

Consideration Summary Conclusions Recommendations

Committee investigating NLA-program in Syria

The Hague, December 2022





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Consideration

White pickup trucks

'Machine guns mounted on pickup trucks supplied by the Netherlands, and covert support to terrorists' – that is the image that prevails after the media coverage of the Dutch NLA program.

This image caused shock among the general public and in the House of Representatives. Many wondered how something like this could have happened. But the coverage also drew criticism. Several people who were interviewed by the committee denounced how the story had been framed and condemned the media's working methods. The question of whether this criticism was justified cannot be answered by the committee, as it is beyond the scope of this investigation. The committee's investigation focused on the actions of the Dutch government and sought to draw lessons for the future.

Coverage disputed, not refuted

The committee notes that the media have exposed shortcomings in the NLA programme with sharp investigative journalism. The committee also notes that while the Ministry of Foreign Affairs has disputed the media's coverage of the NLA programme, it has taken little or no action to correct it. This is all the more striking as the coverage played an influential role in the political process; because the exchange of information between the Cabinet and the House of Representatives was difficult, the latter was largely dependent on information from the media.

No evidence of support for jihadist or terrorist groups

The NLA programme focused on supporting the moderate armed opposition in Syria, without lending support to jihadist or terrorist groups, or groups working closely with such groups. The committee has found no evidence of any violation of this policy.

The programme did, however, take significant risks. In a war situation such as the one in Syria, keeping a complete overview of all the groups involved is by definition impossible. It would also be unrealistic to expect that armed groups in this conflict – including those supported by the Netherlands – would be able to keep clean hands. Moreover, location-based coordination and cooperation between different groups fighting at the frontlines is common and, from a military-tactical perspective, in some cases necessary. Even when it comes to incidental collaboration on some occasions with terrorist or jihadist groups in order to survive or repel attacks.

Punching above its weight

Legal experts at Foreign Affairs were aware that NLA was at odds with international law. They were also aware of the high risks associated with intervening in the chaotic war in Syria.

This knowledge, however, was of limited influence on decision-makers in other departments at Foreign Affairs. Awareness of potential conflicts with international law was hardly reflected in the information provided to the House of Representatives. On the contrary, the information created the 'illusion of control': while there were risks, these seemed manageable due to the fact that "only carefully vetted groups" were eligible for support and through "professional

monitoring". Furthermore, the term 'civil support' was used, creating the false impression that the material supplied would not be used in combat.

In reality, the Netherlands did not have the ability to independently vet groups, nor did it have the ability to independently and accurately monitor them. The Netherlands relied on allies and private implementing organisations for vetting and monitoring.

The committee was impressed by the engagement of the directly involved employees, the staff of the Syria team in Istanbul and Amman in particular; they put in a lot of effort to ensure the programme's success and to prevent resources from falling into the wrong hands. They were also the ones who were directly confronted with the needs of local commanders. But although commitment and improvisation are important in such a context to deal with unforeseen issues, they should not be decisive factors within a programme of this nature. Basically, such a high-risk operation must be robustly designed. This was not the case for the NLA programme, which saw Foreign Affairs, as it were, 'punching above its weight'.

Issue still topical

In the future the Netherlands will continue to be faced with situations involving great human suffering and an impotent UN Security Council. It befits the Netherlands, just because of its constitutional obligation, to protect the international legal order. As such, the Netherlands will have to consider what role it wants to play in the development of an international legal framework to deal with scenarios in which clashing legal principles (prohibition of violence and non-intervention principles versus the protection of human rights) sometimes keep the international community and its citizens in a stalemate. This requires an in-depth dialogue with Parliament, which should include a transparent discussion of the underlying risks. It also warrants a fundamental discussion about Dutch foreign policy, as the shifting balance of power in the world and changing international relations call for a critical reassessment of applicable international law.

With this report, the committee hopes to contribute to this process so that the Netherlands will continue to commit itself in situations of humanitarian suffering, while also taking into account the balance between ambitions and possibilities.



Summary

This report presents the results of an independent investigation into the provision and funding of non-lethal assistance (NLA) by the Netherlands to armed opposition groups in Syria between 2015 and 2018. The investigation, which was requested by the House of Representatives, focused on the legal risks of NLA, the official and political decision-making processes, the extent to which the conditions the government imposed on the support were met, and the provision of information to the House of Representatives.

Legal risks

Legal risks insufficiently explored and considered

The NLA programme was the concretisation of the moral desire to ‘do something’ about the violence against the Syrian people, inflicted on the one hand, by a regime that systematically failed to protect its own population – it even actively attacked its own citizens, using the most gruesome methods – and, on the other hand, by the rise of ISIS. NLA seemed like a good alternative to arms supplies – an idea that was dismissed due to the risks under international law it entailed. The NLA programme built on existing policy regarding Syria while also allowing the Netherlands to join the company of allies that were providing NLA as well, raising its international profile. The fact that the risks under international law in delivering NLA are actually much more complex than in the case of bombings and the deployment of F-16s over Syria, according to the legal experts involved, was not thoroughly explored during the official decision-making process, nor while advising the ministers who bore political responsibility for the decisions being made. Likewise, these risks were not explicitly discussed with the House of Representatives prior to or during the implementation of the NLA programme.

