It has to consider whether there might be indications of 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. For such a general right to come into existence would involve a fundamental modification of the customary law principle of non-intervention.

> 207 … Reliance by a State on a novel right or an unprecedented exception to the principle might, if shared in principle by other States, tend towards a modification of customary international law. In fact however the Court finds that States have not justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition. The United States authorities have on some occasions clearly stated their grounds for intervening in the affairs of a foreign State for reasons connected with, for example, the domestic policies of that country, its ideology, the level of its armaments, or the direction of its foreign policy. But these were statements of international policy, and not an assertion of rules of existing international law.
>
> 208 In particular, as regards the conduct towards Nicaragua which is the subject of the present case, the United States has not claimed that its intervention, which it justified in this way on the political level, was also justified on the legal level, alleging the exercise of a new right of intervention regarded by the United States as existing in such circumstances. As mentioned above, the United States has, on the legal plane, justified its intervention expressly and solely by reference to the "classic" rules involved, namely, collective self-defence against an armed attack."

The question arises as to whether the Dutch NLA programme means that the Netherlands favours a new interpretation of the rule of customary international law on the principle of non-intervention. However, whether that principle is adapted to allow certain forms of assistance to armed groups fighting a criminal regime depends on State practice and States' legal views on the subject, and it therefore cannot be altered by a unilateral alternative interpretation. The next section discusses developments in State practice.

— 2.2
State practice and potential legal development

For an analysis of the role and substance of the principle of non-intervention under customary international law as it stands, it should be noted that the Dutch NLA programme was part of a wider practice in which a number of States provided "lethal" and "non-lethal assistance" to Syrian non-State armed groups. The States concerned have openly admitted or defended this practice, while in the past such assistance tended to be provided covertly. As far as the provision of assistance by EU Member States is concerned, this was facilitated by a 2013 EU Council Decision authorising such assistance,[13] albeit conditionally upon compliance with a Common Position of the Council of the EU prohibiting export licences for military technology and equipment if they would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination.[14] Previously, UN Security Council Resolution 1970 (2011) allowed States to provide non-lethal military equipment (and sometimes even arms) to certain armed groups in Libya fighting the Gaddafi regime, albeit subject to approval by the UN Sanctions Committee established pursuant to this resolution.[15] As regards Syria, there are no UN Security Council resolutions expressly allowing assistance to Syrian non-State armed entities.[16]

Diverging positions have been taken by States at the international level on the permissibility of providing "non-lethal assistance", particularly in Syria. Syria, Russia and Iran have explicitly condemned assistance provided by foreign powers to Syrian non-State armed groups. Western States have since described Russia's provision of "non-lethal assistance" to rebels in eastern Ukraine as a violation of the prohibition of intervention.[17]

The recent practice of various States that have provided "lethal" and "non-lethal assistance" to Syrian non-State armed groups could eventually lead to the formation of new customary international law on the provision of assistance to non-State armed groups. A rule may possibly be evolving – subject always to the UN Charter system and its restrictions on the use of force – that permits the provision of certain forms of assistance in specific circumstances, provided that it is confined to certain armed opposition groups. If recent practice were to result in the development of a new rule to the effect that certain forms of assistance are permissible in specific circumstances and only to certain armed opposition groups, it would be of the utmost importance to ensure that strict parameters be set for any such expansion of what is permissible, on the basis of three conditions. They concern the following:

1. **Certain situations:** namely situations in which groups are fighting against dictatorial regimes that have committed serious violations of human rights and international humanitarian law, as verified by international authorities.

2. **Certain armed opposition groups:** namely groups that are capable of protecting the civilian population from such violations. For the most part, these will be

groups that exercise control over a particular territory. The considerations set out in section 3 of this advisory report, namely that the armed group itself must also respect international humanitarian law and human rights and that this must be continuously monitored, also play a role in determining whichgroups are eligible for assistance.

3. **Certain forms of assistance:** namely assistance for the benefit of the civilian population, including in any event assistance of a humanitarian nature, as well as assistance in maintaining public order in areas controlled by the group, carrying out border surveillance, and possibly also guarding prisoners, provided that respect for human rights is guaranteed.

However, caution is required given the lack of clear and express legal justification for the "non-lethal assistance", as well as the absence of clear and unambiguous approval by the international community. There does not appear to be a generally accepted *opinio juris* on this matter at present. Moreover, recent State practice is inconsistent as there has in fact been some protest and the permissibility of assistance to non-State armed groups has been assessed differently in comparable situations. Caution is all the more essential since allowing assistance to armed groups generally results in conflict escalation. Escalation is, in turn, usually accompanied by an increase in breaches of international humanitarian law, whereas the international community is actually trying to minimise such breaches.

