Dutch District Court Judgment on Military Support to and Trade with Israel

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On Friday 13 December 2024, the District Court of the Hague handed down its judgment in a torts case related to the Netherlands' military support to and trade cooperation with Israel. Al-Haq and nine other civil society organizations (referred to collectively as Al-Haq) brought the case under civil law against the State of the Netherlands.

In essence, the claimants call for a change in the State's foreign policy in relation to Israel and the Occupied Palestinian Territory (OPT). More specifically, they seek a blanket ban on transfers of military goods to Israel, as well as on military cooperation with Israel. The claimants also requested a ban on Dutch trade with, or investment in, companies that are active in Israeli settlements in the OPT, including a prohibition on the Netherlands buying from companies that are involved in any way in Israeli operations in the OPT. The court rejected all the claims.

This post provides a brief summary of the judgment, as well as some observations on the court's assessment of international arms transfer controls, its evaluation of the Netherlands' trade relations with Israel, and the margin of discretion the court affords to the State in its

foreign and defense policy decisions.

Note that this case is distinct from the case that is ongoing before Dutch courts concerning the export and transit of F-35 parts to Israel. The F-35 case, which was brought by other claimants, is much more limited in terms of the claims and international legal obligations invoked. It focuses on transfers of parts and components of F-35 fighter aircraft and examines the question whether an existing general license adopted in 2016 and with no end-date attached to it should be reviewed and amended given the changed circumstances in arms transfer recipient Israel. The F-35 case is currently before the Supreme Court (for more analysis, see here and here).

Overview of the Judgment

Al-Haq asserted that the Dutch government's current policies toward Israel, such as its policy on arms exports and its "discouragement policy" discussed below, violate international law, particularly regarding the prevention of genocide, severe human rights violations against Palestinians, and serious violations of international humanitarian law (IHL). They argued that the State violates its international obligations and thereby gives Israel free rein to continue its attacks on Palestine and activities related to illegal settlements and endangers the Palestinian population. This, they argued, constitutes a tort under Dutch civil law.

The claimants sought two main outcomes. First, in relation to military support, they petitioned the court to order the State: to halt any export and transit of weapons, weapons parts, and dual-use goods to Israel; to cease all military cooperation with Israel and to refrain from concluding a defense treaty; to prosecute anyone who may be contributing to or has contributed to violations of IHL or the Genocide Convention in Gaza; and to make maximum efforts in its international relations to induce other States to do the same. Second, related to trade cooperation, Al-Haq requested the court to order the State: to adjust its trade policy to prohibit any Dutch trade with, or investment in, companies operating in settlements in the occupied territories as well as to investigate, prosecute, and hold accountable any private persons who fall under Dutch jurisdiction who do so; and to induce other States to take similar measures.

The court acknowledged that the humanitarian situation in Gaza is "very serious." It also recalled that the Netherlands recognizes the illegality of the Israeli settlements in the OPT and took note of developments under international law. These included the International Court of Justice (ICJ) provisional measures in the case brought by South Africa against Israel, the ICJ Advisory Opinion of 19 July 2024, and the arrest warrants issued by the International Criminal Court. However, the court rebutted or dismissed all claims and aligned its reasoning closely with defenses that the State invoked.

The court stated that the primary question in this case was whether, and to what extent, a court in summary proceedings can exercise judicial review of the State's foreign and defense policy. The judgment afforded a large margin of discretion to the State in its policy decisions, and the court did not find the Netherlands' arms transfer policy or trade policy to be in violation of international law. Based on this assessment, the court dismissed without further argument any requirement for the Netherlands to induce other States to likewise adopt a prohibitive arms transfer and trade policy. Moreover, regarding the prosecution of domestic actors responsible for possible violations of IHL and the Genocide Convention (or contributions towards these), the court declined to engage with issues of effective policy implementation. It also pointed out that it is up to the public prosecution service to investigate alleged breaches of domestic law, and that it cannot order the State to prosecute anyone.

Arms Transfers

The court assessed the questions regarding arms transfer controls against legal bases in international and domestic law, namely the EU Common Position on Arms Exports (EUCP), the Arms Trade Treaty (ATT), and the Dutch Strategic Goods Decree. The latter provides that an export license for strategic goods may not be granted insofar as it results from international obligations. While the Netherlands claimed that under Dutch law, these are not directly effective provisions from which citizens can derive rights, the court dismissed this argument and affirmed the direct effect of the binding rules on arms transfers.

