

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW — VOLUME 19, 2016  
CORRESPONDENTS' REPORTS

THE NETHERLANDS<sup>1</sup>

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*Case — Participation of non-state actors in an international armed conflict*

- *Claimant v State Secretary of Security and Justice* (District Court of The Hague, 3 August 2016)

The case before the District Court of The Hague concerned an appeal against the rejection of a claim of asylum in the Netherlands by the claimant on the basis of article 1F of the 1951 *Refugee Convention*. The Government contended that the claimant was involved in (facilitating) the use of human shields by Hezbollah, as well as (facilitating) attacks that did not distinguish between civilian objects and military objectives. Between 1986 and 2011, he had fitted bunkers, built by Hezbollah below densely populated areas, with ventilation systems, and informed Israel of the location of these bunkers. When it was discovered that he was passing on this information and thus working for Israel, Israel helped him to leave the country. The claimant argued that the crimes he was alleged to have been involved in could not have been committed, since they could only be committed in an international armed conflict. The context in this case however was not an international armed conflict, but a non-international armed conflict between Hezbollah and Israel.

The Court rejected this argument, and held that non-state actors can also participate in an international armed conflict, relying on the fact that the UN Human Rights Council qualified the underlying conflict as an international armed conflict. It concluded that the claimant directly facilitated Hezbollah in its attempt to use the civilian population as human shields, in order to protect the bunkers from attacks by Israel. The claimant accepted the likelihood that civilians would be killed in the eventuality of a conflict. At least after the conflict in 2016, the Court held, he could have known that Israel would not refrain from disproportionate attacks, killing many civilians.

*Government Policy — Protection of schools and universities against military use during armed conflict*

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- Government Response to Parliamentary Questions concerning the protection of schools and universities from military use during armed conflict (6 April 2016)

The Minister of Foreign Affairs, also on behalf of the Minister of Defence, responded to a question from Parliament regarding the protection of schools and universities during armed conflict. In light of the launch of the Oslo Guidelines stemming from the Oslo Conference of 29 and 30 May 2015, parliamentarians asked how these Guidelines would be implemented, and if they had already been reflected in Rules of Engagement. The Minister pointed to existing IHL obligations which already prohibit attacking civilian objects such as schools and universities. He also stated that, as far as practically possible, all necessary precautions need to be taken to protect civilian objects from dangers stemming from military operations. The Minister noted that the Oslo Guidelines have the same objective as these rules of IHL, but focus specifically on schools and universities, and that the Dutch armed forces already operate according to the spirit of the Guidelines.

*Government Policy — Autonomous weapon systems*

- Government Response to Advisory Report on Autonomous weapon systems (4 March 2016)

In October 2015, at the request of the Ministers of Foreign Affairs and Defence, the Advisory Council on International Affairs and the Advisory Committee on Issues of Public International Law, advisory bodies to the government, issued a jointly prepared report entitled 'Autonomous weapon systems and the need for meaningful human control'. In the report, the Committee and Council looked in particular at questions surrounding the definition of, and need for, meaningful human control over autonomous weapons systems, and whether the existing current legal framework is sufficient to regulate the systems concerned.

In its official reaction to the report, the government agreed with the following working definition of autonomous weapon system:

A weapon that, without human intervention, selects and engages targets matching certain predefined criteria, following a human decision to deploy the weapon on the understanding that an attack, once launched, cannot be stopped by human intervention.

This definition makes clear that even if there is no longer a possibility of human intervention in the use of the weapon, human decision-making does play an explicit role in the programming of the criteria for targeting and decisions concerning selecting and engaging targets. After all, prior to the process whereby a weapon selects and engages a specific target, a human has decided to deploy the weapon concerned. Humans will thus be in 'the wider loop' of decision-making and play a crucial role in the broader targeting process, which also includes such tasks as formulating objectives, target selection, weapon selection and operational planning. The government agreed with the report that autonomous weapon systems that meet the criterion of meaningful human control do not by definition fall within one of the categories of weapons that are prohibited as such under IHL.

The government adopted the view that the relationship between man and machine and meaningful human control should already be taken into account in the development phase of such weapons. This aligns with the report's conclusion that article 36 of Additional Protocol I obliges parties to the Protocol to assess, during the acquisition and development of new means and methods of warfare, whether these are compatible with the requirements of

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international humanitarian law. The Dutch Advisory Committee on International Law and the Use of Conventional Weapons (AIRCW), established by the Ministry of Defence, will perform such assessments. When weapon systems with autonomous functions are procured, it will be made explicitly clear that the AIRCW has assessed them in the context of international law.

Regarding the legal framework, the government agrees that there is no 'accountability gap' in the case of autonomous weapon systems with meaningful human control. The existing legal regime is adequate to hold offenders accountable, as there is no change in the accountability of commanders, subordinates or those in positions of political or administrative responsibility who make the decisions. Likewise, state responsibility remains unchanged in the event of deployment of autonomous weapon systems under human control.

The government rejected the development and use of completely autonomous weapons without meaningful human control. It stated that it is the state's responsibility to ensure that the deployment of any weapon system complies with the requirements of international law. In the case of fully autonomous weapons, this would not be possible.

*Government policy – Destruction of property in occupied territory*

- Government Response to Parliamentary Questions concerning demolition by Israel in Palestinian territory (23 February 2016)

In response to a parliamentary question about whether destruction of Palestinian structures in Area C in the Occupied Palestinian Territory constituted a violation of IHL, the Minister of Foreign Affairs responded that in occupied territory, Israel as the Occupying Power has specific obligations vis-à-vis the Palestinian population and must take their interests into account when administering the area. It is not allowed to destroy movable or immovable property, except where demanded by imperative military necessity. It is for Israel to demonstrate that this exception applies in a specific case. Based on the information available, the Minister considered that the destruction of property in the cases concerned would not seem to fall under that exception.

*Government policy – Oil fields/depots and money caches as military objectives*

- Government Response to Parliamentary Questions concerning the additional letter under Article 100 of the Constitution concerning the Dutch contribution to combating ISIS (15 February 2016)

In response to a parliamentary question whether it was possible for Dutch fighter jets operating against ISIS in Iraq and Syria to bomb oil fields/oil depots or money caches, the Ministers of Foreign Affairs, Foreign Trade and Development Cooperation, and of Defence responded that, under IHL, only military objectives may be attacked. Oil refineries and banks will usually not qualify as such, even when they are financially lucrative for ISIS. Only oil refineries that contribute directly to military action – for example because they provide oil to military materiel of ISIS – can form a legitimate target. The neutralization of such an objective would also have to offer a definite military advantage.

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*Government policy – Sharing intelligence and violations of IHL*

- Government Response to Parliamentary Questions concerning the use of Dutch intelligence in a drone attack with innocent civilian victims (18 January 2016)

In response to a parliamentary question concerning the use of intelligence shared by Dutch intelligence services with foreign partners and possibly used for targeted drone attacks, the Minister of Defence stated that on the basis of IHL the government has the obligation to respect and ensure respect for IHL. This means that when the government knows that intelligence shared by the Netherlands is used or will be used for violations of IHL by a partner, sharing of intelligence with that partner will have to be reassessed.

*Ratification – Kampala amendments*

On 23 September 2016, the Netherlands deposited its instrument of ratification of the Kampala amendments to the Rome Statute of the ICC. The Netherlands was the 31<sup>st</sup> state to do so.

MARTEN ZWANENBURG AND NELLEKE VAN AMSTEL