THE NETHERLANDS

Contents

Case — War crime of outrages upon personal dignity by ISIS member

☛ *Prosecutor v. X* (District Court of The Hague, 23 July 2019)

The case before the District Court of The Hague concerned a Dutch national who travelled from the Netherlands to Syria in order to take part in the civil war there. He was charged with taking part in a terrorist organization, with taking preparatory actions to commit terrorist crimes, and with three counts of the war crime of outrages upon personal dignity, in particular humiliating and degrading treatment. The first war crimes count was concerned with the accused having posed next to a deceased person on a cross who had been killed by ISIS, having his picture taken with that person and posting this picture on Facebook. The second count concerned disseminating a picture of a deceased woman, on whose body a foot was placed, by sending it to another person in a chat conversation. The third count concerned disseminating the picture of a man holding the severed head of a woman.

The district court held that from July 2012, a non-international armed conflict existed in Syria between Syrian government forces and various organized armed groups including ISIS. The district court also concluded that from January 2014, a non-international armed conflict existed between Iraqi government forces and ISIS. The court based these conclusions on the fact that there was protracted armed violence in the period concerned, as well as the fact that ISIS was sufficiently organized. Because there was a non-international armed conflict, in the view of the court common article 3 of the Geneva Conventions was applicable.

The court then focused on the crime of outrages on personal dignity. Based on the ICC Elements of Crimes for this crime, it concluded that this crime can also be committed if the victim is already deceased. The court referred to the ICTY judgments in Kunarać and Haradinaj for a definition of the crime. It then considered that for the determination whether the crime has been committed, regard must be had to subjective criteria related to the vulnerability of the victim as well as to objective criteria related to the gravity of the conduct. The court held that the act of posing with a deceased person hanging on a cross, while smiling, and having a picture taken contributed to the further aggravation of the humiliation and/or degradation of the deceased. That conduct was of sufficient gravity to be regarded as an outrage upon personal dignity. The dissemination of the picture constituted a continuation of that outrage.

The court considered that the accused must have been aware of the status of the person on the cross as a protected person under IHL. It also considered that there was a nexus between the conduct of the accused and the armed conflict. The posing with the deceased person on the cross could not have taken place without the armed conflict, because the person was killed by or at the behest of ISIS as an alleged enemy, and because the accused was in the area as a member of ISIS and was therefore in a position to commit an outrage upon personal dignity. The dissemination of the picture could contribute to displaying and glorifying the power of ISIS.
The court acquitted the accused of the second and third counts of outrages upon personal dignity, because it was not proven that the accused had disseminated the picture of the woman with the severed head, and because the dissemination of the picture of the deceased woman was not of such a character and gravity to be regarded as an outrage upon personal dignity.
The accused received a prison sentence of seven years and six months.

Case — No prescription/statute of limitations in civil case concerning torture committed during colonial war in the former Dutch Indies

☛ *The State of the Netherlands v. X* (Court of Appeal of The Hague, 1 October 2019)

This case concerned an appeal by the State of the Netherlands against a judgment in which the district court held the State responsible under civil law for torture committed by Dutch military personnel during the colonial war in the former Dutch Indies (1947-1949). The claimants were the heirs of a man who claimed that he was captured and tortured by Dutch military personnel in 1947, using *inter alia* sticks and electric shocks. The district court held the State responsible for the beating of the man with a stick and extinguishing a cigarette on his head. Other alleged forms of mistreatment were not considered proven. The appeal mainly focused on the issue of prescription. The State argued that the district court was mistaken in accepting that the law in force in 1947 allowed for exceptions to absolute prescription based on good faith/fairness and equity. It also advanced that in the circumstances of the present case prescription would be incompatible with good faith/fairness and equity. The court of appeal took as a starting point the Law on Prescription ("Verjaringswet"), which contains a prescription period of five years for monetary debts owed by the government. The court considered that the law in force in 1947 did allow for an exception to prescription, if such an exception was required for reasons of fairness ("redelijkheid en billijkheid"). The court referred to a judgment of the Supreme Court of 2000, in which the Supreme Court set out factors to be taken into account when determining whether in a particular case accepting prescription would not be fair. Taking these and other factors into account, the court of appeal held that to accept prescription in this case would not be fair. One of the factors that the court took into account was that the acts concerned constituted torture, and that such acts were already prohibited in 1947. Another factor was that the State had failed to adequately register captured persons or cases of torture. Having concluded that the State could not invoke prescription, the court of appeal turned to the merits of the case. On the basis of a declaration by the victim, a witness statement of the victim's sister and the report of an expert, the court agreed with the district court that it had been proven that the victim had been beaten and that a cigarette had been extinguished on his body. The court of appeal affirmed the judgment of the district court.

