Appeals judgment in case concerning the shipment from the Netherlands of Parts for F-35 Fighter Aircraft to Israel

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Introduction

On 12 February, the Appeals Court of the Hague in the Netherlands handed down its judgment in a case concerning the shipment of U.S. owned spare parts for F-35 fighter aircraft from a warehouse in the Netherlands to Israel (see here, only available in Dutch). The Court of Appeal held that the Netherlands must take adequate measures within a week to stop the further shipment of F-35 parts to Israel. The judgment resulted from an appeal lodged against the judgment of 15 December 2023 of the district court of the Hague in summary proceedings (see here, only available in Dutch).

This blog post discusses the background to the appeals judgment, the judgment itself, and highlights some of the key issues and implications of the judgment.

Background to the shipment of F-35 parts, applicable law and the judgment at first instance

The Netherlands and Israel are both participants in the F-35 programme. One of the regional logistic 'hubs' established as part of the programme for the maintenance of F-35s is located in the Netherlands. In the Netherlands, the export, transit, and transfer of strategic goods, which include F-35 parts, is regulated by the Strategic Goods Decree (hereinafter: SGD). This decree requires a license for the shipment of strategic goods from the Netherlands and provides for three types of licenses: individual, global or general. In 2016 the Minister for Foreign Trade and Development Aid issued a general license for the export, transit, and transfer of strategic goods in the context of the F-35 programme, General License NL009 (hereinafter: the license). The SGD provides that a license cannot be granted where this flows from international obligations of the State. This particular provision was inserted in the SDG following the adoption of the Arms Trade Treaty (ATT). The ATT in Article 6 provides *inter alia* that a State Party shall not authorize the transfer of arms or parts covered by the treaty if the transfer would violate its relevant international obligations under international agreements to which it is a Party (paragraph 2), nor "…if it 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" (paragraph 2). Article 7 ATT provides *inter alia* that if export is not prohibited under Article 6, the State Party must assess the potential that the conventional arms or items would contribute to or undermine peace and security or could be used to commit or facilitate a serious violation of international humanitarian law or to commit or facilitate a serious violation of international human rights law (paragraph 1). Under article 7 the State must also consider measures to mitigate any risks identified (paragraph 2).

If, after conducting this assessment and considering available mitigating measures, the exporting State Party determines that there is an overriding risk of any of the negative consequences in paragraph 1, the exporting State Party shall not authorize the export (paragraph 3).

In 2015, the government amended the SDG to implement the ATT. Consequences for Dutch licensing practice were limited, however, as license applications were already assessed against the criteria set out in EU Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment (hereinafter: EUCP), which more or less reflect the criteria in Articles 6-7 ATT. Notably, Criterion Two of the EUCP provides inter alia that:

"Having assessed the recipient country's attitude towards relevant principles established by instruments of international humanitarian law, Member States shall […] deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of international humanitarian law."

In the EU, the trade in arms and other military items is considered a national responsibility as it impacts national security (see: Article 346(1)(b) Treaty on the Functioning of the European Union, TFEU). Therefore, the EU cannot adopt Regulations under the TFEU which would be directly applicable to all Member States. Instead, the EU has adopted an intergovernmental EUCP under the Common Foreign and Security Policy as some level of coordination between Members States was considered necessary. Adopted under Article 29 of the Treaty on European Union, it is not a legislative act in terms of the TFEU, such as Regulations and Directives. Still, it is binding on the EU Member States as they are required to ensure that their national policies conform to it. Consequently, Member States have a wide margin of appreciation taking into account essential interests of their national security when assessing the application of arms export licenses. In practice, this leads to Member States making very different considerations, with one state denying a license while another state allows the export in the same situation.

The license has no expiry date. It provides in Article 8 for the possibility that the license may no longer be used if the Minister for Foreign Trade and Development Aid has notified the registered user or the person with power of disposition that considerations of integrated foreign policy or security stand in the way of continued use of the license.

Background to the case and judgment of the district court

The case originated in a summons in summary proceedings under Dutch civil law by three civil society organizations against the State of the Netherlands (hereinafter: “Oxfam Novib et al). In their summons, the three organizations argued that by allowing the shipment of parts for F-35 fighter aircraft from the Netherlands to Israel, the State is violating national and international arms export regulations as well as the Genocide Convention, International Humanitarian Law (IHL)- in particular common Article 1 of the Geneva Conventions – as well as the prohibition under general international law of aiding or assisting the internationally wrongful act of another State. The main request put forward by the claimants was for the court to order the State to take all necessary measures to cease the shipment of F-35 parts from the Netherlands to Israel.