The question of whether relaxing or making an exception to the principle of non-intervention is appropriate or even required in situations in which a regime commits large-scale human rights violations against its own people creates tensions comparable to the dilemmas discussed by the AIV and CAVV in relation to humanitarian intervention and the Responsibility to Protect (R2P) doctrine. In previous advisory reports, the AIV and CAVV examined the scope for using force internationally in situations where the UN Charter provides no *prima facie* basis for this.[18] The risks of setting a precedent and of possible abuse of new grounds for intervention have been recognised by the international community. This is also why the Netherlands has, as far as possible, sought additional criteria within the applicable international law framework for maintaining international peace and security, imposing strict conditions on the use of such grounds for intervention which have an uncertain legal basis.[19] More recently, an international group of experts set up by the Minister of Foreign Affairs has advised against the idea of creating a new legal exception to the prohibition of the use of force where force is used for humanitarian purposes.[20] The expert group also indicated that it would be helpful if the government were to take steps to establish informal international consultations on how to deal with humanitarian emergencies and that a similar approach could be adopted for questions about so-called "criminal regimes".[21]

A relaxation of or an exception to the principle of non-intervention would, for the purpose of offering protection, allow for assistance to certain armed groups during armed conflict, especially those which are fighting against dictatorial regimes guilty of serious breaches of human rights and international humanitarian law, as verified by international bodies, and which exercise control over a part of a territory. Such assistance would have to be for specific purposes with a view to protecting the population and may not directly contribute to the use of force. This could include the provision of – possibly discriminatory – humanitarian assistance, the maintenance of public order in those areas, border surveillance, and possibly the guarding of prisoners, provided that respect for human rights is guaranteed. However, the utmost caution should be exercised, given the above-mentioned dangers of conflict escalation and setting a precedent. In keeping with previous advisory reports on humanitarian intervention and R2P, the CAVV and AIV therefore recommend restraint when it comes to creating -or contributing thereto- new legal grounds for intervention.

— Chapter 3

“Non-lethal assistance” and responsibility in relation to humanitarian law and/or human rights by non-State armed groups

As explained in chapter 2, the provision of assistance to non-State armed groups abroad, other than in the form of humanitarian aid, may violate the prohibition of the use of force or the principle of non-intervention or both. Another issue that arises in the discussion about assistance to non-State armed groups abroad is whether and, if so, in what circumstances such assistance can result in the assisting state being responsible in relation to possible violations of international humanitarian law and human rights by the recipient groups.[22] International humanitarian law and international human rights law prohibit states from assisting in violations of international humanitarian law and/or human rights by other actors. The content and scope of these prohibitions are discussed in section 3.1. In certain cases, a violation of international law by another actor can also result in derivative responsibility, also known as complicity, on the part of the state concerned. This is explained in section 3.2.

— 3.1 Prohibition of assistance

International law prohibits States from assisting other actors in committing internationally wrongful acts. The prohibition on providing assistance also entails a duty of due diligence: states are required to observe due care in order to avoid breaching the prohibition. This duty of care can even be held to have been breached without the need to establish whether the principal actor actually acted wrongfully. Violation of these independent primary norms is generally easier to establish than responsibility based on complicity.

The relevant international law is a patchwork of norms derived from treaty and customary law. It was decided that this advisory report should deal only with the prohibition of assistance under international humanitarian law, since this contains the obligations that are most relevant to the provision of assistance to armed groups abroad during armed conflict.

Common Article 1 of the Geneva Conventions imposes an obligation on states to ‘respect and to ensure respect for the present Convention in all circumstances’.[23] This obligation applies to both international armed conflict and internal armed conflict, and is part of customary international law.[24] In the Wall Opinion, the ICJ held that ‘every State party [...] whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question [i.e. the Geneva Conventions] are complied with.’[25] According to the ICJ in the *Nicaragua case*, Article 1 in any event entails ‘an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions’.[26]

There is widespread support for the view that common Article 1 also prohibits certain assistance to participants in an armed conflict when those participants are violating international humanitarian law.[27] However, the precise scope of the prohibition is a matter of debate. Where the group receiving the assistance is clearly violating international humanitarian law, any assistance that may directly contribute to the violations will be unlawful. It has also been established that States have a duty to ensure that before providing assistance they perform a thorough analysis of the recipient armed group and of the conflict in which it is involved, in order to avoid making a direct contribution.[28] And if the assistance is of prolonged duration, the situation must also be monitored.[29]

But what if the assistance provided makes only an indirect contribution by helping to increase the group’s effectiveness or strengthen its position? And is assistance also prohibited if there is only a risk of contributing to violations? The latter question is of particular relevance when the use to which the assistance will be ultimately put is unclear, for example in the case of so-called dual-

use goods, or if there is a significant risk that the goods will be intercepted by other parties to the conflict of whom it is clear that they are violating international humanitarian law.

The Arms Trade Treaty (ATT) contains provisions that provide answers to the questions raised above in relation to arms exports. Article 6 of the Arms Trade Treaty[30] prohibits the export of arms if the state has knowledge that the weapons will be used in violations of international humanitarian law. Even if export is not prohibited under Article 6, it may still be prohibited under Article 7. Pursuant to Article 7, states are obliged to establish an arms export system to assess the risk that arms exports could contribute to violations of international humanitarian law and human rights. Export is prohibited where there is an "overriding risk" of such violations. The choice for the overriding risk criterion has been explained as follows.

> 'The reasoning behind this controversial concept is that sometimes the expected positive effects of arms transfers, coupled with the effect of any relevant and available risk-mitigation measures, may outweigh their possible misuses [...]. Examples would include assisting people to defend humanity, or to exercise their right to self-determination when attacked by an oppressive state.'[31]

It should be expressly noted that an assessment of this kind is applicable only under Article 7, and thus not when it is clear that the arms will be used in the commission of such violations.