The awareness that according to applicable law providing NLA to armed groups in Syria would violate the principle of non-intervention and possibly also the prohibition of violence, was unmistakably present at Foreign Affairs’ Directorate of Legal Affairs. Nevertheless, possible legal opportunities that could contribute to further legal development (including associated risks), for example in relation to protecting the human rights of citizens, were not explored. Given the decision to operate in legal grey areas for moral and (geo)political reasons, an explicit risk assessment would have been appropriate. However, such risks were not clearly identified by Foreign Affairs at the outset of its internal deliberations on the subject, nor were they reviewed on an ongoing basis during the programme’s implementation as circumstances changed. At no point in the programme’s history did Foreign Affairs consistently and transparently explain or defend the balance it struck between its goals and any international legal or other risks.

Criteria for identifying moderate groups unrealistic and difficult to apply

Foreign Affairs assumed that it would be able to determine whether a group was ‘moderate’ using the following criteria: 1) no operational cooperation with extremist groups; 2) sees a role for itself in an inclusive future Syrian administration; 3) sees a political solution as the ultimate path out of the conflict; 4) strives to create an overarching military command structure for the moderate opposition in Syria; and 5) familiarity with humanitarian law of war or prepared to undergo training and willing to comply with these rules. Groups that met these criteria qualified for NLA.

These criteria gave the impression that the risks could be controlled. However, the criteria were open to multiple interpretations and did not relate to the reality of the Syrian conflict. As a result, the criteria were hardly applicable in practice. Incidentally, the investigation did not find any indications that the Netherlands supported groups that could be classified as jihadist or terrorist.

Passive and dependent

Because the Netherlands had no presence in Syria, nor a good independent information position, it was effectively not or hardly able to verify the extent to which the conditions attached to NLA were met. For the selection and screening of the groups, Foreign Affairs was almost entirely dependent on personal impressions of the Syria team and the information from the US, the UK, Jordan and the relevant implementing organisations. However, Foreign Affairs did not have sufficient insight into its allies' assessment criteria and working methods and was therefore unable to verify the information obtained.

For the monitoring of the programme, the Netherlands relied heavily on reports from implementing organisations and feedback from beneficiary groups themselves. In practice, monitoring by implementing organisations focused mainly on whether the goods had been successfully delivered. The Netherlands made efforts to ensure that the support it supplied ended up in the right hands by, for example, requiring implementing organisations to use transfer receipts, inventory records and geotagged photos. In monitoring the NLA recipients' continued adherence to the set criteria, Foreign Affairs was mostly satisfied with the promises made by the groups' commanders with regard to observing the law of war and preventing human rights violations. This kind of 'self-reporting' is vulnerable to manipulation. For the projects in southern Syria, the Netherlands accepted that it was almost entirely dependent on the UK's ultimately brief reports.

As such, the monitoring focused predominantly on the logistical process and not on how the groups used the goods provided in combat, nor on the extent to which the support actually contributed to the goals the Netherlands sought to achieve through the programme.

Decision-making process

Despite all the good intentions and efforts of highly committed government officials, the ministry's governance of the programme was – from a systemic perspective – insufficient. There was a lack of critical and independent reflection at Foreign Affairs with regard to the feasibility of the objectives and the risks of delivering NLA. Legal experts were not structurally involved and assessed the legal options based on what was politically desirable. In some instances, the programme's sensitivities and risks were veiled with euphemistic language. Relevant contextual developments, such as the dynamics of the Syrian conflict, generally did not lead to a rethink of policy, but to an even more strongly felt urgency to continue to play a significant role in the Syrian conflict

Information provision to the House of Representatives

Active provision of information to the House of Representatives was very limited. Although the constitutional obligation to do so is lacking in a legal sense, it is politically important to inform the House about matters that are of great importance for parliamentary control. The implementation of a politically sensitive support programme, aimed at the armed opposition in a dynamic and complex conflict such as in Syria, is an excellent example of this. However, the information provided to the House was abstract and general in nature: it only mentioned



the existence of risks, but these were not made sufficiently explicit. In some cases, risks were even deliberately understated, for instance by referring not to 'uniforms' and 'pickup trucks' but to 'clothing' and '(civilian) vehicles' so as to not arouse suspicion. In this sense, the Cabinet's letters to Parliament helped to maintain the illusion of control.