The judgment of the district court was discussed on this blog (here) and elsewhere (see inter alia here), and will only be briefly summarised here.

The district court rejected the claims of the applicants. The court considered that neither domestic legislation, nor the Common Position or the ATT require a fresh review of the license after new information became available. The court did find that under IHL, the Genocide Convention and general international law there is an obligation to determine whether there is reason to intervene when the State becomes aware of new relevant information. This obligation however does not require, in the view of the court, a review based (only) on the criteria in the EUCP.

Another important holding was that in cases concerning questions of (national) security and foreign policy, the State has a wide margin of appreciation. Taking this margin into consideration, the district court held that the Minister of Foreign Affairs could reasonably have concluded that there was not a clear risk of serious violations of IHL through the use of the F-35.

The judgment on appeal

The Court of Appeal reversed the judgment of the district court, concluding that the Netherlands must take adequate measures within a week to stop the further shipment of F35 parts to Israel. In arriving at this conclusion, it adopted most of the arguments made by Oxfam Novib et al. First, it concluded, based mainly on reports by Amnesty International and Special Rapporteurs of the United Nations Human Rights Council, that there are many indications that Israel has violated IHL in Gaza since 7 October 2023 in a not inconsiderable number of cases. It is worthwhile quoting from the judgment at some length in this context, where the Court stated (translation by the authors):

“It emerges from the facts that there have been large numbers of civilian victims including thousands of children, that thousands of residential houses have been destroyed, that ‘dumb bombs’ are used, that every residential area is attacked if there is only the slightest indication

that terrorist activity takes place there, that limits used previously in respect of ‘collateral damage’ have been loosened in the present conflict, that the policy to warn civilians prior to an attack has been discontinued, that drinking water facilities, bakeries and a grain mill have been destroyed, that a hospital (the Al-Indonesi hospital) has been bombed and that many of the hospitals in Gaza no longer function. That this destruction has been visited only on military objectives or constitutes ‘collateral damage’ is, not only considering its unprecedented scope, but also considering the statements by Israeli military personnel, unlikely.”

Taking this prior conduct into account, it concluded that there is a clear risk of serious violations of IHL by Israel in Gaza in the future with the use of F-35 parts. Second, the Appeals Court disagreed with the district court and the State that a fresh review of the Licence after 7 October 2023 was unnecessary. In the view of the court, not requiring a fresh review in a situation in which the circumstances have changed considerably would undermine the goal of the EUCP and the ATT, by allowing states to issue long-term licenses that would never have to be reviewed no matter how much the circumstances changed. It would also violate the obligation to “ensure respect” for IHL in all circumstances in common Article 1 of the Geneva Conventions, according to the Court. The Court considered that in fact the minister of Foreign Affairs did make a fresh determination. However, according to the Court, she did not apply the correct standard in doing so. The minister should have applied the criteria in the EUCP and ATT. If one of the criteria for rejecting permission for shipment applied – which the Court considers was the case – she should have concluded the review there. It thus rejected the framework for review taking into account other considerations, notably concerning foreign policy and the economy, that the State applied and the district court sanctioned. The Appeals Court found that there was no room for such other considerations once one of the grounds for refusal in the EUCP or ATT applied.

The Appeals Court rejected the argument put forward by the State that the EUCP and ATT apply between States and cannot be invoked directly by individuals under Dutch domestic law. It pointed out that the SDG refers to both, thereby importing their standards into domestic law. It also held that the court must interpret the SDG in such a manner that is in conformity with international law.

It also rejected the other arguments put forward by the State, including that it should be granted a broad margin of appreciation in matters concerning foreign policy and (national) security.

It is unclear why the Court did not engage with the arguments of the appellants that the shipment of F-35 parts should (also) be stopped because of a real risk of serious human rights violations and genocide. Indeed, it is notable that the judgment fails to refer to the provisional measures ordered by the International Court of Justice on 26 January in Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel).

Key points in the judgment

The judgment raises a number of important issues that merit discussion. Because of the limited space available in this blogpost, we limit ourselves to a brief analysis of three key points.

One interesting point in the judgment is its discussion of the role of the EUCP and the ATT in the Dutch legal order. The Court grants these instruments an important role in interpreting the SGD. Considering that the SGD is largely aimed at implementing these instruments, this is surely correct. The State had argued that neither the EUCP nor the ATT have "direct effect" on the Dutch domestic legal order. This refers to a doctrine in Dutch Constitutional law, which reflects the so-called "moderate monist" nature of the Dutch legal order. Under Article 93 of the Constitution, "Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published." In principle, only international obligations that have this nature, or in other words that have "direct effect", may be invoked directly before a Dutch court.

