Prakken d'Oliveira

District Court of The Hague
Case number: KG ZA 23-991
Session: December 4, 2023, 10:00 am

Oral act

Regarding

min

Oxfam Novib et al.
located in The Hague
Plaintiffs

Lawyers: Mr. L. Zegveld and Mr. T.J.R. van der Sommen

In return for:

The State of the Netherlands based in
The Hague

Lawyers: Mr. R.W. Veldhuis and Mr. E.V. Koppe

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1. F-35 DELIVERIES to ISRAEL

1. After October 7, Israel placed an order with the F-35 European Regional Warehouse. Customs made a report to the Ministry of Foreign Affairs: did the Minister want to stop this delivery in view of the war in Gaza? She did not want that, and she still doesn't want that. The warning that the fighter planes could contribute to serious violations of humanitarian laws does not outweigh the State's economic interests and diplomatic reputation.

2. BOMBING OF GAZA: VIOLATIONS OF HUMANITARIAN LAW AND (THREATENED) GENOCIDE

2. The Israeli Air Force has been using F-35 fighter planes to bomb Gaza since early October.
3. By 12 October 2023, Israel had dropped 6,000 bombs. By 1 November, more than 10,000 bombs were dropped on Gaza City alone.
4. The IDF explicitly says it is targeting residential areas in its air strikes. In one month, 45% of all housing units in the Gaza Strip were damaged or destroyed. 1.8 million people have been displaced.
5. According to the latest figures, the total death toll in Gaza is more than 15,207 people. In two months, more civilian deaths have occurred in Gaza than in Ukraine in two years. This number is increasing every day. More than 6,000 children have died. The UN Secretary General has said that “Gaza has become a graveyard for children.”
6. IDF bombs hospitals; 25 of the 36 hospitals are out of use, according to the WHO. It bombs water supplies, and cuts off fuel that runs water plants, resulting in hundreds of thousands of residents in Gaza experiencing severe water shortages. Between 7 October and 21 October, 0 relief supplies entered Gaza, a total blockade, prohibited under international law.
7. The Israeli army therefore makes no distinction between civilians and military targets during the war as required by humanitarian law, and it consciously does not do so. On 1 November 2023, the Minister of Defence says on television that Gaza is one large Hamas base.
8. The IDF spokesperson says that:
   “the emphasis is on damage and not on accuracy”.
9. Minister of Defence indicates in a speech to Israeli troops in the Gaza Strip:
   “I have released all the restraints”.
10. The Minister of Heritage stated on November 5 in a radio interview, quoted from the Israeli newspaper Haaretz:
    "there are no non-combatants in Gaza"
11. It goes even further. The statements show the intention to exterminate the people of Gaza. The Minister of Finance said:
    “We need (…) to take down Gaza.”
12. On 9 October, the Defense Minister said:
    “We are fighting human animals and we are acting accordingly”.
13. On 13 October, the Defence Minister said:
    “Gaza won’t return to what it was before. We will eliminate everything.”
14. On 28 October, Netanyahu refers to “Amalak” during a press conference. That is a call to eradicate the enemy of the Israelis.
15. As early as 19 October, UN special rapporteurs warned the international community of the risk of genocide in Gaza by Israel. Israel has the military capacity to realize this, they warn: “That is why our early warning must not be ignored”.
    “The time for action is now. Israel’s allies also bear responsibility and must act now to prevent its disastrous course of action.”

3. VIOLATIONS BY THE STATE OF ITS INTERNATIONAL OBLIGATIONS AND EXPORT RULES

16. The State must immediately stop its supply of F-35 parts to Israel. This is his duty under

Common Article 1 of the Geneva Conventions, under the Genocide Convention to prevent genocide, and his duty under export regulations.

17. The State's claim that we cannot determine with certainty whether violations are taking place is nonsense. The minimal selection of facts I just cited shows the State's familiarity with the enormous destruction of infrastructure and civilian centers in Gaza.
18. The State also says it takes the statements of various high UN representatives, NGOs and academics about serious violations of the laws of war "extremely seriously". The State also says: "The Cabinet is very aware of the horrible reports that from Gaza since 7 October". The State calls the general blockade a violation of the laws of war and possibly a "war crime".
19. The United States said on Saturday that too many Palestinians are being killed in Gaza and that Israel must do more to protect them.
20. Moreover, UN investigative committees have established numerous times in the past that Israel has committed war violations and even war crimes in Gaza. A point that the Foreign Affairs lawyers also point out.
21. The fact that the State itself does not want to specifically name what Israel is doing is something else. The State consciously avoids any attempt to identify possible violations.
22. The State does not do this in other wars, for example in Ukraine or Sudan. The State usually makes its own assessment of the behavior of conflict parties based on its own intelligence and analysis. This own analysis is used by the State to draw up policy, for example arms export policy.
23. But with regard to Israel, the State believes that it is up to the parties themselves, or the judge, to determine whether rules are being violated. The internal irritation was therefore enormous when the own Defence Attaché at the Dutch Embassy in Tel Aviv explicitly stated that the IDF violates the laws of war.
24. The disqualifications of the countless United Nations sources used by the State in its response are embarrassing for the Netherlands and for the international legal order that it largely depends on the UN.
25. This conduct is in itself unlawful. Consciously not gathering information yourself and undermining authoritative sources is a violation of the duty under humanitarian law to induce Israel to comply with the rules.
26. Be that as it may, establishing with certainty violations involving F-35 fighter aircraft in the current conflict is legally irrelevant. And is therefore wrongly – possibly even consciously – stated by the State. After all, the obligations under international law and our export regulations do not depend on formal recognition of violations by the government or by a judge.
27. If it were otherwise, states could avoid any responsibility by not making any findings.
28. The International Court of Justice, in its interim measures in The Gambia v. Myanmar in January 2020, determined that there was no requirement to establish violations under the Genocide Convention. What mattered was that:

    > "the acts complained of […] are capable of falling within the provisions of the Genocide Convention".

29. The export regulations also oblige the State to stop the supply of weapons if it is clear there is a risk that these contribute to violations.
30. This is what the EU Common Position (EUCP) says. The Strategic Goods Decree (BSG) and Regulation NL009 are subordinate regulations and must be applied in line with the Common Position.

4. THE MANDATORY TESTS UNDER THE EU COMMON POSITION, THE STRATEGIC GOODS DECREE AND THE NL009 REGULATION

31. The BSG stipulates that a permit – including a general permit such as the NL009 – will not

be granted insofar as this results from international obligations.

32. The Court of Appeal in The Hague has determined that these are in any case obligations under the EU Common Position, the eight criteria.
33. Criterion 1 of the EU Common Position stipulates that an export license will be refused if this conflicts with international obligations of the Member States, including the Arms Trade Treaty.
34. Criterion 2 states that an export license will be refused if there is a “clear risk” that the goods “will be used in the commission of serious violations of international humanitarian law.”
35. These criteria alone (but also the others that we discussed in the summons) stand in the way of exports to Israel. The first 4 criteria are prohibition criteria, where a negative assessment of one criterion leads to refusal.
36. For comparison, another case, Yemen. Following the conflict in Yemen, the State carried out “an extra critical assessment” in 2016, after which a number of countries were excluded under the general permit NL007 (from 2012). Reason for this:

    > “Since there is a real chance that the 'less sensitive' military equipment, to which […] NL007 applies, will also be used in the fight in Yemen or in human rights violations.”

37. In light of these criteria, the Minister should have used her authority under Article 8 of the NL009. Both F-35 notes from the ministry repeatedly state:

    > “that there is a clear risk of serious humanitarian violations under the laws of war as a result of the use of the goods”.
    >
    > The verdict must therefore be: the F-35 export license with Israel as final destination is contrary to the criteria of the EU Common Position and is therefore unlawful.

38. Now that the State has not carried out that test under the EU Common Position, your assessment must be the same.

    > *“As explained in the answer to question 4, there is no regular arms export test for the onward supply of military goods that fall under the multi-year general license NL009."53 [bold in original]

39. The Minister cannot circumvent this mandatory test by creating a different type of permit and testing more or differently than the 8 criteria. The fact that the State fails to test against higher regulations must be fully assessed, and not marginal. After all, it is not about the content of the test itself, but about the fact that the State fails to comply with higher regulations. The Court was also clear about this in 2022.
40. To be clear: we do not dispute the authority to establish a general permit. What we are saying is that the 8 criteria cannot be circumvented by limiting the assessment moment to the moment of establishing a general permit. In this case, that was in 2016. No assessment was carried out at that time either. Pointing out the legal obligation to do so and an assessment by the United Kingdom are not sufficient. However, the UK does appear to be assessing against the EU Common Position.
41. Never to test again after 2016 is clearly contrary to the purpose and scope of the EU Common Position and completely undermines its effectiveness.
42. Directive 2009/43/EC ensures that before export to a third country there is always a Member State that checks against the EU Common Position. And by the way: individual permits that have already been issued can also be revoked at any time.
43. The bottom line is that the State must be able to intervene if a situation arises that requires it under the EU Common Position.
44. If the Minister does not use her authority under Article 8, the ministerial regulation must be adjusted. The State also recognizes this:

> "The second method is for the cabinet to amend the General Permit Regulation NL009 itself so that Israel is excluded as a destination from the general permit. This requires adapting a Ministerial regulation."

45. That it is possible is evident, for example, from the fact that in 2016 the Minister excluded Yemen, Saudi Arabia, the United Arab Emirates and Qatar as a final destination under the general transit permit NL007.. This is due to the real chance of use in the fighting in Yemen or in case of human rights violations. Egypt will be excluded in 2019, and Turkey and Ukraine in 2020.
46. So anything is possible. It all has to be done under the EU Common Position.

