THE NETHERLANDS[1]

Contents

Case — Responsibility of the Netherlands for an attack on an Afghan residential complex during fighting in Chora

☛ *X and others v. State of the Netherlands* (District Court of The Hague, 23 November 2022)[2]

This case concerned a claim for compensation by victims of a bombardment by Dutch forces during fighting in the Chora district, Uruzgan province, Afghanistan. Between 2006-2010, the Netherlands was the lead nation of the Task Force Uruzgan (TFU) and was involved in the defence of Chora in 2007. On 16 June 2007, the TFU Commander issued a stand and fight order in response to an attack by Taliban forces. During the fighting, air assets were used to strike qualas (residential complexes) where Taliban forces were identified, including Quala 4131, where the claimants' families were located. According to the TFU Chief Joint Fires' report, the quala was marked as a Taliban firing position, and upon positive identification by a joint terminal attack controller, was destroyed in the early morning of 17 June 2007. The claimants disputed the lawfulness of this attack, arguing that the State insufficiently verified the military nature of the target in breach of the principles of distinction and precautions; that the principle of proportionality was not upheld; that insufficient warnings were given; and that the State failed to investigate the incident as required by Article 2 of the European Convention on Human Rights (ECHR). The claimants demanded compensation for this unlawful act attributable to the Dutch State.

With regard to the lawfulness of the attack, the Court first established that international humanitarian law (IHL) rules pertaining to non-international conflicts were applicable, in

[1] This report was prepared by Jonathan Kwik (Doctoral Candidate, University of Amsterdam) and Marten Zwanenburg (Professor of Military Law, Netherlands Defence Academy and University of Amsterdam).
[2] https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2022:12424. All links were accessed 4 April 2023.

particular, the customary rule of distinction. It emphasised that the duty to verify the military nature of targets extends up to the moment the attack is executed. While it acknowledged that the TFU was under significant pressure to defend Chora against rapidly advancing Taliban forces, it held that "even, or perhaps particularly, under difficult circumstances … the principles of IHL must be respected" (authors' translation).

The Court stated that in answering the question whether (the principle of distinction in) IHL had been respected, the applicable standard is if the commander could reasonably have decided to use force, i.e. the reasonable commander test. It also underlined that only information that was available to the commander at the relevant time is to be taken into account.

The Court then proceeded to apply this framework to the facts of the case. It recalled that the claimants argued that the principle of distinction had not been respected sufficiently in attacking the quala. They submitted that the quala was a residential complex from which no hostilities were carried out, so that it was not a military objective. They also submitted that there were insufficient facts and circumstances for the commander of the TFU to reasonably conclude that the quala was a military objective.

The Court held that the claimants had, in principle, met their obligation to furnish facts ("stelplicht") by claiming that the Taliban had not operated from the quala and that there was no, or at any rate an insufficient, basis on which to qualify it as a military objective. It considered that it was for the Netherlands to give as precise an insight as possible into the circumstances that led the responsible commander to qualify it as such.

The Netherlands argued that there was sufficient basis to consider the quala as an enemy firing position, such that it made an effective contribution to military action by its use. It considered it relevant that the quala was situated at a strategic location in relation to a choke point and a dry river-bed, which could serve as an alternative to the roads in Chora. The Court took this into account, as well as the fact that early in the morning of 16 June, Dutch forces had noted that there were opposing forces around the quala, and that opposing forces fired from the vicinity of the quala around midday.

The Court concluded that the only relevant circumstances were that there had been firing from the vicinity of the quala around 20 and 15 hours before the bombing, respectively (referring to the events in the morning of 16 June). The Court stressed that it did not follow that there had been fire *from* the quala. In addition, the presence of opposing forces around the quala in the morning of 16 June and the firing from its vicinity around midday were too remote in time from the bombing to justify the latter.

The Court then considered the argument by the Netherlands that it was likely that intelligence had been available that one or more persons who were part of the Taliban command structure had been identified as being present in the quala. The Netherlands had referred, in that context, to the fact that not all communication and intelligence had been recorded. The Court held that what the Netherlands had adduced about the possibility of there being intelligence was insufficiently concrete. In the view of the Court, in a situation in which the Netherlands' armed forces (order an) attack (on) a quala, it must be able to explain the circumstances that justify the assumption that it was a military objective.