It is noteworthy that the ATT prohibits exports only where they would directly contribute to violations of international humanitarian law and human rights. Moreover, a combined reading of Articles 6 and 7 of the ATT seems to suggest that, where there is only a risk that exports will contribute to violations, States do not consider that imposing an export ban is part of their existing obligations under international law. Analogous application to the obligation of common Article 1 of the 1949 Geneva Conventions would warrant the conclusion that this article does not extend to prohibiting the provision of assistance in situations where there is only a risk that it will contribute to violations of international humanitarian law by the recipient group.

The lack of agreement on the precise scope of the prohibition of assistance as laid down, *inter alia*, in common Article 1 of the 1949 Geneva Conventions, leaves a considerable grey area in which it is difficult to determine whether assistance of a particular kind is in accordance with international humanitarian law. Clearly, however, the relevant legal frameworks require States to take appropriate measures to prevent facilitation of violations of international humanitarian law and human rights. It is therefore essential for the provision of assistance to armed groups engaged in armed conflict to be accompanied by a thorough analysis of the nature and conduct of the groups. Particularly where dual-use goods are provided, it is not inconceivable that the prohibition will be breached if the groups are generally known to be guilty of violations of international humanitarian law and the goods are capable of being used in operations in which these violations take place.[32] The nature and complexity of some armed conflicts, and the sometimes opaque command structures and the organisation of the armed groups concerned tend to hamper information gathering and risk assessment. The provision of assistance in such situations is therefore generally not without legal risk.

— 3.2
Complicity in violations of international law committed by a non-State armed group

The legal consequence of providing wrongful assistance as described in section 3.1 above may be that one State becomes complicit in a violation of international law by another State, and thus itself becomes responsible in relation to that violation. Article 16 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA)[33] formulates the rule of customary law[34] as follows:

'A State which aids or assists another State in the commission of an internationally wrongful act [...] 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.'

A State which aids or assists in a violation of international law committed by another State is not responsible for the acts of the other State, but is itself deemed to have violated the rule of international law by providing the aid or assistance.[35] This form of responsibility only arises when the principal actor actually violates international law. It should be noted that responsibility based on complicity does not make an

assisting State responsible for all consequences of the wrongful act of the recipient actor. In its Commentary on Article 16 of the ARSIWA, the International Law Commission (ILC) emphasises that 'the assisting State will only be responsible to the extent that its own conduct has caused or contributed to the internationally wrongful act. Thus, in cases where that internationally wrongful act would clearly have occurred in any event, the responsibility of the assisting State will not extend to compensating for the act itself.'[36]

Article 16 of the ARSIWA concerns interstate relations. The question whether the same rule applies to the provision of assistance to non-State actors is a matter of debate. A possible distinction between state and non-State actors could long be explained by the fact that international law did not impose obligations on non-State actors. There was 'simply no international wrong for the state to be complicit in'.[37] However, as international law now increasingly regulates the actions of non-State actors as well, it is often argued that the rule contained in Article 16 of the ARSIWA should be applied by analogy to cases where non-State actors have violated their obligations under international law.[38] In the Bosnian Genocide case, for example, the ICJ applied Article 16 by analogy in determining Serbia's complicity in the genocide committed by the Bosnian Serbs.[39] Although 'complicity in genocide' is explicitly prohibited under the Genocide Convention,[40] it is hard to think of any good reason why this form of State responsibility should not also apply when non-State actors violate other obligations to which they are subject under international law.

Article 16 of the ARSIWA mentions three conditions for the establishment of State responsibility through complicity.

1. There must be a sufficient link between the assistance provided by the assisting state and the wrongful act. According to the ILC, it is not necessary for the assistance to have been 'essential' for the commission of the act. Instead, 'it is sufficient if it contributed significantly'.[41] The ILC added, however, that 'the aid or assistance must be given with a view to facilitating the commission of the wrongful act, and must actually do so. […] A State is not responsible for aid or assistance under article 16 unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct.'[42] This interpretation of article 16 is controversial[43] and is not supported by the text of the article itself. If States are complicit only when it is determined that they intended to facilitate the wrongful act, establishing responsibility would seem difficult. However, it has been argued that a State's intention may be inferred from the fact that it provided assistance notwithstanding well-known and credible reports that the recipient violated international law.[44]

2. The assisting State had knowledge of the circumstances that made the other actor's conduct wrongful. It should be noted here that a state probably cannot evade responsibility by stating that it had no knowledge of the incriminating facts if it was 'wilfully blind' about facts in the public domain.[45]

3. The act would be unlawful if it had been committed by the assisting state itself; in other words, the assisting state itself must be bound by the violated obligation.

Whether the provision of assistance to an armed group that violates international law leads to derived State responsibility on the part of the Dutch State therefore depends in any event on whether the assistance made a significant contribution to those violations and whether the Netherlands was (or possibly should have been) aware of the unlawful acts by the armed group at the time it provided the assistance. The third criterion is less relevant to this question if it is assumed that the key obligations of international humanitarian law are of a customary nature and that they are also binding on non-State armed groups.

