THE NETHERLANDS

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Case – Immunity from prosecution of Dutchbat personnel and mens rea required for being an accessory to war crimes

☛ *Mehida Mustafić-Mujić et al v Karremans et al* (District Court of Arnhem/Leeuwarden, 29 April 2015)

The Court rejected a complaint against the decision of the prosecutor's office not to pursue prosecution of three members of Dutchbat for being accessories to genocide, war crimes and murder. The plaintiffs considered that these three members were primarily responsible for their husband and father, and father and brother, respectively, not being adequately protected by Dutchbat from the Bosnian Serbs. The three members were the Commander and deputy Commander of Dutchbat, and a third member who told the husband and father of some of the plaintiffs that they could not remain on the Dutchbat compound.

In its decision, the Court analyzed arguments made by the defendants regarding immunity from jurisdiction. The Court found that the defendants appeared to base their claims to immunity on the Status of Forces Agreement ('SOFA') concluded between the UN and Bosnia and Herzegovina concerning UNPROFOR, on a derivative of the immunity of the State in civil cases before Dutch courts, and on promises allegedly made by the public prosecutor's office. The Court rejected these claims. It held, inter alia, that the SOFA between the UN and Bosnia and Herzegovina could in any event only provide immunity from the jurisdiction of the host State, and not from that of the Netherlands. Promises of exclusion of criminal prosecution would in any case not cover war crimes.

Regarding the acts under consideration, the Court considered that the *mens rea* for being an accessory to genocide is knowledge of the *dolus specialis* of the principal. The defendants did not have such knowledge. As for being an accessory to war crimes, in the view of the Court the *mens rea* that must be established is intent or at least knowledge that the conduct would lead to a certain result. Under Dutch criminal law this means: a conscious acceptance of the likely consequences of one's actions. The Court, on the basis of an extensive inquiry into the facts underlying the complaint, held that this requirement was not met in the case of the defendants.

Case – LTTE – Applicability of domestic criminal law to acts committed in the context of non-international armed conflict

☛ *Prosecutor v LTTE* (Court of Appeal, 30 April 2015)

The Court of Appeal of The Hague was seized of an appeal from the District Court of The Hague, concerning the conviction of members of the Liberation Tigers of Tamil Eelam (LTTE) for membership of an organization with the purpose of committing terrorist offences. One question that was raised by the defendants was whether prosecution of terrorist offences under domestic law was precluded by preambular paragraph 11 of the *European Framework Decision on Combating Terrorism* of 13 June 2002. This Framework Decision required European Union (EU) member States to align their legislation and introduce minimum penalties regarding terrorist offences. The Framework Decision defined terrorist offences, as well as offences related to terrorist groups or offences linked to terrorist activities, and set down the rules for transposition into the domestic law of EU member States. A number of offences in Dutch criminal law, including offences for which the defendants were prosecuted, were included in domestic law as an implementation of the Framework Decision. The defendants argued that preambular paragraph 11 precluded the application of the Framework Decision in this case, and as a consequence, also the domestic criminal law that implements the Decision. Preambular paragraph 11 reads:

> Actions by armed forces during periods of armed conflict, which are governed by international humanitarian law within the meaning of these terms under that law, and, inasmuch as they are governed by other rules of international law, actions by the armed forces of a State in the exercise of their official duties are not governed by this Framework Decision.

In considering this argument, the Court held that it was necessary to define the term 'armed conflict' and to analyze its application to the facts of the case. In doing so, it concluded that during the period in which the alleged acts took place (1 October 2003 to 26 April 2010) the conflict in Sri Lanka was a NIAC. The Court found that in such an armed conflict, there is no combatant immunity. Therefore, members of the LTTE could not claim such immunity. In any event, the Court found that acts of terror against the civilian population violate IHL and are criminal under domestic law. The Court of Appeal established that the Dutch legislature has chosen not to transpose preambular paragraph 11 of the Framework Decision in domestic legislation, whereby the Court suggested that any limits flowing from that paragraph under European law do not extend to domestic criminal law. It was, according to the Court, never the intention of the Dutch legislature to exclude violent acts committed in the context of a NIAC from the application of domestic criminal law provisions addressing terrorism or other common crimes. The Court also recalled its earlier case law in which it found that the application of IHL during a NIAC does not exclude the application of domestic law. It therefore concluded that preambular paragraph 11 does not preclude the application of Dutch legislation on terrorism.

Case — "Context" case on the applicability of Dutch criminal law in the context of international humanitarian law

☛ *Prosecutor v Imane B et al* (District Court of The Hague, 10 December 2015)

Nine accused were charged with, inter alia, participation in a criminal organisation with a terrorist intent, recruitment for violent jihad, and incitement to commit terrorist offences. All nine accused were convicted to prison sentences of varying lengths.