In the course of the programme, the responsible ministers started to share more information regarding the implementation of the NLA programme with the House – on a confidential basis. Although this constituted an improvement, many MPs remained critical of the provision of information. It was only when the programme was finally discontinued that a serious discussion about the programme began, partly as a result of media coverage.

In the parliamentary discussion between the Cabinet and the House, the fact that certain information – such as the identity of the groups that received NLA – was classified as state secret played a complicating role. The effect of the classification of information on the parliamentary intelligence relationship does not correspond to the way in which these classifications are established. It is unclear who assigns, adopts or controls a classification on what grounds. Nor is it clear whether the House is able to question or undo the classification of information.

In a number of cases, the House was confidentially informed about the NLA programme. This information was provided using a procedure copied from the House Committee on Intelligence and Security Services (popularly referred to in Dutch as *de commissie Stiekem* – the Covert Committee). Under this procedure, the information was only made available to MPs who were members of the Standing Committee on Foreign Affairs. This could be viewed as a violation of Article 68 of the Constitution, which assumes that all MPs have an equal right to information. By informing the House confidentially, Foreign Affairs sought to do justice to the spirit of this article: instead of refusing to provide information, it attempted to find a procedure that would do as much justice as possible to the principle of parliamentary oversight. This does not alter the fact that such a procedure must be in accordance with the Constitution. Ideally, it should also be explicitly regulated.

Although opportunities were sought to enable the House to exert parliamentary control, the end result was not satisfactory to the House. The parliamentary debate regarding this matter eventually led to this investigation.

Conclusions

General

1. The Dutch NLA policy was aimed at supporting the moderate armed opposition. Although there is no clear definition of the concept of moderation, the Committee has found no indications that Foreign Affairs has supported groups that can be regarded as jihadists or terrorists.

Decision-making

2. The desire to 'do something' against the brutal violence inflicted against the Syrian people by the Assad regime and ISIS prompted the Netherlands to join like-minded allies in providing NLA. The abstract objective of the support was easily reconciled with the Netherlands' broader policy regarding Syria and matched seamlessly with the existing commitment to support the opposition. Because the decision to provide NLA was more or less definitive, no deliberate assessment of purpose versus means and risks took place, and the decision-making process took on a ritualistic character.
3. During the term of the NLA programme, there was also a lack of critical reflection on the objectives and risks in the decision-making process. Relevant developments in the conflict in Syria did not lead to a reconsideration of the policy, but to an even more strongly felt urgency to continue to play a significant role in the Syrian conflict, in such a way that the program could be continued. Counterthinking was not encouraged within the NLA programme.
4. The NLA programme was characterised by its hybrid nature (partly development cooperation, partly military), coupled with a political strategy and an element of secrecy. This involved several directorates within Foreign Affairs (Stability and Humanitarian Aid, Security Policy, North Africa and Middle East, and Legal Affairs) that fell under different Directors-General or directly under the Secretary-General. In such a complex structure, there must be clarity about the ultimate responsibility for the operation as a whole. This was not the case for the NLA programme.

Legal risks

5. Under applicable international law, the Dutch NLA programme violated the non-intervention principle and some components of the support constituted minor violations of the prohibition of violence. This assessment, however, takes on a different connotation if a government consciously decided to influence legal development, for example to protect human rights in Syria. This choice and the associated limitations and risks under international law must then be explicitly justified and motivated. Possible justifications calling into question the violations of the principle of non-intervention and the prohibition of violence have neither been examined nor put forward by Foreign Affairs. As such, there was no conscious decision to influence legal development in relation to the NLA programme.

Risk management

6. The procedures for the selection and assessment of NLA recipients were deficient. The Netherlands, having no independent intelligence gathering capability in Syria, accepted that it was almost entirely dependent on allies and/or implementing organisations for the vetting and monitoring of groups. The Netherlands had hardly any insight into their working methods and was not able to independently assess the quality of the information it was receiving. An important internal safeguard in the established group selection procedure was removed early on when Foreign Affairs chose to no longer request assessments of the groups from the Dutch intelligence and security services.
7. Foreign Affairs' criteria for recipients of NLA gave the impression of control, but in reality were not suitable to ensure adequate risk mitigation. The criteria were not clearly formulated and unrealistic, making them difficult to assess in practice. In addition, Foreign Affairs did not have sufficient insight into the groups it supported to determine whether the criteria were met.
8. Foreign Affairs stressed that only civilian and/or medical support would be provided. In doing so, it did not sufficiently highlight the fact that the resources could also be used for military purposes, nor that this was actually happening, exposing itself to international legal risks. During the programme's run, Foreign Affairs decided to supply additional resources with a higher probability of military deployment, such as vehicles and night vision goggles. Foreign Affairs was aware of the increased risk this entailed, but did not take additional measures to mitigate it.