— Chapter 4

Concluding remarks and some reflections on the role of advice on international law

This advisory report sets out the international law framework for assessing whether "non-lethal assistance" to non-State armed groups abroad is permissible. The framework consists of the rules on the prohibition of the use of force and the principle of non-intervention on the one hand and the rules on the prohibition of assistance and the possibility of complicity in violations of international humanitarian law and human rights on the other. As explained in this advisory report, the rules of this framework are not yet fully crystallised and may indeed still be evolving. Whether particular assistance is permissible under international law also depends heavily on the situation and the purpose of the assistance.

In this advisory report, the CAVV and AIV have focused on the overall assessment framework. This means that the question of whether certain forms of assistance, as contained in the NLA programme implemented by the Netherlands, are permissible, cannot be answered in retrospect; the CAVV and AIV are not equipped for this. They can, however, as requested, identify elements for an assessment framework for the benefit of government and parliament. Such an assessment framework cannot replace the political assessment and the government's accountability to parliament in this respect. The framework does, however, provide an indication, determined by legal parameters, of how to make that political assessment. The appraisal of the international situation that is required for this purpose necessarily includes evaluations of political and strategic factors.

— 4.1 Advising on international law as a part of the assessment

First, the assessment framework requires a careful procedure comprising public advice on international law and the opportunity for dissenting views to be expressed. The main factor in ensuring that the advice is an integral part of the decision-making process is the position of the internal Legal Adviser, as he or she has full access to the relevant facts and considerations.[46] In this context, the CAVV and AIV refer to the report of the independent Committee of Inquiry on Iraq (the Davids Committee) of 12 January 2010[47] concerning the preparations and decisions made in the period from summer 2002 to summer 2003 on Dutch political support for the invasion of Iraq in general and on aspects of international law, aspects of intelligence and information provision and aspects of alleged military involvement in particular. The report includes a recommendation to ensure that the provision of advice on international law is embedded more firmly within the organisation of the Ministry of Foreign Affairs.[48] This recommendation was adopted by the Minister of Foreign Affairs in a ministerial order of 25 May 2011.[49] This order provides that internal advice on international law can be submitted directly and confidentially to the Minister either at the Minister's request or on the initiative of the head or deputy head of the International Law Division.[50] The measures taken in recent years to strengthen the internal Legal Adviser's position, enabling the adviser to bring international law matters directly to the attention of the Minister on his or her own initiative, have been an important and welcome development.

On the question of whether it would be desirable for all official international law advice to be made public or at least made available to parliament, the CAVV and AIV note that this concerns documents that are drawn up for the purpose of internal consultation and that the information is generally not disclosed under the Government Information (Public Access) Act (WOB), in accordance with existing case law.[51] Under article 68 of the Constitution, the established government policy is for documents relating to internal consultation not to be part of the debate with the House of Representatives.[52] The background to this is that under the Constitution the Minister is responsible for all official actions and is accountable for policy. Civil servants must be able to freely advise their minister, so that all arguments for and against can be discussed and, if necessary,

dissenting views can be put forward. Although such documents are occasionally provided – in redacted or confidential form – to the House of Representatives, these are exceptional cases and do not detract from the importance of protecting internal consultation and the fact that under the Constitution the Minister is accountable to the House. The routine disclosure of documents relating to internal consultation would obstruct the proper functioning of the ministries, ministers and cabinet. Protecting the confidentiality of internal consultation is essential to guarantee optimal decision-making. It is then up to the Minister to provide accountability to the House for the position or order in question, the underlying arguments and other relevant information.[53] The CAVV and AIV therefore consider that further steps to increase public disclosure would be undesirable.

— 4.2 Elements of the assessment framework

On the basis of the foregoing, this section describes the elements of a framework for assessing "non-lethal assistance". The assessment of possible "non-lethal assistance" requires consideration of the particular situation at hand and is subject to the international law parameters described in this advisory report. These parameters include the possibility, referred to in section 2.2, that a rule may possibly be evolving based on widely accepted State practice – and subject always to the restrictions on the use of force contained in the UN Charter system – to the effect that certain forms of assistance to certain armed opposition groups are permissible in very specific circumstances.

1 Arming (supplying weapons and related materials) and training non-State armed entities abroad, and otherwise providing assistance to them in a way that directly contributes to the use of force by those entities is in principle a violation of the prohibition of the use of force in article 2 (4) of the UN Charter, and hence by definition a violation of the principle of non-intervention as well. Other forms of assistance to non-State armed entities violate, in principle, the non-intervention principle if they amount to coercion of the sitting government on matters in which it is permitted to decide freely.

2 If recent State practice were to result in the development of a new rule to the effect that certain forms of assistance are permissible in specific circumstances and only to certain armed opposition groups, it would be of the utmost importance that strict parameters be set for any such expansion on the basis of three conditions. They concern the following:

- **Certain situations:** namely situations in which armed groups are fighting against dictatorial regimes that have committed serious violations of human rights and international humanitarian law, as verified by international authorities;

- **Certain armed opposition groups:** namely groups that are capable of protecting the civilian population from such violations. For the most part, these will be groups that exercise control over a particular territory. The considerations set out in section 3 of this advisory report, namely that armed groups themselves must also respect international humanitarian law and human rights and that this must be continuously monitored, also play a role in determining what groups are eligible for assistance.

