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Dutch Judgment on IHL Compliance in Chora District, Afghanistan

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December 19, 2022

by [Marten Zwanenburg](#) | Dec 19, 2022



On 23 November 2022, the district court of the Hague handed down its judgment in a case brought against the State of the Netherlands by relatives of persons killed during fighting in the Chora district, Afghanistan in 2007 (Dutch language only). The case is unusual because it was decided on the basis of the domestic law of torts but revolved around alleged violations of International Humanitarian Law (IHL).

This post aims to provide an overview of the judgment. The post will focus mainly on allegations concerning the violation of IHL, and less on the part of the judgment that deals with an alleged violation of the duty to investigate under Article 2 of the European Convention on Human Rights (ECHR). To that end, it will first provide some background on the case and the events that led up to it. The post will then describe the judgment itself. It will conclude with a few observations.

Background

This description of the background of the case is based on the district court judgment itself. A [detailed military analysis](#) of the events in Chora by Major Wiltenburg and Captain Leeuwenburg is also available.

From August 2006 to August 2010 the Netherlands, together with Australia, contributed a task force to the NATO-led International Security Assistance Force (ISAF) in Afghanistan. The task force, named Task Force Uruzgan (TFU), deployed to the southern province of Uruzgan. It consisted of a so-called Provincial Reconstruction Team that was essentially concerned with assisting the local Afghan authorities in maintaining and reinforcing their authority in the province, as well as a battle group. The battle group had as its disposal, *inter alia*, a self-propelled howitzer (Panzerhaubitse, PzH).

On 16 June 2007, a large force of Taliban fighters attacked Afghan National Police posts in the Chora district in Uruzgan, including the town of Ali Shirzai which is the district center. The attack pushed back three platoons of the TFU and Afghan security forces in the area and placed them at risk of being overrun.

During the day of 16 June, Dutch units had reported being fired on from the vicinity of the “quala” in which the claimants and their relatives lived, as well as from a point around 800 meters from it. A quala denotes a typical Afghan residential complex that consists of several buildings surrounded by a wall.

By the evening of 16 June, the TFU Commander had to decide whether to abandon Chora or stay and defend it. He chose the latter. During that evening and night (16-17 June), ISAF’s fixed wing and rotary wing aircraft and the PzH each fired on designated locations in the Chora district, in which the majority of the Taliban forces were believed to be concentrated. This fire support was coordinated by the Chief Joint Fires of TFU.

During the night of 16 – 17 June, ISAF aircraft destroyed the quala, killing several relatives of the claimants and injuring one of the claimants.

The Judgment

The claimants brought the case under the Dutch domestic law of torts based on civil law. The relevant provision of domestic law is Article 6:162 of the Dutch Civil Code (DCC). The article reads (in unofficial translation):

1. A person who commits a tortious act against another person that can be attributed to him, must repair the damage that this other person has suffered as a result thereof.
2. As a tortious act is regarded a violation of someone else’s right and an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct, always as far as there was no justification for this behaviour.

3. A tortious act can be attributed to the tortfeasor if it results from his fault or from a cause for which he is accountable by virtue of law or generally accepted principles.

Based on this article and relevant case law, a tort claim must meet five requirements to be successful including: unlawfulness; attributability; loss; causality; and relativity.

The claimants submitted that the tort committed by the Netherlands consisted of the bombing of their houses in contravention of customary rules of IHL, namely the principle of distinction, the proportionality principle, and the duty to take precautions in attack. They also argued that the Netherlands violated article 2 of the ECHR because the investigation into the events was not sufficiently independent and adequate. This claim referred to the procedural obligation to investigate the (potential) use of deadly force which the European Court of Human Rights (ECtHR) has concluded flows from that article.

The principal relief sought by the claimants was a declaration by the court that the Netherlands had acted unlawfully by bombing their houses and their relatives and by not conducting an effective investigation. They also sought reparations for the damages caused by that conduct.

The court first dealt with the Netherlands' argument that the claims were time-barred. In principle, a claim for reparation under Dutch civil law is time-barred five years after the victim has become aware of both the damage and the (potentially) responsible person. A victim can prevent the claim from becoming time-barred by notifying the responsible person within those five years of the claim. The court concluded that the majority of claimants had satisfied this requirement. For one claimant, this was not the case. With respect to this claimant, the court considered that the Netherlands did not have a legal interest in his claim being time-barred because the facts and circumstances relating to that claim were identical to those of the claim of the other claimants, and the latter claim was not time-barred. The specific circumstances of this case therefore warranted an exception to the rule that statutes of limitations must be strictly construed.

The court then dealt with the claim on the merits. It considered that in this case the "act or omission in violation of a duty imposed what according to unwritten law has to be regarded as proper social conduct" referred to in Article 6:162 DCC, was to be given substance by the rules of IHL. The court then focused specifically on the principle of distinction invoked by the claimants. The court started by considering that it was agreed that the principle of distinction applied to Dutch forces during the fighting in Chora, which took place in the context of a non-international conflict in the sense of IHL.

For the contents of this principle, the court looked to the relevant provisions of Additional Protocol I, which the court held constitute a codification of international customary law that applies in all types of conflicts. It then referred specifically to Articles 48, 52 and 57 of AP I.