No Blanket Prohibition on Arms Transfers

Al-Haq argued that the State should by default refuse any arms transfer destined for Israel and replace its current approach of case-by-case export assessments. In response, the Netherlands refuted the necessity for a general ban, or embargo, on deliveries of weapons and their parts and components to Israel. The State argued that, in its case-by-case export assessment, internationally binding rules for arms transfer decisions are carefully applied in light of the item in question and the given circumstances. Recalling that several licenses have been refused since 7 October 2023, the State asserted that it is unlikely that any new licenses will be issued that may contribute to Israel's activities in Gaza and the West Bank, acknowledging the "clear risk" that weapons in the current context contribute to serious violations of IHL (para. 4.14). The court found that the State is under no obligation to adopt an embargo and stated that there is no legal basis for this.

Silence on Common Article 1 to the Geneva Conventions

Common Article 1 to the Geneva Conventions and the duty to ensure respect for IHL may encompass a legal basis for a ban on arms transfers. While not all States agree that this obligation entails an external dimension, the Netherlands does. Commentators have identified various ways in which States can implement this obligation, one of them being bilateral arms embargoes.

The appeals judgment in the F-35 case before Dutch courts acknowledged Common Article 1 to be a foundational obligation entailing restrictions in weapons transfers to actors that may use them contrary to IHL (para. 5.25). Admittedly, measures to ensure respect for IHL can at times seem intangible and thus difficult to implement in domestic systems. However, the Advocate General to the Dutch Supreme Court, an autonomous and independent part of the judiciary that advises the Supreme Court, issued an opinion on the F-35 case pending before that court. He noted that the duty to ensure respect for IHL is an obligation of conduct which is given substance by the EUCP and ATT (see elaborations on ground 5.4, here).

In light of the above and considering that Al-Haq based its claims, *inter alia*, on Common Article 1, it is striking that the court in the present case did not engage with the obligations deriving from it. After all, interpreting arms transfer controls in line with the obligation to ensure respect for IHL can support States to effectively use the means that are available to them to uphold the humanitarian protections that Common Article 1 seeks to safeguard.

Prohibitions Under the Arms Trade Treaty

The two core obligations under the ATT are prohibitions of arms exports under Article 6, and the requirement to conduct an arms export assessment pursuant to Article 7. The latter has been central in arms transfer litigation in domestic courts, for instance in Canada, Denmark, and in the Dutch F-35 case. Article 7, however, only applies if the export in question is not already prohibited under Article 6 ATT. Article 6(3) ATT prohibits the authorization of any transfers if the transferring State has "knowledge at the time of authorization that the arms or items would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party."

The court disregarded this differentiation of legal obligations under the ATT. In the case at hand, prohibitions under Article 6(3) could be seriously considered, even if the applicable thresholds are significantly higher than those stated in Article 7. Notably, commentators have identified the threshold of knowledge to be that exporters "should have normally been aware." In light of repeated and continuous reports of alleged international crimes committed in Gaza it is contentious at what point an arms exporter has constructive knowledge that the exported items would be used in the commission of international crimes. Article 6(3) ATT seeks to prevent such crimes and their facilitation. States can violate Article 6(3) if they authorize transfers in the knowledge that the arms would be used in a way that violates international law, even if no harm materializes.

Effect of Arms Transfer Prohibitions

The precise implications of arms transfer prohibitions under Article 6(3) are still underexplored, given the absence of jurisprudence and some conflation of ATT obligations under Articles 6 and 7 in the literature. The treaty text calls for a prohibition of "any" transfer, a textual interpretation of which contrasts with an assessment on a case-by-case basis under the EUCP and Article 7 ATT. Al-Haq argued that a complete halt to any arms exports to Israel is required given that it can never be ruled out that a weapon or component will be used in hostilities against the Palestinian people.

The court dismissed this argument as insufficiently substantiated. It also added a logic of differentiation between offensive and defensive weapons, citing Israel's right to air defense of its own territory. In this respect, it should be noted that IHL does not differentiate between offensive and defensive weapons, as all weapons can be used to gain a military advantage. To illustrate its reasoning, the Court referred to components for radar systems and anti-aircraft purposes, stating that such deliveries may not be impeded by arms transfer rules. Essentially, the court agreed with the State that a case-by-case assessment for arms transfers to Israel continues to be sufficient.