- **Certain forms of assistance:** namely assistance for the benefit of the civilian population, including in any event aid of a humanitarian nature, as well as providing assistance in maintaining public order in those areas where the group exercises control, carrying out border surveillance, and possibly also guarding prisoners, provided that respect for human rights is guaranteed.

3 However, the utmost caution is warranted in relation to such a development, given the dangers of conflict escalation and setting precedents. In keeping with previous advisory reports on humanitarian intervention and R2P, the CAVV and AIV recommend restraint when considering the idea of creating or contributing to new grounds for legal intervention. This necessarily also entails making political and strategic assessments of the international situation.

4 Whether such a legal development should be initiated or supported must be assessed in the light of the geopolitical context, any ensuing objections there may be regarding passivity, and the advantages and disadvantages of the legal development at stake. These factors are part of the duty to exercise the utmost caution, as referred to earlier in this report. A political urge not to remain passive towards humanitarian emergencies that constitute a threat to the international peace and security can arise as a result of the UN Security

Council's incapability to act because of the use of the veto. In such cases too, the provision of assistance must in any event remain within the parameters and conditions described above (i.e. only in certain situations may assistance be provided and only to certain armed groups, and only certain forms of assistance).

5 The relevant legal parameters oblige States to take appropriate measures to avoid facilitating violations of international humanitarian law and human rights. Wherever assistance is to be provided to armed groups engaged in an armed conflict, it is therefore essential for their nature and conduct to be thoroughly analysed.

6 Providing assistance to an armed group that violatesinternational law may lead to derivative responsibility on the part of the Dutch State. This may be the case if the assistance has made a significant contribution to those violations and the Netherlands was (or, possibly, should have been) aware of the wrongful acts by the armed group when it provided the assistance.

Notes

1 Nor does the advisory report relate specifically to failed State situations, i.e. where government authority has ceased to exist and government bodies no longer function. On this point, see AIV/CAVV advisory report 35/14: 'Failing States', May 2004. The report also does not deal specifically with post-conflict reconstruction or transitional justice; as regards the latter, see AIV/CAVV advisory report 65/19: 'Transitional Justice', April 2009.

2 According to the International Court of Justice, this principle is 'part and parcel of customary international law', Case Concerning Military and Paramilitary Activities in and against Nicaragua *(Nicaragua v. United States of America)*, judgment of 27 June 1986, I.C.J. Reports 1986, paragraph 202 (below the *Nicaragua* judgment).

3 Ibid., paragraph 195.

4 Armed Activities on the Territory of the Congo, *Democratic Republic of the Congo v. Uganda*), judgment of 19 December 2015, I.C.J. Reports 2005, paragraphs 161-165.

5 CAVV advisory report 25: 'Humanitarian Assistance', August 2014, pp. 8-9.

6 Ibid., pp. 19-21. The Security Council has adopted a number of resolutions allowing humanitarian assistance to be provided in Syria without the consent of the Syrian authorities, S/RES/ 2165 (2014), paragraphs 2-3, and more recently S/RES/ 2504 (2020).

7 *Nicaragua* judgment, paragraph 205.

8 Ibid., paragraph 205.

9 Ibid., paragraph 241.

10 On this point see also E. Koppe, 'Het NLA-programma en het non-interventiebeginsel' (The NLA programme and the principle of non-intervention), *Nederlands Juristenblad* 12: 796-802, March 2019, 800.

11 T. Ruys, 'Of Arms, Funding and "Non-lethal Assistance": Issues Surrounding Third-State Intervention in the Syrian Civil War', *Chinese Journal of International Law* 13(1): 13-53, March 2014 and A. Nollkaemper, Position Paper, Roundtable discussion of Dutch assistance to the armed opposition in Syria, 27 September 2018, paragraph 5.

12 R. Higgins, 'Intervention in International Law', in R. Higgins, *Themes and Theories, Selected Essays, Speeches, and Writings in International Law* (Oxford University Press 2009), p. 283.

13 EU Council Decision 2013/109/CFSP of 28 February 2013, preamble, paragraph 3. The Council decided to 'amend the measures concerning the arms embargo to enable the delivery of non-lethal military equipment for the protection of civilians or for the Syrian National Coalition for Opposition and Revolutionary Forces which the Union accepts as legitimate representatives of the Syrian people and the delivery to them of non-combat vehicles manufactured or fitted with materiel to provide ballistic protection, as well as the provision to them of technical assistance intended for the protection of civilians'. Press release of the Foreign Affairs Council of 27 and 28 May 2013, 9977/13, paragraph 2, pp. 11-12. The Council also permitted member States to authorise the import of crude oil from areas controlled by Syrian rebels. Article 6 of Council Decision 2013/255/CFSP of 31 May 2013 ('With a view to helping the Syrian civilian population, in particular to meeting humanitarian concerns, restoring normal life, upholding basic services, reconstruction, and restoring normal economic activity or other civilian purposes [...], the competent authorities of a Member State may authorise the purchase, import or transport from Syria of crude oil and petroleum products [...]'.