Information provision to the House of Representatives

9. While the information provided to the House of Representatives at the beginning of the programme's implementation did provide an overview of the intentions, goals and risks, the picture it painted remained highly abstract and general. Later letters to Parliament also helped to maintain the 'illusion of control', asserting that the risks were known and being mitigated. As a result, the House of Representatives did not have a detailed, realistic overview of all the possibilities and risks of the NLA programme.

State secret

10. Classification as a state secret is insufficiently regulated by law and is therefore a threat to the parliamentary oversight process. It is unclear who assigns, adopts or verifies such classifications, or on what grounds. Nor is it clear whether the House is able to question or undo the classification of information. The fact that certain information is classified as state secret often presents the House with a *fait accompli* in the information provision process. Instead of substantiated case-by-case decisions, such an automatic refusal to disclose information to the public poses a real threat to parliamentary oversight.

11. By informing the House confidentially an attempt has been made to do justice to the spirit of Article 68 of the Constitution by not simply refusing to provide information to the House on the ground that this would compromise state interest, but by looking for a procedure that would allow the House to exert parliamentary control. On a number of occasions, information was provided using a procedure copied from the House Committee on Intelligence and Security Services. Under this procedure, the information was only made available to MPs who were members of the Standing Committee on Foreign Affairs. This seems to be against Article 68 of the Constitution, which assumes that all MPs have an equal right to information. Moreover, this procedure has not been laid down in the Rules of Procedure of the House of Representatives.



Recommendations

The committee finds shortcomings in the way the NLA programme was created and implemented. In the future, the Netherlands will continue to be confronted with situations of great humanitarian suffering and an impotent UN Security Council. The Netherlands will have to examine what role it wants and can play in the development of the international legal framework in which conflicting legal principles (prohibition of violence and non-intervention with regard to the protection of human rights) sometimes keep the international community and its citizens in a stalemate. Breaking that stalemate means taking risks. It is good to appoint these risks transparently and clearly and to discuss them with parliament.

This investigation shows that future programmes will require improvements in dealing with the risks under international law, the decision-making process, Foreign Affairs' governance, and the provision of information to the House of Representatives.

The Advisory Committee on Public International Law/Advisory Council on International Affairs' careful advice on providing and funding 'non-lethal assistance' to non-state armed groups abroad may contribute to these improvements, but it is not sufficient to remedy all the shortcomings identified by the committee.

The committee therefore makes the following recommendations:

To the Minister of Foreign Affairs:

1. Prior to a final decision on non-lethal assistance, as well as on changes to that assistance, it should be made clear whether and how risks under international law have been mitigated. This should be done as follows:
 - a. Clearly identify the risks under international law at the outset and keep them under constant review during the programme's run as circumstances change. Explicit attention should be paid to the international law mandate and legal context. If legal grey areas come into view, make it clear what purpose and what kind of legal development are being served.
 - b. Position internal legal advice more centrally within Foreign Affairs and ensure that international law aspects are fully taken into account from the beginning of the policy-making process and planning phase. Ensure that in-house legal experts remain involved in assessing the enforcement of frameworks and conditions during the implementation phase.
 - c. Where appropriate, request independent legal advice on the intended support from the Advisory Committee on Public International Law.
 - d. If there are international legal risks, ensure independent intelligence gathering and do not accept dependence on information from allies without insight into its provenance and quality.
 - e. Ensure independent monitoring and have it focus on the objectives and (international law) risks of the programme.

2. Improve policy governance and implementation by, among other things:
 - a. Describing the goals and risks of support programmes in an explicit and verifiable manner and periodically evaluating whether the approach still contributes to the intended goal, as well as whether the contribution is still proportionate to the identified risks;
 - b. Explicitly defining who bears final responsibility for the programme;
 - c. Investing in an organisational structure and culture within Foreign Affairs in which employees are encouraged to express critical signals and the leadership demonstrably integrates signals from employees and outsiders into its decision-making.
3. Inform the House of Representatives fully, timely and correctly about the goals, risks and mitigation measures involved in providing support to armed groups. Discuss potentially conflicting legal principles openly with the House of Representatives. Motivate the possible choice to take risks under international law and argue for what purpose this contributes to which legal development.

To the Cabinet:

4. End the irregularity with regard to the classification of information as state secret and confidentially informing the House of Representatives by, among other things:
 - a. Legally regulating who assigns, adopts or verifies a classification on what grounds, as well as the opportunities for the House to question or undo a classification.
 - b. Periodically subjecting the confidentiality to a substantive review in the interest of parliamentary oversight (cf. Davids Committee 2010).
 - c. Establishing, in consultation with the House, a clear procedure for handling confidential information and effective parliamentary oversight on this matter.

To the House of Representatives:

5. If selective provision of information to only one House committee (with the exclusion of the other MPs) is desired, create an explicit framework for this and lay down the procedure to be followed in the Rules of Procedure of the House(s).