The Court found that the quala was attacked without due regard for the principle of distinction, and awarded compensation to the victims. The Court also carefully noted, however, that it made no pronouncements on the act as a war crime: it only established that the State insufficiently motivated its attack, not that the quala (as a non-military entity) was deliberately targeted. Having found the act to be unlawful on the basis of the principle of distinction, it also dismissed the other points of contention.

Case — Individual right to reparations based on Hague Convention IV Article 3 or customary law

☛ *X and others v. State of the Netherlands* (District Court of The Hague, 1 June 2022)[3]

This case revolved around the question of whether a norm exists in international law that grants individual victims of IHL violations the right to demand reparations from the perpetrating party. The claimants in this case were (relatives of) victims of the Japanese occupation of the Dutch-Indies during the Second World War, who had suffered numerous outrages, including starvation, maltreatment, forced labour and sexual violence, which in many cases led to death. Previously, the claimants had sought reparations before a Japanese court, but lost this case, *inter alia*, due to the terms of the San Francisco Treaty, which – in the spirit of preventing another Versailles – provided that all Allied Powers would waive their nationals' rights to individual claims against Japan. The Netherlands is party not only to this treaty, but also to the bilateral Yoshida-Stikker Protocol, in which the Netherlands confirmed that "neither itself nor any Netherlands nationals will raise against the Government of Japan any claim concerning the sufferings inflicted during the Second World War by agencies of the Government of Japan upon Netherlands nationals". Before the Dutch court, the claimants argued that this 'waiver' of the State of their right to reparations constituted an unlawful act.

While the Court swiftly found that the claim failed due to the lapse of the period of prescription, it nevertheless engaged in a substantive analysis at the request of both parties. The claimants' argument relied on the notion that by 'contracting away' Dutch nationals' rights to compensation, the State deprived them of their property (or legitimate expectations thereof) in violation of Article 1 of ECHR Protocol I. The Court thus set out to determine whether such 'property' existed in the first place. It did this by examining whether in 1956, a treaty or customary norm existed that would reasonably generate the expectation that individual damages for violations of IHL could be sought from the perpetrating State. The Court found that such a norm did not, and still does not, exist. From a plain reading of Article 3 of Hague Convention IV of 1907, its *travaux préparatoires*, writings by prominent scholars and a study of State practice, it concluded that the obligation to provide reparations only existed at an inter-State level, and that this was usually effectuated through the payment of a lump sum or the establishment of a claims commission. Individuals, subsequently, would receive (or have to claim) compensation from their respective States. It thus concluded that legitimate expectations of such reparations did not exist, and accordingly, could not have been 'contracted away' unlawfully.

Case — Individual criminal liability for the downing of flight MH17

☛ *Prosecutor v. Sergey Nikolayevich Dubinskiy, Igor Vsevolodovich Girkin, Leonid Volodymyrovych Kharchenko and Oleg Yuldashevich Pulatov* (District Court of The Hague, 17 November 2022)[4]

This case concerned the downing of flight MH17, for which all accused were tried *in absentia* on two counts of common crimes (deliberately causing the crash of flight MH17, and the death of its passengers). In the context of the Ukraine-Donetsk People's Republic (DPR) conflict in which the incident took place, the Court established a hierarchy of military command from Girkin (as DPR Minister of Defence and Supreme Commander) down to Dubinskiy, Karchenko, and finally Pulatov. While none of the accused 'pulled the trigger' of the Buk-TELAR rocket launch system that was used to down flight MH17 themselves, the Court found

[3] https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2022:5165.
[4] https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2022:12216;
https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2022:12217;
https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2022:12218;
https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2022:12219.

that (with the exception of Pulatov, who was acquitted) each person had significantly contributed to the ultimate launching of the rocket, as the system required extensive preparations and authorisations to obtain, transport, and render it operational.