14 Council Common Position 2008/944/CFSP of 8 December 2008, Article 2, Criterion Three.

15 S/RES/ 1970 (2011), paragraph 9.

16 However, S/RES/ 2083 (2012), paragraph 1 (c) talks about a duty of care of states to prevent assistance given to non-State armed groups from falling into the hands of al Qa'ida.

17 In 2015, the United States, Lithuania and the United Kingdom protested against Russian 'humanitarian' convoys in Ukraine. The German chancellor Angela

Merkel condemned the Russian assistance as a violation of international law. See policy statements by Federal Chancellor Angela Merkel on the situation in Ukraine, 13 March 2014, https://www.bundesregierung.de/breg-en/chancellor/policy-statement-by-federal-chancellor-angela-merkel-on-the-situation-in-ukraine-443796 and a speech by her on 18 February at the 53rd Munich Security Conference, 18 February 2017, https://www.bundesregierung.de/breg-en/ chancellor/speech-by-federal-chancellor-dr-angela-merkel-on-18-february-2017-at-the-53rd-munich-security-conference-415114. The Parliamentary Assembly of the Council of Europe pressed for a resolution that 'the Russian authorities … 10.1. cease all financial and military support to the illegal armed groups in the Donetsk and Luhansk regions' Res. 2198 (2018), p. 2.

18 AIV/CAVV advisory report no. 13/7: 'Humanitarian Intervention', April 2000, AIV/CAVV advisory report no. 36/15: 'Pre-emptive action', July 2004, and AIV advisory report no. 70: 'The Netherlands and the Responsibility to Protect', June 2010.

19 Cf. Parliamentary Papers, House of Representatives, 2006/2007, 29 521, no. 41, p. 8 (humanitarian emergency) and Parliamentary Papers, House of Representatives 2013/2014, 32 623, no. 110, ('humanitarian' intervention criteria). And, more recently, the letter to parliament containing the government's response to the final report of the Expert Group on Interstate Use of Force and Humanitarian Intervention, 17 April 2020, Parliamentary Papers, House of Representatives 2019/2020, 29 521, no. 406. See also the next two footnotes.

20 Humanitarian Intervention and Political Support for Interstate Use of Force, Report of the Expert Group established by the Minister of Foreign Affairs of the Netherlands, December 2019, in particular paragraph 35 (https://www.tweedekamer.nl/kamerstukken/detail?id=2019Z25744&did=2019D52902).

21 Ibid., paragraphs 36 and 37.

22 See, for example, the frequent references during the House of Representatives debate on 2 October 2018 to alleged violations of international humanitarian law and human rights by non-State armed groups in Syria which received non-lethal assistance from the Netherlands; House of Representatives, Dutch support for the armed opposition in Syria, 2 October 2018, House of Representatives 7-26-1.

23 See, for example, the Convention concluded in Geneva on 12 August 1949 for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 1.

24 *Nicaragua* judgment, paragraph 220.

25 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, I.C.J. Reports 2014, paragraph 158.

26 *Nicaragua* judgment, paragraph 220. Common Article 3 sets out the key principles of international humanitarian law and offers minimum protection to persons not engaged in combat during non-international armed conflicts.

27 O. Corten and V. Koutroulis, *The Illegality of Military Support to Rebels in the Libyan War: Aspects of jus contra bellum and jus in bello*, 18(1): 59-93 April 2013: 85; Ruys, p. 29; M. Brehm, 'The Arms Trade and States' Duty to Ensure Respect for Humanitarian and Human Rights Law', Journal of Conflict & Security Law 12(3): 375-6.

28 M Sassoli, 'State Responsibility for Violations of International Humanitarian Law', *International Review of the Red Cross* 84: 401-434, 412, 2002; Brehm, *The Arms Trade and States' Duty to Ensure Respect for Humanitarian and Human Rights Law.*

29 D. Fleck, 'International Accountability for Violations of the Ius in Bello: The Impact of the ICRC study on Customary International Humanitarian Law', *Journal of Conflict & Security Law* 11(2): 179-199, 182-3, 2006.

30 Arms Trade Treaty, New York, 2 April 2013.

31 Clapham et al., *The Arms Trade Treaty, A Commentary* (Oxford University Press 2016), p. 275, paragraph 7.93.

32 See also EU legislation on dual-use goods: Council Regulation (EC) No 428/2009 of 5 May 2009; Council Common Position 2008/944/CFSP of 8 December 2008; Council Regulation (EC) No 1236/2005 of 27 June 2005.

[33] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the Commission at its fifty-third session in 2001, UN Doc A/56/10. For the applicability of Article 41.2 and how this relates to Article 16, see the commentary on Article 41, in particular paragraph 11.

[34] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), judgment of 26 February 2007, I.C.J. Reports 2007, paragraph 417 (hereafter 'Bosnian genocide judgment').

[35] ILC Commentary, paragraph 8: 'The obligation not to use force may also be breached by an assisting State through permitting the use of its territory by another State to carry out an armed attack against a third State'.

[36] ILC Commentary, paragraph 1.

[37] M. Jackson, *Complicity in International Law* (Oxford University Press 2015), p. 176.

[38] Jackson, chapter 9, p. 202: 'Wherever international law imposes obligations on non-State actors, so state complicity in violations thereof would give rise to international responsibility'.

