Prakken d'Oliveria

Court of Appeal in The Hague

Case number: 200.336.130/01

Session: January 22, 2024, 9:30 am

Plea note

Regarding

1. **the Oxfam Novib Foundation**, with offices in The Hague
2. **the PAX Netherlands Peace Movement Foundation**, with offices in Utrecht
3. **the Rights Forum Foundation**, with offices in Amsterdam

Appellants, respondents in cross-appeal

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

In return for:

The State of the Netherlands (Ministry of Foreign Affairs)

based in The Hague

Respondent, appellant in cross-appeal

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

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1. Starvation from bombing

1. The seriousness of the situation in Gaza will not have escaped your Court.
2. The consequences are reflected in the number of deaths. During the court's verdict on 4 December 2023 the counter stood at more than 15,207 people. Now it stands at 24,620. More than 9,000 deaths involved.
3. A reality on the ground that has become increasingly large-scale and fatal in recent weeks, is starvation.

> [Image I: People queuing for bread, November 4, 2023, exhibit 56 Oxfam Novib et al.]

4. For more than half a million Gazans, hunger takes over their lives. An adult person can go without food for about three months. During that time the body eats itself slowly. For Palestinian children the consequences are even more destructive.

> Experts say this: "*Their opportunities are reduced in all areas and that has ripple effects throughout society. […] When you think about that, it becomes clear how enormous hunger can be a destructive and long-lasting weapon*."

5. Hunger in Gaza is not an accidental byproduct of Israel's warfare. It is no collateral damage. Since the start of the war, Israel has blocked access to the vast majority of bakeries, water treatment plants, agricultural lands, and, later, bombed sporadic aid convoys.

> [Image II: Satellite image analysis of Gaza: destroyed residential area (red) and agricultural area (orange), dated 26 November and 11 December 2023, exhibits 50 and 61 Oxfam Novib et al.]

6. These bombings that are completely destroying Gaza and life in Gaza are carried out by and with the help of F-35s. The Netherlands supplies the parts.

2. No more Palestinian Gaza in the near future

7. The State would have you believe that the bombings and suffering in Gaza are decreasing. The respondents should know better. Prime Minister Netanyahu is clear about his intentions. The Israeli Prime Minister said at the end of December 2023 that they will not stop, and the fighting will continue to intensify. After South Africa filed an application with the International Court of Justice (ICJ) for genocide against Israel, Israel publicly stated it would adjust tactics. But after this initial response, Netanyahu said they will not stop for anyone, not even for 'The Hague'. OCHA is still reporting every day, without exception, that the intensive bombing continues.
8. Israel's far-right National Security Minister Ben-Gvir called for an occupation of Gaza five days ago and for Palestinians to be encouraged to leave the territory.
9. The Dutch Defence Attaché at the Tel Aviv embassy previously warned about this. She said she was "concerned" about "leaked Israeli plans to kill more than two million Palestinians in Gaza forced to move, temporarily or otherwise, to Egypt's Sinai desert."

> [Image III: Quote UN Secretary General, dated 6 December 2023, exhibit 47 Oxfam Novib et al. "Amid constant bombardment by the Israel Defence Forces, and without

shelter or the essentials to survive, I expect public order to completely break down soon due to the desperate conditions, rendering even limited humanitarian assistance impossible."]

10. Almost no price seems too high to prevent further suffering.

3. The State uses post-truth politics

11. Let me say something about the facts of this case. Appellants have submitted overwhelming evidence. 101 products in total. 35 of them directly address Israel's violations humanitarian law and the Genocide Convention. 21 products are UN sources and identify violations of humanitarian law and warn of genocide.
12. 16 products have been submitted about the use of Israeli F-35s in this conflict. 17 other products focus on the role of the Netherlands, in particular the export of F-35 parts. 7 products focus more generally on the current conflict between Israel and Hamas and 9 on the context and history thereof, mainly from UN sources. Another 7 products provide an explanation of the legal framework to be applied.
13. When examining the State's position, the question arises as to what it considers to be facts at all. The State asks itself that question in Chapter 4 of its response memorandum ("Facts?") and concludes that no facts exist. No single source is of any value, at least the State does not have to pay attention to it. Unwelcome facts are dismissed as opinions, as emotions. The argument reads like one classic case of "group think" in which everything has to make way for one's own reality. The State does not have any knowledge of its own, he wants you to believe.
14. Foreign Affairs officials are therefore rightly concerned from their own professional responsibility, that the State takes as little advice as possible and keeps experts at a distance. In the letter they wrote to inform your Court, they write:

> "In addition, there is a special tendency in the ministry to question figures and facts reported by leading international organizations, such as the UN, Amnesty International, Human Rights Watch, the International Red Cross, on Gaza. […] At the same time, there is an active and conscious effort to narrow advice received from the ministry's top officials. This is in stark contrast to other files where this trend is not observed. In the case of the Russian invasion of Ukraine, the advice was justified, as usual, just broadly drawn."