As the Court correctly held, however, the issue here is not whether the EUCP and ATT have "direct effect", but whether the SDG must be interpreted in line with the instruments which it implements. The fact that the EUCP and the ATT do not prescribe in detail how they must be implemented by States does not change this. The Court correctly noted the fact that the SDG refers to the norms in the EUCP and ATT, in the sense that the SDG provides that a license will not be issued where this flows from international obligations of the State. Domestic case law and government documents concerning the 2015 amendment of the SDG make clear that these "international obligations" mainly concern the EUCP and the ATT, thus importing these instruments into domestic law. The government documents do not, however, explicitly clarify that the government intended to waive its margin of discretion in assessing applications for arms export licenses. In particular, one would have expected the government to reflect on its decision to rely on a strict legal assessment denying itself the ability to take national security interest into account. The Appeals Court also refers to the doctrine in Dutch case law of "treaty conform" interpretation of Dutch law. According to this doctrine, rules of domestic law are, where possible, to be interpreted in such a way that they do not violate international obligations of the State. This doctrine was reaffirmed for example in the well-known judgment of the Dutch Supreme Court in the Urgenda case.

A second key point is what the judgment has to say on the obligation to "ensure respect" for IHL. Oxfam et al invoked common Article 1 of the four Geneva Conventions of 1949, which provides that the parties to those Conventions "undertake to respect and ensure respect for" those Conventions in all circumstances. They argued inter alia that based on the obligation to "ensure respect", States have a positive obligation to take all measures within their power to prevent violations of IHL and if necessary stop them. It followed from inter alia that obligation, they further argued, that the State was obliged to stop the shipment of F35 parts.

There is much controversy on the question whether the obligation to “ensure respect” has an “external dimension”, in the sense that it obliges States to ensure respect for IHL by other States rather than itself. States appear divided on the answer to this question, as well as on the question what precisely such an external dimension would require if it does exist. The literature is also divided, with some commentators rejecting such an external dimension (see here and here) and others, including one of the authors of this post, accepting such a dimension (see here). Another controversial issue is whether if there is such an external dimension, it only requires negative action in the sense of not supporting or inciting violations of IHL or whether it also requires positive action.

Until recently the Netherlands did not take a clear position on these questions. In a recently published document, however, the Dutch Government accepted that there is such an external dimension, and seems to suggest that it requires positive action. The Court of Appeal agrees, and concludes that it would be irreconcilable with the obligation to “ensure respect were a State to be able to close its eyes to serious violations of IHL and would refuse to draw consequences for a license for the shipment of arms to a State committing such violations. The Court here takes a clear position not only on the interpretation of common Article 1, but also on a concrete measure which it may require in particular circumstances. In doing so, it refers to the User’s Guide to the EUCP, which appears to support a similar interpretation (para. 2.13).

A third key point is the way in which the Appeals Court comes to the conclusion that there is a “clear risk” of serious violations of IHL by Israel. As noted above, for this conclusion, the Court largely relies on the views of Amnesty International and UN Special Rapporteurs concerning the lawfulness of targeting operations by Israel in the conflict so far and seems to extrapolate a risk for the future from that. The State had contested the expertise of these institutions and/or their access to the kind of operational information that would allow the drawing of conclusions on whether the rules of distinction, proportionality and precautions have been respected. The Appeals Court held that the views of Amnesty and UN Special Rapporteurs should be taken seriously. This may be the case, but it does not address the point that these institutions, like the State, do not have access to (Israeli) operational information that is necessary to draw firm conclusions on the legality of certain targeting operations. The mere fact, for example, that almost half of the bombs used by Israel are “dumb” bombs, which is one of the “facts” drawn from the reports of those institutions by the Court, does not in itself justify such a conclusion. It is true that, as the Appeals Court states, a conclusion that there is a ‘clear risk’ of future violations does not require certainty concerning whether past actions violated IHL. But even on that standard, the conclusions drawn by the Court seem quite far-reaching.

Conclusion and implications

The judgment of the Court is far from equivocal, and potentially has far-reaching obligations for the possibility for the Netherlands to grant licenses to ship strategic goods to other States in the future. It is, therefore, not surprising that the State has already announced that it will lodge an appeal with the Supreme Court. The Supreme Court notably does not review the facts found by lower courts, which will make it difficult to assail one of the arguably weaker points in the judgment, namely the relative ease with which the Appeals Court found that there is a serious risk of serious violations of IHL by Israel in the conduct of targeting. It will be interesting to see if the judgment will play any role in similar procedures that have been initiated in other States, such as the ones in the UK and the US.