[39] Bosnian genocide judgment, paragraph 420.

[40] Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948, Article 3.

[41] ILC Commentary, paragraph 5.

[42] Ibid. See also paragraph 7 and paragraph 9.

[43] Jackson, 161-2; V. Lowe, 'Responsibility for the Conduct of Other States', *Japanese J Intl* 101(1): 1-15, 8.

[44] Jackson, 159-160; S. Talmon, 'A Plurality of Responsible Actors: International Responsibility for Acts of the Coalition Provisional Authority in Iraq', in P. Shiner & A. Williams (eds.) *The Iraq War and International Law* (Hart 2008), 218-9; Nolte & Aust, 15.

[45] See CAVV, Advisory Report on State Responsibility, advisory report no. 9, 19 January 2001. M. Jackson, Complicity in International Law (Oxford University Press, 2015), 162; H. Moynihan, Aiding and Assisting: 'The Mental Element under Article 16 of the International Law Commission's Articles on State Responsibility', ICLQ 67 (2018), 461-462.

[46] As regards external advice on international law, the CAVV refers to its mandate under which it can issue advice on issues of international law either on its own initiative or at the request of the government or parliament. As regards the External Adviser on International Law (EVA), the CAVV refers to its letter of 15 February 2011 in which it stated that the position of the adviser in relation to the existing structures was not entirely clear. For a copy of the letter, see annexe II.

[47] https://www.rijksoverheid.nl/documenten/rapporten/2010/01/12/rapport-commissie-davids.

[48] Recommendation no. 22, p. 427.

[49] Not published, but included as annexe III.

[50] The established practice is for internal advice on international law to be included in an advisory report that also deals with the policy aspects. Since that date, the International Law Division has been considerably expanded and now consists of four groups: (i) international rule of law; (ii) peace and security; (iii) international environment; (iv) human rights. The division has 25 staff. Where necessary, the division also seeks external legal advice.

[51] See Article 11, paragraph 1 and the settled case law of the Administrative Jurisdiction Division of the Council of State, for example the judgment of 31 January 2018, ECLI:NL:RVS:2018:314.

[52] See letter to parliament containing an explanation of Article 68 of the Constitution. Parliamentary Papers, House of Representatives, 2015/16, 28 362, no. 8, p. 7.

[53] See letter to parliament explaining the relationship between Article 68 of the Constitution and the Government Information (Public Access) Act (WOB): House of Representatives 28 362, no. 23.

— Annexe I

Request for advice

Tweede Kamer
DER STATEN-GENERAAL

Voorzitter

RECEIVED ON 7 NOV 2019

Professor L.J. van den Herik
Chair of the Advisory Committee on
Issues of Public International Law
P.O. Box 20061
2500 EB The Hague

P.O. Box 20018
2500 EA The Hague
+31 (70) 318 30 33

The Hague, 5 November 2019

Dear Mr Van den Herik,

Today, 5 November 2019, the House of Representatives decided, pursuant to Article 30 of the Rules of Procedure of the House of Representatives of the States General, to ask the Advisory Council on International Affairs (AIV) and the Advisory Committee on Issues of Public International Law (CAVV) for their joint advice on a framework for assessing the provision and funding of non-lethal assistance to non-State armed groups abroad.

The request is based on the motion submitted by MP Pieter Omtzigt and others concerning a joint advisory report of the CAVV and AIV on an assessment framework (Parliamentary Paper 32 623, no. 231), which was passed by the House of Representatives on 9 October 2019. Please find attached a copy of this motion.

On behalf of the House, I would kindly ask you to comply with this request. I have sent a letter to the same effect to the Advisory Council on International Affairs.

Yours sincerely,

Khadija Arib
President of the House of Representatives of the States General

House of Representatives of the States General 2

2

2018-2019 session

32 623 Current situation in North Africa and the Middle East

No 231 MOTION BY MP PIETER OMTZIGT AND OTHERS
Tabled on 2 October 2018

The House of Representatives,

having heard the deliberations,

noting that the provision of non-lethal assistance in Syria involved a new form of aid in which the government provided assistance to armed groups that were not part of any regular armed forces;

requests the CAVV and the AIV to produce a joint advisory report on a framework for assessing the provision and funding of non-lethal assistance to non-State armed groups abroad;

requests the CAVV and the AIV, as a basis for the report, to study the NLA programme in Syria and include the facts and findings of that study when formulating the assessment framework;

requests the CAVV and the AIV to include in their report the role of advice on international law, including the extent to which it is made public and the scope for taking account of dissenting views;

and requests the government to cooperate fully by providing access to documents and participating in discussions,

and proceeds to the Order of the Day.