One of the arguments put forward by defendants was that their acts were committed in the context of an international armed conflict, and that as participants in that armed conflict they enjoyed combatant immunity. In their view, a non-international armed conflict (NIAC) in

Syria had been internationalized as a result of States exercising 'overall control' over organized armed groups party to that conflict. The Court established that in the period relevant for the facts under consideration, from July 2012 until 31 October 2014, there was an armed conflict in Syria and this conflict was a NIAC, not an international armed conflict. The Court considered that in a NIAC, IHL is not exclusively applicable as other legal regimes also remain applicable, including national criminal law. It then found that members of organized armed groups in a NIAC do not enjoy combatant immunity. Therefore, they can be prosecuted under national criminal law for participating in hostilities.

The Court also addressed the relationship between IHL and counter-terrorism instruments, in particular the *European Framework Decision on Combating Terrorism* of 13 June 2002 referred to above. The defendants raised the issue of the meaning to be given to preambular paragraph 11 of the Framework Decision. The defendants suggested that this preambular paragraph precludes those terrorist offences in Dutch criminal law which are based on the Framework Decision, being applied during armed conflicts. The Court held that it needed to establish the meaning of 'armed forces' as used in the Framework Decision to answer this question. It considered that it is clear that this term encompasses the armed forces of a state. It found that the term does not encompass organized armed groups. It based this conclusion on, inter alia, the fact that such groups are usually referred to not as 'armed forces' but as 'organized armed groups', such as in Article 1 (1) of Additional Protocol I. It also considered that in interpreting preambular paragraph 11, the object and purpose of IHL and of the preambular paragraph should be taken into account, as well as consideration of the fact that the Framework Decision is one of a number of instruments adopted by the international community in response to the global threat of (organized and armed) terrorist groups. The purpose of these instruments, namely the domestic prosecution of suspected terrorists on the basis of domestic terrorism legislation, is of great importance. Interpreting the exclusion clause in a way that would preclude the prosecution of suspected terrorists for their acts because these were committed during an armed conflict would be unreasonable.

Government Policy — Targeting of oil-infrastructure and other sources of financing, targeting of persons directly participating in hostilities

☛ Government Response to Parliamentary Questions concerning the Dutch contribution to the fight against ISIS and progress report on the military contributions, 4 February 2015

The Ministers of Foreign Affairs, Defence, and Foreign Trade and Development Cooperation, responded to a range of questions from Parliament regarding the Dutch contribution to the coalition fighting ISIS. In response to questions regarding the targeting of sources of income for ISIS, such as the oil infrastructure, the Ministers clarified that objects that merely have an economic advantage for the opposing party, but that do not make an effective contribution to military action, are not legitimate military objectives under international humanitarian law applicable to the Netherlands. Hence, Dutch F-16's cannot attack lines of financing and the oil infrastructure, except for, for example, fuel storages next to ISIS camps destined for ISIS vehicles.

The Ministers also clarified that ISIS fighters are legitimate targets. ISIS fighters are those persons who demonstrably have the task within ISIS to participate in hostilities, as well as persons who during an attack directly participate on the side of ISIS. Direct participation also includes those who are supplying or supporting ISIS fighters in combat locations and those who direct ISIS operations.

Government Policy — Humanitarian Access

☛ Government Response to Advisory Report on Humanitarian Assistance, 29 January 2015

In September 2014, an advisory body to the government, the Advisory Committee on Issues of Public International Law ('CAVV'), issued an advisory report on humanitarian assistance. In the report, which had been requested by the Minister of Foreign Affairs, the Committee looked in particular at questions surrounding the difficulty of humanitarian access to areas of armed conflict.

In its official reaction to the report, the government noted the CAVV's conclusion that IHL requires state consent for the provision of humanitarian assistance on its territory. It shared the view that it is not generally accepted that consent can be given by a non-state actor controlling a part of that territory. However, the wrongfulness of providing assistance without consent can in certain circumstances be precluded by 'necessity'. The government shared the view of the CAVV that the current international legal framework regarding humanitarian access during armed conflict could be strengthened. However, the government did not consider this a realistic option in the short term. It indicated its willingness to raise the topic of humanitarian assistance, and the reasons for refusal of access, in the context of thematic meetings of states parties to the Geneva Conventions that could take place as the outcome of the ongoing process on strengthening compliance with IHL. In its reaction the government did not take up the suggestion by the CAVV to amend Dutch criminal law to criminalize the act of starvation of the civilian population in a situation of NIAC. However, the government has since changed its position after a Parliamentary motion was adopted, and has initiated the process of amending the *International Crimes Act*.

MARTEN ZWANENBURG AND NELLEKE VAN AMSTEL