15. The picture that the officials paint here also emerges from the State's response memorandum. The UN's reports, warnings and appeals are being questioned as "(political) opinions". The State uses post-truth politics here.
16. Certain information is also deliberately not shared with the minister - or not in writing. With the apparent aim: the less the minister knows formally and traceably, the less it is forced to act on it.
17. The double standard also becomes clear in the response memorandum. On the one hand, the UN Secretary General quoted regarding the heinous acts of Hamas. On the other hand, his many and urgent calls for Israel in Gaza become international law violates, pushed aside as legally irrelevant, as "judgments" and not facts.
18. The UN experts are also irrelevant to the State. Their expertise is questioned, and are considered as opinions rather than facts.

19. Also, extensive research from renowned international organizations such as Amnesty International, who were given weight in the past, are not considered as any reason for the State to assume a 'clear risk' of violations. The State also occupies a questionably isolated position here. The UN Secretary General and the EU Common Position User's Guide, to name just two authorities, do value investigations by (human rights) NGOs.
20. It is downright reprehensible that the State relies on a statement of the imprisoned director of the Kamal Adwan hospital taken by Israel (although the State does not wish to attach any further evidentiary value to this). May we remind the State of the many reports from the UN about mistreatment of Palestinian detainees by Israeli soldiers in the current conflict?
21. On 18 January, a parliamentary debate of the Foreign Affairs Council took place, which focused on, among other things, the International Court of Justice's decision on the genocide case. The minister was requested to "actively promote compliance by parties directly involved" if provisional measures are indeed taken. The answer from the minister was as telling as it was shocking: "[T]he ruling is not binding on the third parties," she responded and she does not want to prejudge the ICJ decision.
22. That is very remarkable. From 7 October, the State will say: there must be a judicial decision before we can say anything about violations. This may soon take the form of a provisional judgement by the highest international court on the worst crime: genocide.

    Of course, both cannot be true: either you are capable of making an independent judgment (as many have), or you follow the judge's ruling. The state cannot have it both ways.

23. Your Court ruled in your 2022 arms export judgment that:

    "it is primarily up to the minister to determine the facts and circumstances of the specific case, such as the circumstances in the country of destination".

    And:

    "It is also up to the Minister to assess whether there is a risk of misuse of the goods to be delivered and whether that risk is sufficiently 'clear'."

24. That may be so. But then the Minister must be prepared to face the facts. If she does not do so, then it cannot in any case be said that "the Minister reasonably has been able to reach its judgment on this matter," and it is up to you as a judge to carry out the test.

4. Deployment of F-35s over Gaza with the help of the State is also a fact

25. I will briefly say something about the role of the F-35s and the Netherlands's contribution to it.
26. Immediately after 7 October, Israel placed an order with the F-35 European Regional Warehouse (ERW). 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 her successor still does not want that.
27. The State has confirmed that these deliveries by the Netherlands directly contribute to the war:

    > "Public sources [including exhibit 18 of appellants] do indicate that Israel has deployed the F-35 over Gaza."

28. An IDF spokesperson already confirmed on 1 November 2023 that Israel is deploying F-35s in Gaza:

> "We can confirm that the F-35s have been operating in the Gaza Strip throughout this operation, i.e. the war against Hamas that started on 7 October".

29. The F-35s are therefore - contrary to what the State states - not only used to support ground troops, who entered Gaza at the end of October, but have been deployed from the very beginning. In any case, one part of the military deployment cannot be viewed in isolation of the other parts, as it concerns an integrated operation in which all parts work together to achieve set objectives.
30. It also follows from the statements of the American director of the F-35 program and the American Under-Secretary of Defence for Acquisition and Sustainment that Israel has been using F-35s very intensively in this war since the beginning of October.
31. After the statement of grievances, we added an interview with one Israeli pilot on 2 November 2023. He is standing in front of an F-35 aircraft, wearing his uniform the insignia of the 140 F-35 squadron. He says:

> [Image IV: Image F-35 pilot, dated November 2, 2023, exhibits 87A and 87B]
>
> "The air force has been carrying out attacks and defences in all areas of war for about a month now. We focus on the fighting in the Gaza arena, […]. We have carried out very important attacks that seriously damage the Hamas regime in the Gaza Strip."

32. Another F-35 pilot from the 116 F-35 squadron explains:

> "[…] The firepower has decreased, but it has been reduced in line with what ground forces needed. The troops are in the heart of Gaza, and I have no room to shrink a neighbourhood now. Much more with tweezers, because they like returning home.