Omtzigt
Voordewind
Sjoerdsma
Koopmans
Kuiken
Van der Staaij
Van Ojik

Parliamentary Paper 32623 231
ISSN 0921 7371
The Hague 2018

House of Representatives, 2018-2019 session, 32 623, no. 231

— Annexe II

Letter of 15 February 2011 from the CAVV to the Minister of Foreign Affairs

ADVISORY COMMITTEE ON ISSUES OF PUBLIC INTERNATIONAL LAW

To: The Minister of Foreign Affairs

Secretariat: Bezuidenhoutseweg 67
P.O. Box 20061, 2500 EB THE HAGUE
Tel.: +31 (70) 348 4931
Fax: +31 (70) 348 5128

Date
15 February 2011

Reference
CAVV-MK

Subject
International Law Adviser

Dear Sir,

The Advisory Committee on Issues of Public International Law (CAVV) has noted with interest the recently published vacancy for an international law adviser. Since the function of the CAVV is to give government and parliament advice, both solicited and unsolicited, on issues of international law, it feels it would be appropriate to reflect on how the provision of advice on international law to the government will be arranged once this new official has been appointed.

The CAVV assumes that the new position is a consequence of the report of the Committee of Inquiry on Iraq (the Davids Committee). The government's response to this report stated that the Minister of Foreign Affairs would establish a separate position of international law adviser at his Ministry.

The Davids Committee proposed that the provision of advice on international law should be embedded more firmly within the organisation of the Ministry and that such advice should be more readily available to senior civil servants and ministers. The Committee pointed in this regard to what it termed the 'subordinate position' (of the International Law Division of the Legal Affairs Department (DJZ)) within the Ministry of Foreign Affairs. For a country that so often prides itself on its international law tradition in foreign policy, it is remarkable that advice on international law has to travel such a long way through the civil service hierarchy of the Ministry of Foreign Affairs to reach those at the top of the Ministry. This also makes it more difficult for such advice to have a positive effect in the political consultations between the Ministry of Foreign Affairs, the Ministry of General Affairs, the Ministry of Defence and other ministries involved. For these reasons, the Committee recommended that the position of international law adviser be restored within the Ministry of Foreign Affairs (p. 273 of the Davids Committee report).

The Committee used the word ‘restore’ advisedly since it was referring to the situation that existed before the Ministry was reorganised in 1998 (see p. 243, note 48). At that time, the Ministry had a Legal Adviser (JURA), whose tasks included bringing international law matters directly to the attention of the Minister on his or her own initiative.

The CAVV does not wish to comment on the details of the ministerial organisation, but would like to make some general observations. If the aim is to improve the international law advice which the Minister receives, it is not self-evident in our view that this goal will be achieved by establishing a position for an adviser in the proposed form. What is particularly striking is the limited time allocated for this work (about 10 working days a year). It is also unclear whether the new official may advise on his or her own initiative. It follows that the creation of this new position is hardly likely to implement the Davids Committee’s recommendation that the provision of advice on international law should be embedded more firmly within the organisation of the Ministry, even if the vacancy is filled by an internal candidate.

The CAVV is of the opinion that the recommendations and underlying intentions of the Davids Committee will be fulfilled only to a very limited extent by the creation of the new position. It therefore suggests that you consider taking more extensive measures to carry out these recommendations. In our view, these measures should be designed in part to strengthen the position of the International Law Division (DJZ/IR) within the structure of the Ministry. The role played by the Legal Advisers of the UK Foreign Office and the US State Department within their respective organisations could serve as an example.

The CAVV would appreciate it if its own role in the new system for the provision of advice on international law could also be taken into account in the considerations. The current division of responsibilities between the CAVV and the Ministry is clear. However, how the position of the International Law Adviser relates to the CAVV and the International Law Division (DJZ/IR) is less apparent and should be clearly defined.

I would be glad to explain the above in more detail in a meeting with you.

Yours faithfully,

Professor M.T. Kamminga,
Chair of the Advisory Committee on Issues of Public International Law

For

Secretary, Advisory Committee on Issues of Public International Law

— Annexe III

Ministerial Order of 25 May 2011

Order of the Minister of Foreign Affairs of 25 May 2011, no. DJZ/BR/0467-11, containing an instruction for the provision of civil service advice on international law

The Minister of Foreign Affairs

Having regard to the Ministry of Foreign Affairs (Organisation) Order 1996;

orders as follows:

Article 1

In this instruction the term 'civil service advice on international law' means: Authoritative advice on current issues of foreign policy involving important aspects of international law, prepared by the head or deputy head of the International Law Division and designated as such.

Article 2

The advice is prepared either at the request of the Minister or on the initiative of the head or deputy head of the International Law Division.

Article 3

The advice must be presented to the Minister directly and confidentially, without going through the Secretary-General or any Director-General or Director, with a copy to the Secretary-General and the Director of the Legal Affairs Department.

The Minister of Foreign Affairs

— Annexe IV

List of abbreviations

AIV
Advisory Council on International Affairs

ARSIWA
Articles on Responsibility of States
for Internationally Wrongful Acts

ATT
Arms Trade Treaty

CAVV
Advisory Committee on Issues
of Public International Law

CFSP
Common Foreign and Security Policy

EU
European Union

EVA
External Adviser on International Law

Ibid
Ibidem (in the same place)

ILC
International Law Commission
of the United Nations

ICJ
International Court of Justice

ICLQ
International and Comparative Law Quarterly

NLA
Non-lethal assistance

R2P
Responsibility to Protect

S/RES
Resolution of the
United Nations Security Council

UK
United Kingdom

UN
United Nations

UN Charter
Charter of the United Nations

US
United States

WOB
Government Information (Public Access) Act