The court stated that in answering the question whether the principle of distinction in IHL has 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 recalled the claimants' argument that the principle of distinction had not been respected sufficiently in attacking the qala. They submitted that the qala was a residential complex from which no hostilities were carried out, such that it was not a military objective. They also submitted that there were insufficient facts and circumstances for Commander TFU to reasonably conclude that the qala 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 qala and that there was no, or at any rate 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 qala as an enemy firing position, such that it made an effective contribution to military action by its use. It considered relevant that the qala was situated at a strategic location in relation to a choke point and a dry riverbed, 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 qala, and that opposing forces fired from the vicinity of the qala around midday. The court considered that the fact that a Dutch platoon took fire from a location around 800 meters from the qala at the end of the afternoon of 16 June could not have reasonably contributed to qualification of the qala as a military objective. The same was the case for the fact that possible Taliban fighters had been spotted and engaged in the riverbed around 400 meters from the qala around the same time.

The court concluded that the only relevant circumstances were that there had been firing from the vicinity of the qala 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 qala. In addition, the presence of opposing forces around the qala 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 qala. 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 that there had been

intelligence was insufficiently concrete. According to 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.

On this basis, the court held that it must be assumed that the quala was bombed without respecting the principle of distinction, and thus unlawfully. In this context the court considered relevant that the conduct concerned was attributable to the Netherlands, which had full command over its own troops and was the red card holder (target approval authority) for those troops.

In an *obiter dictum*, the court underlined that it did not express a view on whether the bombing constituted a war crime. Apart from the fact that a breach of IHL is not necessarily a war crime and such a determination is not for the civil courts to make, it emphasized that it did not establish that the quala was a civilian object nor that at the relevant time there was insufficient information on the basis of which a reasonable commander could have qualified the quala as a military objective. Rather, it only held that given the insufficiently motivated contestation by the Netherlands, it must be assumed that at the time of the bombardment there were insufficient grounds on which a reasonable commander could regard the quala as a military objective.

The court held that in view of its conclusion on the principle of distinction, there was no need for a further appraisal of the alleged violation of the principle of proportionality or the duty to take precautions in attack.

With respect to the claim based on Article 2 ECHR, the court noted that for the article to be applicable, it was necessary to establish that the Netherlands exercised jurisdiction in the sense of Article 1 ECHR over the area in which the quala was situated. The court then—seemingly contradicting that narrow statement focusing only on control over an area—concluded that the parties agreed that neither of the accepted grounds for the exercise of extraterritorial jurisdiction in the case law of the European Court of Human Rights (ECtHR) was applicable. These two grounds are effective control of an area and authority and control over a person.

The court then focused on a third ground that has been developed by the ECtHR in recent years, namely special features of a particular case. The claimants had pointed to a number of special features which they considered to establish jurisdiction, including the fact that the Dutch public prosecutor had investigated the case, and that the Rome Statute of the International Criminal Court required such an investigation (an apparent reference to the complementarity principle in that Statute). The court concluded that there were insufficient special features to conclude that the Netherlands exercised jurisdiction in the sense of Article 1 ECHR.

Based on the above, the court declared that the Netherlands had acted unlawfully in respect of the claimants and that it was responsible for the damage. The court rejected the Article 2 ECHR claim.

Observations

As stated above, this post aimed to describe the judgment rather than offer an analysis. However, a few brief observations can be made. First, the case revolved around the burden of proof. Essentially, the Netherlands was held responsible because it could not adequately rebut the claimant's submission that there was insufficient basis in 2007 to qualify the quala as a military objective. This approach imposes a heavy burden on the State in terms of recording and preserving relevant information in a situation of armed conflict. It has been noted that recording information is an important step in the context of the duty to investigate alleged violations of IHL.

But it is also recognized that the scope of recording may depend on the feasibility of doing so in the circumstances. In this respect, the intelligence that the Netherlands argued was likely available at the time is illustrative. The court noted that the Netherlands was put on notice by the claimants within five years after the events, and therefore could and should have taken into account the possibility that it might have to furnish information in a legal procedure. However, the court's argument does not address the question exactly which information must and can reasonably be recorded contemporaneously. In this sense, the judgment may be an illustration of the fact that IHL is better suited to being applied on the battlefield than in the courtroom, as pointed out by Rogier Bartels elsewhere.

Second, the case shows the "openness" of Dutch torts law to claims brought on the basis of international law, including against the Dutch government. Earlier examples in Dutch case law are against the Netherlands relating to the fall of Srebrenica, decided mainly on the basis of alleged violations of human rights (but in which violations of IHL were also alleged). Under Dutch torts law, there is no comprehensive bar to cases brought against the government relating to armed conflict, such as a doctrine of act of State.

Third, it is noteworthy that the conclusion of the court focused on the IHL principle of distinction. The analysis by the court however seems to focus on the duty to take precautions more so than the principle of distinction. If the court would have framed the issue in that way, it could have avoided the awkward *obiter dictum* concerning war crimes.

Finally, it is striking how little attention the judgment pays to the issue of attribution. The court simply notes that there is no discussion between the parties about the fact that the Netherlands retained full command over its own troops and was red card holder for those troops. The quala was destroyed by air assets, rather than by the PzH. Nowhere in the judgment is clear that the air assets used were (exclusively) Dutch. In any event, air assets were under the command of the NATO commander Regional South. At the time of the

fighting in Chora, this was a British Major-General. Against this background, it might have been expected that the court would devote more than one sentence to the question of attribution.

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Photo credit: Gerben van Es/Ministerie van Defensie

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