5. ARGUMENTS FOR NOT EXCLUDING ISRAEL AS A FINAL DESTINATION OF THE NL009 SCHEME

47. The criteria must be tested against the left or right. The Court said:
> "The Common Position, with its precise and partly mandatory regulations, leaves no room for policy freedom for individual Member States outside the provisions of the Common Position."
48. Less strict sub-requirements at national level – as possible in Article 8 of NL009, which refers to integral foreign policy or security considerations – are therefore not allowed.
49. Once again I point out that the Minister himself has already said that criterion 2 has been met. This already means that allowing exports is contrary to the EU Common Position and we do not have time for further arguments.
> "Despite the clear risk identified by DJZ that Israeli F-35s are involved and/or become involved in violations of humanitarian law, option A advises not to intervene in the operation of the NL009."
50. I will nevertheless consider the other arguments put forward by the Minister and assess them in the light of the mandatory 8 criteria.
51. I hereby follow the order of the second F-35 memoranda, not the conclusion of the answer, but the same arguments are in both documents. In this F-35 note we read:
> *"DVB advises to choose option A in view of"*.
52. "The Importance of the F-35 in Israel's Regional Security Strategy." However, the fourth criterion of the EU Common Position works exactly the other way around: it is a compelling ground for refusal if the recipient country uses the weapons for territorial claims, taking into account "the need not to significantly adversely affect regional stability". Given Israel's evident military supremacy in the region and the US security guarantees, recently confirmed, this does not seem to be in question at all. In addition, this criterion cannot be a basis for allowing exports now that several other criteria are negative.
53. The State links this to Israel's right to self-defence. That is Criterion 5 of the EU Common Position. The question is whether Israel, as an occupying power, has a right to self-defence, but in any case it must adhere to the rules of necessity and proportionality. More importantly, Criterion 5 cannot carry any weight, because it stipulates that the security interests of friendly countries "should not influence the application of the criteria for compliance with human rights".
54. A second argument of the Minister for not stopping exports would be that this would affect all countries participating in the F-35 program.
> **"If you use the authority under Article 8 of the General Permit Regulation NL009, this means that companies must submit an individual permit application to Customs for all transactions under the F 35 program. The regular arms export control procedure based on a test against the European arms export policy then applies."*
55. Of course that is not the case. "A general export license may be established subject to restrictions and regulations and conditions may be attached to it," states Article 13(2) BSG. And this is also evident from the example I mentioned of exclusions of different countries

at different times under the NL007. Nowhere does it state - not even in Article 8 of Regulation NL009 - that this must be an all-or-nothing arrangement. The Minister may at any time use her authority under Article 8, exclusively with regard to transit or export to Israel.

56. This so-called legal obstacle did not exist in the first F-35 memorandum either.73 It stated:
    "If you make use of this authority, companies must also submit an individual permit application to Customs for transactions under the F-35 program if the goods are going to Israel."
    "Temporarily excluding Israel is considered undesirable, because this temporary nature implies that over time it can be said that these risks no longer exist. This is considered unlikely given the volatile situation in the region."
57. It was only after the NRC publication, that a second memorandum was issued stating the so-called legal impossibility of adapting Regulation NL009 only for this situation in the Gaza war.
58. A third reason for not stopping exports would be that it damages the reputation of the Netherlands. The State fears "The impact of intervention on the relationship with F 35 partners. Intervening in exports also affects the Dutch F-35 "business case".
    ** - "The impact of intervention on the relationship with F 35 partners, in particular the US and Israel. Intervening means going back on previously made agreements about the reliable supply of F-35 parts from a Regional Warehouse for the European region. This undermines the expectations of all F-35 partners.*
    - "The negative consequences for the position of the ERW. Disrupting the logistics chain of supply of F-35 parts may be a reason for F-35 partners to question further services provided by the ERW for the F-35 program. The ERW is part of the NL-F-35 business case."
59. Article 10 EU Common Position recognizes this importance. However, it also stipulates that it should not influence the application of the 8 criteria of the EU Common Position. It was known when the Netherlands entered into cooperation with the US, Israel and other European countries that it must adhere to its own (and higher European) export regulations and international law.
60. Finally, the State points out: <u>*The limited material effect of intervention.*</u>
    "It is obvious that in the event of a Dutch supply stop, Israel will be supplied with F-35 parts via other routes, for example from the hubs in the US and/or Australia. The Netherlands has no say in this."
61. The EU Common Position is also unaware of this ground and must be firmly rejected. What matters is that the State does not contribute to violations. What the US does is not up to us. Furthermore, the Arms Trade Treaty obliges the State to assess the risk of diversion and, if necessary, to take restrictive measures (Article 11).
62. In short, the arguments against using the power under Article 8 are that we do not know exactly how to do it, in the view of the Minister it yields little and political/reputational interests should prevail. However, these arguments must outweigh the legal arguments: preventing the risk of military equipment from the Netherlands being used in the event of serious violations and many thousands of civilian casualties in Gaza.