Case — No prescription in civil case concerning summary executions committed during colonial war in the former Dutch Indies

- *The State of the Netherlands v. X and others* (Court of Appeal of The Hague, 1 October 2019)

This case also concerned acts committed by Dutch military personnel during the colonial war in the former Dutch Indies in 1947. This case was brought by five individuals who claimed to be children of men who were summarily executed in South Sulawesi (the former South Celebes), in or close to the village of Suppa by Dutch military personnel. The district court handed down a number of interlocutory judgments, in which it held *inter alia* that the invocation by the State of prescription was not reasonable and must be rejected. The court of appeal upheld this holding, on similar grounds as it did in the abovementioned judgment. In this context the court of appeal considered *inter alia* that Dutch military personnel carried out numerous summary executions of unarmed Dutch nationals, which were unlawful also on the basis of the law applicable at the time. These summary executions constituted gross violations of human rights. The court of appeal drew a parallel with prescription under criminal law, and recalled that nowadays there is a national and international consensus that there is no prescription for war crimes and crimes against humanity. The court considered that this supports the consideration that acts such as the ones at issue constitute a special category within the debate on prescription. The court of appeal affirmed the interlocutory judgments of the district court.

Case — Responsibility of the Netherlands for conduct of Dutchbat in Srebrenica

- *Fejzić and others (including Association the Mothers of Srebrenica) v. The State of the Netherlands* (Supreme Court, 19 July 2019)

This case concerned an appeal against the judgment of the court of appeal regarding actions of the Dutch batallion (Dutchbat) forming part of the UN peace operation in Bosnia (UNPROFOR) during the fall of Srebrenica in July 1995. The court of appeal had held the State responsible under the law of torts for two actions by Dutchbat. One was continuing to support the evacuation of the refugees by the Bosnian Serbs who were present outside the Dutchbat compound on 13 July, thereby facilitating the separation of the men from the other refugees by the Bosnian Serbs. The other was not offering the Bosnian men who remained on the Dutchbat compound on 13 July 1995 the opportunity to remain there. The Supreme Court dealt with the various grounds of appeal put forward by the parties.
One of these grounds led the Supreme Court to determine whether the conduct of Dutchbat was attributable to the State. It started from the premise that conduct of Dutchbat was attributable to the State if the State exercised effective control over that conduct. As command and control over Dutchbat had been transferred by the Netherlands to the UN, it was in principle the UN that exercised effective control over Dutchbat. The Supreme Court inquired whether an exception to that principle applied. For the applicable rules of attribution, the court looked to the ILC's articles on State responsibility and the responsibility of international organizations, respectively (ARSIWA and ARIO). The court referred in particular to articles 4 and 8 of the ARSIWA. The Supreme court held that Dutchbat was not an organ of the Netherlands in the sense of article 4 ARSIWA. With respect to article 8 ARSIWA, the court held that a general, comprehensive instruction cannot constitute effective control, because the article requires effective control over specific conduct. Nor can, according to the court, the mere fact that a State is in a position to prevent conduct constitute effective control. Rather, effective control requires factual control over specific conduct. The Supreme Court agreed with the court of appeal that the State did not exercise effective

control over conduct of Dutchbat prior to 11 July 1995 at 23.00. This date and time were relevant, because the court of appeal had determined that after this point in time the State exercised effective control over conduct of Dutchbat, based on certain factual elements. These elements included a meeting between the UNPROFOR commander and two Dutch generals during which it was agreed to evacuate Dutchbat and the refugees. The determination by the court of appeal concerning attribution after 11 July 23.00 was not contested before the Supreme Court.

The Supreme Court also dealt with the argument made by the plaintiffs that conduct of Dutchbat should be attributed to the State because it was in contravention of UN orders (*ultra vires*). The Supreme Court held that based on article 8 ARIO, *ultra vires* conduct is in principle attributable to the international organization. Such conduct could only be attributed to the State if the State exercised effective control.