33. The F-35 is a multi-role fighter aircraft. They do indeed support ground troops (close air support), but - contrary to what the State argues - they also have been carrying out bombings since the beginning of October, and they're gathering intelligence that's being used to support all other components of the IDF.
34. The court therefore rightly ruled that it was "very likely that the F-35 makes contributions, to alleged violations."
35. The doubts that the State wants to raise about whether the F-35 even existed before the ground invasion was active in Gaza, are not only irrelevant but also do not hold up.
36. It is remarkable that the State itself apparently does not know or does not want to know anything about the deployment of the F-35s in Gaza and its components. He leans back, claiming that it is up to appellants is to provide him with information about the F-35 deployment. The State has apparently do not want to collect its own information. Despite good relations with Israel, it apparently did not inform Israel about this. The so-called "trusted community" of F-35 countries apparently do not provide the State with any information.
37. The only source that the State uses with regard to the F-35 is an article by Al Jazeera, to which it refers in a footnote in pleadings. The article states: "a back of the envelope

calculation" of Israel's war costs. So that is a beer coaster calculation. It contains a single, unfounded assumption about the F-35 deployment.

38. But what matters is that the Minister knew that the F-35 has been deployed in Gaza from the start. As early as 19 October, their own civil servants wrote:

> "[There is] a (clear) risk that the F-35 parts contribute to the violations of international humanitarian law by Israel through the maintenance of fighter aircrafts".

This will be repeated on 15 November in the second F-35 memorandum.

39. Moreover, the State requires a degree of certainty, which we do offer, but which is not necessary for these proceedings. The relationship between the deployment of an F-35 (including parts from Netherlands) and the death of a Palestinian family does not need to be proven. In this summary proceedings, it concerns a threatened violation that must be prevented. The Rules of evidence do not apply as in substantive proceedings.
40. What matters is that given the overwhelming amount of evidence of the destruction of Gaza, the contribution of the F-35s to it, and the finding of violations by many organizations, there is a very high risk that the State will contribute to this.
41. The Minister knows that and has identified that risk. She just didn't weigh it heavily.

5. Assessment framework

42. I am saying something about the assessment framework that you must apply in this case.
43. Exports resulting in violations of humanitarian law and possible genocide are outside your purview. The treaties draw the boundaries in the State's foreign and security policy. The basic principle of international law is that agreements to which the State has committed to must be observed, including in the national legal order. A standard of national law (whether it is the negligence standard, or the Regulation NL009, or a national assessment framework) may never be interpreted in such a way that this violates an international law obligation of the State.
44. It is safe to assume that there are violations of international law. In the more than 100 products we have submitted, there are numerous qualifications from experts of the actions. They leave no doubt: humanitarian laws are being violated on a large scale in Gaza.

> "The Israeli military's massive bombardment, in a manner inconsistent with international humanitarian law, has not spared hospitals, schools, refugee camps, residential buildings, markets and religious establishments, where civilians should be safe and protected from indiscriminate and disproportionate attacks."

45. Genocide largely involves the same facts as violations of humanitarian law, but with the intention of exterminating the Palestinians as a people in Gaza (completely or... partially). The statements showing that this risk is enormous are too many to count to call. I refer you to the database we have introduced.
46. The preliminary relief judge was aware that the judgment he delivered on 4 December could turn out differently in the near future. In the judgment he wrote that the issue was whether the State could continue the F-35 export to Israel "provisionally". In this appeal, it has

therefore been added that the State is now required to assess, at least to reassess whether the continued use of Regulation NL009 with regard to of Israel can be maintained.

47. This case therefore concerns both an ex tunc assessment and an ex nunc assessment. The State should have stopped exports immediately after 7 October, based on the facts known at the time. And the State must now do so based on the facts that have since become known.
48. The State is trying to tempt you not to test against the standards, or at least leave the weight that should be assigned to them entirely up to the State. To this end, the State is initiating a discussion about direct effect. A discussion that does not need to be had. You are indeed authorised to assess the standards invoked for the purpose of this procedure. The standards are specific enough for this. Where the standards leave room for the state, it is given it, as previous case law shows
49. The emergency step that the State is now taking is apparently motivated by a concern that the State's discretion is not sufficient to justify its policy. That alone should set off alarm bells. The proposal to introduce legal standards to avoid judicial review raises eyebrows and raises major concerns for appellants. The State is not only using post-truth politics here, but also post-rule politics.

6. Export rules: assessment required

50. Then to the EU Common Position. Starting with the required assessment. Indeed, it seems that it was never there. Not after 7 October , the State is explicit about this. At that time, only Article 8 of NL009 was tested, but that does not fit within the EU Common Position.
51. But if the EU Common Position has not been tested after 7 October, when will it be? The State creates a smokescreen and contradicts itself several times.
52. The State mentions that “the F-35 project” has been tested. But according to the State:

> There is “no obligation to record in writing per criterion per country, that the criterion does not prevent the granting of a permit or the establishment of a permit.”