The court's finding can however be critically reviewed considering the wording ("any" transfer) and purpose of Article 6(3) ATT. The obligation may necessitate a blanket prohibition of arms transfers to a certain recipient. This logic is in line with the reasoning of multilateral arms embargoes, which usually acknowledge the serious situation in a recipient State, and the recipient's overall conduct in disregard of international law. In that respect, even if a case-by-case assessment was applied under Article 6(3), this assessment pertains situation-to-situation, rather than transfer-to-transfer.

The indicators for a case-by-case assessment of arms transfers (usually applicable under Article 7 ATT and the EUCP) largely center around the recipient's past, current, and potential future conduct and its respect for international law. In support of the court's view, assessment indicators also acknowledge that the nature of the item in question presents one factor in the evaluation whether the arms transfer could be used in violation of international law. However, as the EUCP User's Guide notes (p. 49), when considering the nature of the item in an arms transfer assessment, "it is also important to recognise that a wide variety of equipment has a track record of use to commit or facilitate repressive acts."

The EUCP User's Guide provides guidance to EU Member States regarding implementation of the eight criteria put forward by Article 2 EUCP against which any arms export license application should be assessed. The User's Guide allows for an arms transfer assessment to be applied situation-to-situation, rather than transfer-to-transfer (see especially p. 43-49). This is not only founded in EUCP's criterion 2, respect for IHL and international human rights law (IHRL), and the fact the recipient's attitude toward IHL and IHRL serves as an indicator to assess the risk of international law violations. It also derives from other criteria put forward by the EUCP, such as criterion 3, existence of tensions or armed conflict, and criterion 4, preservation of regional peace, security and stability, and criterion 6, behavior of the recipient

toward the international community. A cumulative consideration of EUCP assessment criteria under Article 2 arguably indicates that the Netherlands could prohibit all arms transfers to Israel, assessing the overall situation, rather than conducting the assessment on a case-by-case basis (i.e., transfer-by-transfer).

It follows that a blanket prohibition of arms transfers to Israel might be founded in Common Article 1, Article 6(3) ATT, and Article 2 EUCP. For the purpose of reducing human suffering and in pursuit of peace, security and stability, these legal bases presuppose States' restraint in arms transfer decisions. The role that domestic courts are taking in the enforcement of applicable rules is a difficult one. It demands a harmonious interpretation of rules under the EUCP and ATT, in light of Common Article 1, as exemplified by the Court of Appeals in the Dutch F-35 case.

Trade Relations

Al-Haq's claim that the Netherlands must prohibit trade with, or investment in, companies which are involved in military operations in Gaza or settlements in the West Bank is based, *inter alia*, on the ICJ's Advisory Opinion of 19 July 2024.

The State maintained that its so-called "discouragement policy" (*ontmoedigingsbeleid*) accords with its international obligations. The discouragement policy entails that the Dutch government does not support the activities of companies that directly contribute to the development and maintenance of Israeli settlements in the OPT, or that directly facilitate them. If Dutch companies consult the government, they are informed about this policy. The government then explains that, based on international law, the Netherlands and the EU do not recognize Israeli sovereignty over the territories occupied by Israel since June 1967 and that they consider Israeli settlements in occupied territory to be contrary to international law.

In applying this policy, the Netherlands argues that it is primarily the responsibility of the private companies themselves to respect human rights. They should take into account the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises on Responsible Business Conduct. In its pleadings in the case, the Netherlands also referred to several trade-related measures taken in an EU context, including concerning the labeling of goods from the OPT. The court considered that against this background, Al-Haq did not demonstrate sufficiently that the government's actions were unlawful. This led the court to reject Al-Haq's claim.

It is noteworthy that the court did not explicitly refer to the ICJ's views on the consequences arising for third States from the ICJ's finding that the Israeli occupation is unlawful. These consequences include an obligation "to abstain from entering into economic or trade dealings with Israel concerning the [OPT] or parts thereof which may entrench its unlawful presence in the territory" and an obligation "to take steps to prevent trade or investment relations that assist in the maintenance of the illegal situation created by Israel in the [OPT]" (para. 278).