Regarding the alleged wrongful conduct, the court first considered whether it was unlawful for Dutchbat to continue supporting the evacuation by the Bosnian Serbs of the refugees who were present outside the Dutchbat compound. The plaintiffs argued that by doing so, Dutchbat was facilitating the separation of the Bosnian men from the women and children, while knowing that there was a real risk that the men would be exposed to inhumane treatment or execution. The Supreme Court disagreed with the view of the court of appeal that Dutchbat should have stopped supporting the evacuation. There was no reasonable possibility for Dutchbat to act in a way that would have avoided the risk to life and physical integrity of the men outside of the compound. The Bosnian Serbs would in any event have continued the evacuation. By acting as it did, Dutchbat attempted to prevent chaos and the risk of accidents for the most vulnerable groups (women, children, and the elderly). Dutchbat therefore did not act unlawfully by doing so.

The Supreme Court did however uphold the judgment of the court of appeal that Dutchbat acted unlawfully by not giving the Bosnian men who remained on the compound of Dutchbat on 13 July 1995 the opportunity to remain. According to the court of appeal, Dutchbat failed to take the measures that could reasonably be expected of it to avoid the real risk that the men would be subjected to inhumane treatment and executions. Dutchbat should have explained to the men the risk they faced, and should have left them the option to remain on the compound. With regard to causality, the Supreme Court found that the men on the compound, if they had been given the choice to stay on the compound, would have had a 10 % chance of staying out of the hands of the Bosnian Serbs. This was a lower percentage than the 30 % arrived at by the court of appeal.

The Supreme Court concluded that the State acted unlawfully by not offering the Bosnian men who remained on the Dutchbat compound on 13 July 1995 the opportunity to remain, thereby depriving them of a 10 % chance not to be subjected to inhumane treatment and executions.

Government Policy – IHL and cyber operations

- *Letter of the Minister of Foreign Affairs on the international legal order in the digital domain* (5 July 2019)

In a letter from the Minister of Foreign Affairs to Parliament, the Dutch government set out its position on the application of international law in the cyber domain. One of the fields of international law addressed in the letter was IHL. The letter states that IHL is applicable to cyber operations in both international and non-international armed conflict. An important part of IHL is the law of neutrality, according to the letter. Neutrality entails that States not party to the conflict refrain from any actions that suggest the involvement or siding with any of the parties to the conflict. In order to maintain its neutrality, the neutral State must treat all parties

to the conflict equally. This includes not denying one of the parties to the conflict access to its information technology systems whilst granting it to another. The letter also states that IHL rules regarding attacks against individuals and objects apply in full to cyber operations in the context of an armed conflict. The planning and execution of such operations needs to be carried out in conformity with, for example, the principles of proportionality and distinction, as well as the duty to take precautions in attack.

Government Policy – Autonomous weapon systems

- ☛ *Government Response to Parliamentary Questions concerning autonomous weapon systems pursuant to a letter to Parliament from the Minister of Foreign Affairs on the international (legal) framework for the use of new technologies as (a part of) weapon systems* (18 October 2019)

In response to parliamentary questions regarding autonomous weapons and their compliance with IHL, the way in which they operate and accountability, the Minister of Foreign Affairs responds that in order to fully answer these questions, a distinction must be made between autonomous and *fully* autonomous weapon systems. The response refers to definitions used in a report by two government advisory committees in their advice on autonomous weapon systems of 2015. According to that report, an autonomous weapon is a weapon that independently selects and attacks targets, whether offensive or defensive, which meet certain preprogrammed characteristics, after humans have decided to use the weapon and without humans being able to stop the attack. A fully autonomous weapon is programmed in such a way that it independently carries out the entire targeting process, from the formulation of the military objective to the determination of the place and time of execution. Meaningful human control over such systems is not possible and therefore such weapons would be in violation of international law. This is why new legally binding frameworks, for example in the form of a prohibition, do not have added value.

The letter also states that the Dutch government rejects the development and use of fully autonomous weapon systems. With respect to non-fully autonomous systems, it cannot be determined in advance whether these systems by definition can or cannot distinguish between a civilian and a soldier. This must be determined for each weapon system individually. What is clear, is that a weapon system that is not able to make this distinction, is in violation of IHL and is therefore prohibited. In addition, each country is obliged in the development, acquisition or adoption of a new weapon system, to subject that system to a strict review to determine that the weapon can be employed in conformity with the rules of international law, including IHL.

According to the Dutch government humans, not machines, remain responsible at all times for the decision to use force. This means that combatants or fighters belonging to a party to an armed conflict will remain responsible for the obligation to, prior to deciding to employ a weapon system, determine whether in that particular case international law can be complied with. This obligation flows, *inter alia,* from the principle of precautionary measures in IHL, which is fully applicable to the use of autonomous weapon systems.