The most significant finding related to IHL concerned the discussion of whether the accused enjoyed immunity from prosecution, pursuant to their so-called combatant's privilege. First, the Court examined whether the conflict in the Donbas at the time of the alleged crime constituted "protracted armed violence" in order to qualify as a non-international armed conflict (NIAC), which it answered in the affirmative. However, as combatant immunity only exists in an international armed conflict (IAC), the Court then had to consider whether the Russian Federation had overall control over the DPR so as to render the conflict international. On the basis of the accused's close ties with Russia; the provision of arms, training and other material support; and ample evidence of direct instructions from "Moscow" to DPR authorities on many occasions, the Court determined that there was overall control of the Russian Federation and classified the conflict as an IAC. The Court refused to accord combatant immunity to the accused, however, as they took part in hostilities under the flag of the DPR, which was never integrated into the Russian military hierarchy, as required by Article 43 Additional Protocol I. Indeed, the Court pointed out that the Russian Federation could not have done this, as it structurally denied any involvement in DPR affairs.

Substantively, the Court considered whether *error in objecto/persona* (i.e., that the accused assumed to have attacked a Ukrainian military aircraft) could exonerate the accused. It found that it could not, since the status of the aircraft and persons was materially irrelevant: in the absence of combatant immunity the accused would be liable, irrespective of whether the aircraft and its passengers were military or civilian. The Court additionally found that deploying the Buk-TELAR in a "chaotic situation", against airspace which was known to be heavy in civilian traffic and without any additional precautions, was indicative of the accused "accepting the significant risks associated".

Case — Individual criminal liability for war crimes committed at the Pul-e-Charkhi Prison in Afghanistan

☛ *Prosecutor v. X* (District Court of The Hague, 14 April 2022)[5]

This case concerned a nationalised Afghan who was found guilty of war crimes while he was overseeing the Pul-e-Charkhi Prison in the 1980s. During this time, the Soviet-backed Afghan regime detained hundreds of political and military opponents, and subjected prisoners to systematic arbitrary detention, inhumane treatment, torture and summary executions. The accused was tried under the Dutch Criminal Law in Wartime Act, which criminalised violations of the laws and customs of war. The Court first confirmed the existence of protracted armed violence at the time of the commission of the crimes. The Court established that a NIAC existed between the Afghan regime and opposition forces, which involved infantry operations, bombardments, and the large-scale use of military assets. The Court also established the required nexus with the conflict by arguing that while most detainees were political opponents, the prison could not be separated from the broader conflict, and that the arbitrary detention and poor treatment of detainees was mainly used to destroy the enemy's ability to resist the regime militarily.

For most counts the accused was charged with, the Court relied on Common Article 3 to the Geneva Conventions, in particular, the prohibition of "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture", "outrages upon personal dignity", and the "passing of sentences and the carrying out of executions without previous

[5] https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2022:3410.

judgment pronounced by a regularly constituted court". For the count of arbitrary detention, the Court observed that this was not explicitly prescribed by Common Article 3, but held that the prohibition derived from the general IHL principle that persons not actively participating in hostilities "shall in all circumstances be treated humanely", Rule 99 of the ICRC's Customary IHL study, and other human rights treaties.

Case — Individual criminal liability for war crimes committed under the Ethiopian Mengistu-regime

☛ *Prosecutor v. X* (Court of Appeal of The Hague, 8 June 2022)[6]

The Court confirmed most counts on which the appellant, who was tried for war crimes committed in the 1970s in the Gojjam Province of Ethiopia, had been convicted by the District Court. At the time, the appellant oversaw several camps where suspected members of the opposition Ethiopian People's Revolutionary Party (EPRP) were held by the Derg military government. During this period, multiple violations of Common Article 3 to the Geneva Conventions and customary IHL were committed for the purpose of quickly breaking the EPRP's political will to resist, which included arbitrary deprivation of liberty, inhumane treatment, serious humiliation, degradation and serious attacks on human dignity, and torture. As the appellant was tried under the Dutch Criminal Law in Wartime Act, the Court needed to establish both the existence of a NIAC between the Derg and EPRP at the time of the commission of the crimes and a nexus to the conflict, which it did.