The Netherlands has implemented a policy in this regard, the question however is whether this policy is sufficient to implement these obligations. Several commentators have argued that doing so requires putting in place a blanket ban on trade with the illegal settlements (see here and here). They also suggest that more might be required, since dealings with Israeli companies that have links to the occupation may also entrench the Israeli presence there or assist in the maintenance of the existing situation. The United Nations Commission of Inquiry on the OPT has interpreted the ICJ's findings to mean, *inter alia*, that States must cease all financial, trade, investment and economic relations with Israel that maintain the unlawful occupation or contribute to maintaining it, and that they must review their trade and economic agreements with Israel that involve products and produce of the unlawful settlements.

Separation of Powers and Margin of Discretion

The Netherlands does not have a political question doctrine like, for example, the United States, or a doctrine of *actes de gouvernement* such as in France. Nevertheless, the Dutch Supreme Court in its case law has developed the idea that the courts should be reticent when dealing with cases involving matters of foreign policy and defense. This doctrine is usually traced back to Supreme Court judgments in cases concerning nuclear weapons in 1989 and 2001. The rationale behind the doctrine is that such cases are closely tied to political choices, which should be made by the executive and the legislative powers and not the judicial power (see, for example, here).

Another factor that plays a role is that the standards that apply to such choices are often more general and less well-defined. Exceptions to the starting point of judicial restraint are cases which concern the execution rather than the formulation of foreign policy and defense, and cases where there are clearly defined norms that allow for a more stringent evaluation.

The court seems to attach a great deal of importance to this doctrine in the case at hand. It states that the question is whether and how the court can evaluate State policy in the field of foreign politics and defense, including arms and trade policy (para. 4.9). It answers this question by stating that such evaluation can take place, but only marginally. The court returns to this doctrine at various points in the judgment to support its rejection of specific claims (paras. 4.18, 4.24-25, 4.28, 4.33, 4.35).

This can be contrasted with the judgment of the Court of Appeal in the F-35 case. In that case, the Court of Appeal was willing to go quite far in evaluating matters of foreign affairs and defense. For that reason, the judgment has been described as unique. At the same time, the literature has generally concluded that the Court of Appeal can take this approach. This was also the conclusion of the Advocate General to the Supreme Court in his opinion of 29 November 2024 regarding the F-35 case pending before the Supreme Court.

In the case at hand, the claimants requested broader, more generic, and unspecified orders from the court than in the F-35 case. Also, some of the legal rules invoked are more discretionary in nature. Nonetheless, we suggest that the difference between the two judgments cannot be fully explained by the fact that different norms applied, which in one case were more well-defined. Although it could be said that Common Article 1 is an example of a less precise norm that arguably does not entail deviating from a reticent approach by the court, this is not the case for the norms that apply to arms exports, namely the ATT and EUCP. The latter norms were applicable in both cases.

Conclusion

By refuting all claims, the court applied a doctrine of restraint in the judicial review of foreign and defense policy and adopted the same reasoning to its review of foreign trade policy. This judgment follows the approach taken by the district court in the F-35 case, likewise allotting the government a broad margin of discretion. The Court of Appeal, however, overruled that judgment.

The intricacies of general arms transfer prohibitions in domestic systems remain a subject for further exploration. The harmonious interpretation of the applicable rules of the ATT and EUCP, founded in Common Article 1, may arguably present a legal basis for a complete halt of arms transfers to a specific recipient. As the court found that a case-by-case (i.e., transfer-to-transfer) arms export assessment suffices to comply with arms transfer law, it did not examine whether Israel as a recipient meets the thresholds to order the Netherlands to adopt a ban on arms deliveries.

Given that the Court omitted to engage with obligations deriving from Common Article 1 and the Genocide Convention, which the claimants relied on, and also did not discuss any effects on third States asserted by the ICJ Advisory Opinion, the judgment leaves several questions unanswered.

The extent of discretionary power in foreign and defence policy, especially arms transfer decisions, and the effective implementation thereof, continue to be questioned in domestic systems. In the absence of international dispute settlement mechanisms to examine issues of interpretation and implementation of international arms transfer regulations, it remains for domestic courts to evaluate State conduct against international obligations, to further clarify requirements, and to give effect to resulting protections.

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