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Publication date

2023

Document Version

Final published version

[Link to publication](#)

Citation for published version (APA):

Sluiter, G. (2023). Are Dutch government officials complicit in war crimes committed by Israel?. Web publication or website, Rethinking SLIC.
<https://www.rethinkingslic.org/blog/criminal-law/176-are-dutch-government-officials-complicit-in-war-crimes-committed-by-israel>

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Criminal law

23.11.2023

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Are Dutch government officials complicit in war crimes committed by Israel?

***T**his piece was originally published on [Nederland Rechtstaat](#) on 14 November 2023

Recent coverage by the [NRC Handelsblad](#) reveals that the Netherlands supplies spare parts for Israel's F35s – a type of combat aircraft. Despite warnings from legal advisers that through this supply the Netherlands would facilitate war crimes committed by Israel, the deliveries are ongoing.

In this blog post, I answer the question whether the cabinet, in particular the most involved ministers, namely Rutte (general affairs), Bruins Slot (foreign affairs), and Schreinemacher (foreign trade), are complicit under Dutch criminal law in war crimes committed - and yet to be committed - by Israel.

In answering this question, three points are of particular importance.

First, complicity only arises if war crimes are in fact being committed by Israel. Judging from the coverage of the conflict and numerous [reports](#) from humanitarian and human rights organizations, Israel's actions in the war following October 7th take little or no account of the vulnerability of civilians in Gaza. Both the method of warfare chosen by Israel, resulting in a very high number of civilian casualties, as the overall failure to take measures to spare civilian losses as much as possible would on the basis of relevant jurisprudence of international criminal tribunals need to be treated as serious violations of international humanitarian law. As far as I am concerned, there is strong evidence of a multitude of indiscriminate attacks affecting the civilian population and civilian objects, knowing that these attacks cause excessive loss of life and injuries to non-combatants. Such attacks constitute war crimes under international law (ICC Statute) and under Dutch criminal law (International Crimes Act).

The second issue pertains to whether the Dutch ministers have provided assistance to a crime committed by another person, as punishable under Article 48 of the Penal Code. Under Dutch criminal law, this assistance need not be a condition for the commission of the crime, but it must have facilitated it in *some* way. (Supreme Court, 8 January 1985). It could be argued that by exporting spare parts of F35s, Rutte et al. have not -yet- made an actual contribution to committed war crimes. After all, it remains to be seen whether the spare parts supplied were actually used in attacks on the civilian population of Gaza; perhaps they are still in a warehouse somewhere.

However, relevant jurisprudence suggests that for complicity in war crimes, it is not necessary to have *actually* contributed to the concrete offences committed. (Cases of *Van Anraat* District Court The Hague, 23 December 2005, Court of Appeal The Hague, 9 May 2007, Supreme Court 30 June 2009 and *Kouwenhoven* Court of Appeal Den Bosch 21 April 2017, Supreme Court 18 December 2018)

In fact, it can be sufficient that the military capability is strengthened of a warring party in respect of which there are serious indications of it committing war crimes. Therefore, whether and when military assistance (the supplied F35 components) is used in combat operations does not matter.

By comparison, Kouwenhoven was convicted of complicity in war crimes for supplying weapons (including AK47s) to the troops of former Liberian president Charles Taylor, who are guilty of killing and raping civilians on a significant scale. However, it was not considered necessary to prove that the weapons supplied by Kouwenhoven were *actually* used in the killing of civilians. I do not see why a different standard should apply in respect of military support to Israel.

The third key question is whether the Dutch ministers provided military support to Israel after October 7th with the prerequisite mental element. In the case of complicity, a double intent is required. Under Article 48, the assistance must have been provided intentionally and it must have been provided with the intent – whether conditional or not – to facilitate the crime (Supreme Court 19 December 2017).

There is no doubt that the Dutch ministers intended to provide assistance to the Israeli armed forces.

Hence, the crucial question is whether intent was also aimed at committing war crimes. At first glance, the answer seems to be in the negative, as the Dutch government continuously stresses the need to comply with humanitarian law. But this is not just about direct intent aimed at facilitating war crimes; under Dutch criminal law a conditional intent construction can be used, meaning that a defendant with their assistance accepts (or: knowingly and willingly accepts) the substantial likelihood that their contribution will facilitate the commission of crimes.

How this conditional intent when giving military support to a warring party guilty of war crimes can be constructed is demonstrated by the Kouwenhoven case:

In view of the foregoing, the court of appeal is of the opinion that the accused (i) by importing arms and ammunition for the benefit of Charles Taylor's regime, (ii) by handing over armed personnel to the Liberian combined forces, (iii) by providing lorries and drivers, (iv) as well as by providing the RTC camp Bomi Wood, knowingly and intentionally exposed himself to the substantial chance that thereby war crimes and/or crimes against humanity would be committed by third parties. This applies both to the crimes involving direct use of weapons and ammunition (such as shooting at civilians) and indirectly, where use was made of the threat of weapons and/or by the armed group (such as rape and looting).

The court assumes in this respect that the accused, notwithstanding his statements regarding his knowledge about this, was familiar with the - also then widely known - violent character of (the armed fighters of) the regime of Charles Taylor.

By making weapons, personnel and equipment available to that armed struggle under those circumstances, the accused, in the opinion of the court of appeal, knowingly accepted the chance that war crimes and/or crimes against humanity would be committed. (Court of Appeal Den Bosch 21 April 2017, L.2.5)

One could seamlessly apply this analysis and verdict to Rutte et al. In this contemporary information era, Dutch ministers must have very quickly become familiar with Israel's violent -and punishable- modes of warfare. At some point in the days after October 7th, the cabinet must have known that the -continued- military support for Israel would risk facilitating the commission of war crimes. As such, I believe that conditional intent can reasonably be inferred.

There are additional factors that support this assumption of conditional intent. First, the Dutch ministers cannot hide behind blind faith in Israel's compliance with humanitarian law, and thus claim that they did not know of a risk of facilitating the commission of war crimes. In this respect it is significant that, according to reports in the NRC, legal advisers have vehemently pointed out the risks of continued military support to Israel. Willfully disregarding these warnings makes even more evident that they willingly assumed the risk of aiding and abetting the commission of war crimes.

There are other relevant factors to be considered. Preceding the aforementioned warnings from legal advisors, the Dutch government was already aware of Israel's continuous and structural violation of international and humanitarian law in its treatment of Palestinians. Hence, well before October 7th, there was every reason for exercising caution regarding any military support for Israel. In 2004, the International Court of Justice ruled that Israel was violating international and humanitarian law in its treatment of Palestinians; a ruling that Israel has never recognised or implemented in any way. As of 2021, the Prosecutor of the ICC is investigating war crimes and crimes against humanity committed by Israel and by other parties involved, such as Hamas, from 2014 onwards. Such an investigation only takes place if the Prosecutor considers that there is a reasonable suspicion that those international crimes were committed on the territory of Palestine (Gaza, West Bank, including East Jerusalem).

Lastly, there were already clear warning signals issued from within the Netherlands that one should be extremely cautious about military -and logistical- support to Israel, insofar as such assistance could be used in the commission of international crimes. More than a decade ago, the Public Prosecutor's Office conducted criminal investigations into the crane rental company Riwal for complicity in war crimes committed by Israel. The criminal investigation triggered searches; because Riwal rapidly ended its support to Israel the prosecution was not pursued. In a press release on the Riwal investigation, the Dutch Prosecution Service stated: "Dutch companies are required not to be involved in violations of the International Crimes Act or the Geneva Conventions in any way." I wholeheartedly agree and this also applies to the Dutch government and its relevant ministers.



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