The letter further states that meaningful human control is control that consists of more than just a "kill-switch" that is solely intended to turn the system on or off. Meaningful human control applies within the entire decision cycle that precedes the decision to employ the (autonomous) weapon system. It can extend, if necessary, to control and supervision during deployment of the weapon system. The degree of control required during the different steps in the cycle depends on, *inter alia*, the type of system, the capacities of the system, the type of targets the weapon will be aimed at, and the context within which the system needs to

operate. At all times humans will have to determine the conditions for the time and place of deployment of the weapon and the determination of the targets the weapon may be used against. Within these boundaries a weapon system is allowed to have certain autonomy, but the system may not adjust these boundaries by itself. A system capable of making such adjustments is not under meaningful human control and therefore in violation of international law.

Government Policy – Use of phosphorus bombs/grenades

- ☛ *Government Response to a Parliamentary Question concerning the use of phosphorus bombs/grenades by Turkey in Northern Syria* (30 October 2019)

In response to a parliamentary question concerning the use of phosphorus bombs and/or grenades by Turkey in Northern Syria and whether or not this is in violation of IHL, the Minister of Foreign Affairs stated that ammunition containing white phosphorus is used in smoke grenades for artillery and in ammunition to illuminate the battlefield. The use of this ammunition is, when in accordance with IHL, not forbidden. Although IHL does not specifically forbid phosphorous ammunition, the use of this ammunition, regardless of the type or kind, must comply with the applicable law. This concerns in particular the principles of proportionality and distinction between civilians and combatants, as well as the duty to take all feasible precautions to protect the civilian population.

Government Policy – Handling of claims in Iraq as a result of the fight against ISIS

- ☛ *Government Response to a Parliamentary Question concerning the process for the handling of claims in Iraq as a result of the fight against ISIS and the part of the Netherlands therein* (4 November 2019)

In the night of 2 to 3 June 2015 a facility for the making of *vehicle borne Improvised Explosive Devices* in Hawija (Iraq) was bombed by a Dutch F-16 fighter jet, as a part of the anti-ISIS coalition operations. The bombing created an unexpectedly large secondary explosion, resulting in multiple civilian casualties. As a result, parliamentary questions were asked.

In response to a parliamentary question concerning the process for the handling of claims in Iraq as a result of the fight against ISIS and the part of the Netherlands therein, the Minister of Defence stated that the legal basis for Dutch deployment of F-16 fighter jets in Iraq was the request for military assistance from Iraq in the fight against ISIS. Therefore all States that are active in the anti-ISIS coalition and engage in military activities in Iraq do so with the consent of Iraq. The Iraqi authorities were involved in the targeting process and had to give permission prior to the attacks. Based on the general international law principle of State sovereignty, it is for Iraq to determine how to deal with damage resulting from the request for military support in the fight against ISIS. It follows from this that Iraqi citizens in first instance can turn to the Iraqi authorities.

The deployment of the Dutch F-16's against ISIS took place in the context of an armed conflict. Therefore IHL applies. This means that when attacks are carried out in accordance with IHL they are legitimate attacks, even in the case of civilian casualties or damage to civilian objects. It follows that in such cases there is no liability, so that relatives or victims do not have a right to compensation in those cases. The absence of a legal obligation to pay compensation notwithstanding, a State may choose to compensate *ex gratia*. Naturally, in case of an unlawful act (breach of IHL) relatives and victims have a right to compensation.

Government Policy – Procedures before and after airstrikes in armed conflict

- ☛ *Government Response to Parliamentary Questions concerning an airstrike in Mosul in 2015 with civilian casualties* (8 November 2019)

In response to a parliamentary question concerning an airstrike in Mosul in September 2015 resulting in four civilian casualties, the Minister of Defence stated that the Dutch *After Action Report* (AAR of 21 September 2015) gave no reason to believe that the airstrike had resulted in possible civilian casualties. The initial CENTCOM-report that the Ministry received two months later noted that the intelligence of the anti-ISIS coalition leading to the identification of the target turned out to be false. The additional investigation carried out by the Ministry concluded nevertheless that the steps of the targeting process were taken correctly, the available intelligence at the time was sufficient to designate the target as a legitimate military target and both before and during the airstrike there were no indications that the intelligence might have been false. Therefore the airstrike was conducted in conformity with IHL.

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