With regard to the appellant's individual responsibility, the Court established that the appellant was the sole representative of the Derg in Gojjam and the leader of the Coordinating Committee, and thus ultimately responsible for the outrages committed. The Court rejected the appellant's argument that he only fulfilled a 'coordinating' role at the time, finding instead that he possessed "absolute political authority" in Gojjam and was directly involved in committing or ordering the commission of war crimes. In discussing the different counts, the Court made extensive reference to international jurisprudence, in particular that of the International Criminal Tribunal for the former Yugoslavia (ICTY).

Government Policy — Obligation to ensure respect for IHL

☛ *Government response to report of commission of inquiry on non-lethal assistance to Syrian opposition groups* (20 December 2022)[7]

From 2015 until 2018, the Dutch Government provided non-lethal assistance (NLA) to armed opposition groups in Syria. After parliamentary questions were raised concerning this assistance, the government established a commission of inquiry to investigate the programme, including the decision process leading to the programme, the legal risks, the extent to which conditions set by the Dutch government were respected, and information provided to Parliament. The Commission presented its report in December 2022. The report found, *inter alia*, that under certain conditions, the obligation in Common Article 1 to the Geneva Conventions to respect and ensure respect for the conventions is breached when support is provided to armed opposition groups that commit war crimes systematically or more than incidentally.

[6] https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHDHA:2022:973. For a more extensive English analysis of the judgement, including a link to the English translation of the Dutch judgement, see https://www.internationalcrimesdatabase.org/Case/3317.

[7] https://open.overheid.nl/documenten/ronl-3a4c3ed30e60de497351a14cda11531bc27c97d9/pdf.

In its written response to the report of the commission, the government stated that it considered that the Netherlands had taken measures, in accordance with Common Article 1 to the Geneva Conventions, to ensure respect for IHL by the groups that had been supported.

Government Policy — War crimes in non-international conflicts

☛ *Government response to report on 'Independence, Decolonisation, Violence and War in Indonesia 1945-1950'* (14 December 2022)[8]

On 17 February 2022, the Netherlands Institute for War, Holocaust and Genocide Studies (NIOD), the Royal Netherlands Institute of Southeast Asian and Caribbean Studies (KITLV) and the Netherlands Institute for Military History (NIMH), published the main results of an independent study on 'Independence, Decolonisation, Violence and War in Indonesia 1945-1950'.

In a second written response to the report, the government addressed the qualification of extreme violence employed by the Netherlands. The government recalled that the researchers concluded that the judicial authorities took no or insufficient action against the extreme violence perpetrated by the Dutch side, and in doing so gave a legitimising signal. The research did not take a position on the question of whether the extreme violence should be characterised as war crimes. Whether it should, was the subject of societal debate following the presentation of the research.

In this context, the government wrote that at the time of the adoption of the Geneva Conventions of 1949, criminal and international law did not yet criminalise violations of IHL as a war crime in NIACs. This means that the term war crime was not applicable to the war of independence in Indonesia, and the acts of extreme violence cannot be qualified as such. Nevertheless, some forms of extreme violence committed during the period 1945-1949, such as torture and extrajudicial executions, would qualify as war crimes if they were committed now.

Government Policy — Equality of belligerents

☛ *Government response to a parliamentary question concerning alleged war crimes committed by the Ukrainian armed forces* (6 September 2022)[9]

Parliamentary questions were posed concerning alleged war crimes committed by the Ukrainian armed forces, on the basis of a press release by Amnesty International suggesting that by placing military objectives in urban areas, Ukraine did not respect the obligation to take passive precautions. In response, the Minister of Foreign Affairs stated that IHL is equally applicable to all parties to an armed conflict, and that consequently all parties must respect IHL. The fact that Ukraine is the victim of Russian aggression does not change that. The Dutch government did not, however, subscribe to the conclusions in the press release by Amnesty International. It noted that the United Nations Office for the Coordination of Humanitarian Affairs stressed on several occasions that Ukraine does everything feasible to evacuate civilians in a timely manner and to accommodate them elsewhere.

Government Policy — Blockade and starvation of the civilian population

☛ *Government response to a parliamentary question concerning the Russian blockade and starvation of the civilian population* (23 June 2022)[10]

[8] https://open.overheid.nl/documenten/ronl-b9ef8f7040a3400d4bbc90fa5f42d2c2b48e9680/pdf.
[9] https://open.overheid.nl/documenten/ronl-52aa0e2e2b5e1a8e41e1c34ba4b7d21b0dd26b8f/pdf.
[10] https://open.overheid.nl/documenten/ronl-014106981e46cd68f856cad5dcfce660b90a14c2/pdf.

In response to parliamentary questions concerning the blockade of Ukrainian ports by Russia, the Minister of Foreign Affairs, also on behalf of the Minister for Foreign Trade and Development Assistance, strongly condemned the blockades instituted by Russia that made the export by Ukraine of grain via the Black Sea impossible. The government considered it unacceptable that Russia uses food as a weapon, thereby endangering global food security. From a legal perspective, starvation of the civilian population during an armed conflict is a violation of IHL and may constitute a war crime. This is only applicable in relation to the population of the territory where the conflict is taking place, which in this case, is the Ukrainian population. The prohibition of intentional starvation is established in Additional Protocol I to the Geneva Conventions. The Netherlands qualifies the situation in Ukraine as an IAC. This means that it is not necessarily prohibited for parties to an armed conflict to impose a naval blockade, as under certain conditions IHL allows the imposition of naval blockades for military purposes. This is not allowed where the blockade leads to the starvation of the civilian population.

Government Policy — Autonomous weapons

☛ *Government response to an advisory report on autonomous weapon systems* (17 June 2022)[11]

On 3 December 2021, two advisory bodies to the Dutch government, the Advisory Council on International Affairs (AIV) and the Advisory Committee on Public International Law (CAVV), presented a joint report on autonomous weapon systems (AWS). This was an update of a report on the same topic of 2015. In the new report, the AIV and CAVV recommended, *inter alia*, that the government actively work toward a prohibition of fully AWS. In their view, different options are available to regulate both fully and partially AWS in more detail, including a new protocol additional to the Convention on Certain Conventional Weapons (CCW).

The government writes that it adopts the recommendation and will exert itself to achieve such a prohibition of fully AWS and a concretisation of the applicable rules to partially AWS, for example in a protocol to the CCW.

In this regard, it is important to take into account the complex international playing field. The definition and scope of a prohibition requires careful consideration. For the government, the principal objective of a prohibition is preserving human judgment in the employment of a weapon system. It is therefore important to distinguish between AWS that can be developed and employed in conformity with existing international law, and systems for which this is not possible. Caution is required to prevent existing systems important to national security, such as the Goalkeeper and the Patriot, from falling under the prohibition. A definition that is too narrow could, in practice, lead to a prohibition that is not effective. For the feasibility and effectiveness of a prohibition, it is also important that States that contribute to the development of AWS would join such a prohibition. The Ministry of Defence must also be able to conduct, together with allies, research into AWS that are, or may be, used by potential adversaries.

Government Policy — Foreign fighters

☛ *Government response to a parliamentary question concerning Dutch nationals fighting for Ukraine* (14 April 2022)[12]

In response to a parliamentary question concerning Dutch nationals fighting for Ukraine, the Minister of Foreign Affairs stated that civilians do not have the right to participate in

[11] https://open.overheid.nl/documenten/ronl-b0989977117317abd9f46b0c18da5fe726e78d3e/pdf.
[12] https://open.overheid.nl/documenten/ronl-e59dca1cda5c154cd564ccf3fd3b0f243558da5a/pdf.

hostilities and can be prosecuted for committing acts of violence. However, enlisting in foreign armed forces, which gives one the right to participate in hostilities, is not a criminal act. Violating IHL is, however, a criminal act and as such may be prosecuted in the Netherlands. The government also noted that under Article 205 of the Dutch Criminal Code, a person can be prosecuted if he or she recruits someone for service in foreign armed forces or to participate in an armed conflict without authorisation from the Dutch government.

Government Policy — Explosive weapons in populated areas

- ☛ *Government signs political declaration on use of explosive weapons in populated areas* (18 November 2022)

On 18 November 2022, a large number of States met in Dublin to endorse a Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences arising from the use of Explosive Weapons in Populated Areas. The Netherlands was one of the States that signed the declaration.