53. The State therefore admits: nothing has been established. So nothing can be submitted to demonstrate the assessment. In other words: it has not been tested.
54. The Minister herself said this in July 2023: she is issuing the permit for F-35 parts “without substantive assessment”.
55. According to the State, we should not take this too seriously because, he states:

> “the assessment of whether the criteria of EU Common Position Article 2 were met” in the context general permits such as Regulation NL009 is “also significantly simpler than usually with an individual permit”.

56. The State takes every liberty here, because the EU Common Position would not prescribe: “how the assessment against the criteria must be met or should be recorded”. This is incorrect.
57. At first instance, the State stated that it should not in any case carry out an abstract test.
58. In addition, the EU Common Position and the User’s Guide are very specific on many points. This is already pointed out here in our grievance 45. The User’s Guide is specifically aimed at the licencing officials, and discusses for each criterion the “elements that must be included in the assessment” and sources that can be consulted.

59. The two F-35 notes show what the test should have looked like. They are on paper. The reason, all considerations and the Minister's decision. It's difficult to imagine state that for something as important and extensive as the F-35 project, the State should carry out an assessment does not establish the mandatory legal standards of the EU Common Position.
60. This would also be an extremely untransparent approach towards the F-35 project countries. By not recording anything, the State would create a right to carry out the EU Common Position test at any time. That is not helpful for confidence within the F-35 project, which the State frequently relies on.
61. Somewhat too often the State also uses words such as: “relationship of trust” in its memorandum, “similar profile as the Netherlands”, “friendly countries”thus suggesting that a test was not necessary. And then he continues:

> “Nor does that mean that the EU Common Position will be bypassed. The EU Common Position criteria form the assessment framework for the selection of countries with which such cooperation is entered into and the organisation of that cooperation, as also happened with a General Permit; the General Permit also includes delivery to Israel.”

62. In other words: the test would already be included in the selection of countries with which the State would like to collaborate in the F-35 project. That's how we should see it. If you belong then you naturally meet the EU Common Position criteria. The State does not need to spend any further words on this, and certainly no paper.
63. The only conclusion must be: the test did not take place in 2016 when the NL009 was adopted.
64. Taking a test now after unhindered exports for 8 years would seriously damage the confidence of its partners. The Netherlands does not dare to do that. The State prefers to outline an alternative approach, namely:

> “that countries that have previously assessed in principle that they are entering into and carrying out this project on the basis of trust have a multitude of options to influence each other. In the event of any worrying developments, there is no reason for this to be the only option to have the right to intervene or not in any delivery”.

65. According to the State, that's the easy way out. But in the meantime, the mandatory EU Common Position test hangs over this case like a dark cloud.
66. The only thing we have verifiable now is the decision after 7 October 2023. That was a broad assessment on the basis of Article 8 Regulation NL009 as the State admits. The EU Common Position played no role in this and did not have to, at least according to the State.
67. Now that the State has not tested, your Court must do the test. The Minister has indicated what the outcome of the test should be: Regulation NL009 simply falls short of EU Common Position Criterion 2 with regard to the delivery to Israel. Criterion 6 is also negative. In addition to the fact that Israel has completely bombed the occupied territory, Prime Minister Netanyahu recently declared that he will not accept a Palestinian state under any circumstances. And so the export to Israel come up against a number of criteria. We've outlined it in the summons and plea in the first instance. The Legal Affairs Department also warned about this when it noted “that the EU arms export control policy will not be implemented” if arms exports are not stopped.
68. The export of F-35 parts to Israel is therefore prohibited.
69. Even if, in the hypothetical case, the assessment in 2016 can be classified as a test under the EU Common Position, then the test must comply with the EU Common Position after

October 2023. Whether that test is carried out under the label of encouragement, or whether that test distances itself completely of the EU Common Position, that doesn't matter. It is not about the label that the Minister puts on it. What matters is that the Minister saw reason to make a new decision on 7 October. The only framework in which it could make that decision is the EU Common Position. After all, that is the higher, mandatory regulation that leaves no room for self-invented alternatives.

70. This also explains why the State wants to get rid of your Court's 2022 judgment on export to Egypt. That case was not about encouragement at all, but the State has realized that, encouragement or not, if you test, it must be within the limits of the EU Common Position. To get rid of this, the only way out for the State is to argue that arms exports may no longer be subject to judicial review. It's an understandable emergency. But this cannot last.
71. Finally, human rights are not mentioned at all in the State's response statement as an element against which the State must assess its exports. While this was explicitly mentioned in the F-35 memoranda as an obstacle to exports to Israel, the current Minister has apparently ignored this. Unacceptable.

7. Suitable and appropriate measures

72. Now to the question: is ceasing the export of F-35 parts indeed a suitable option and appropriate measures that may be required of the State?
73. The answer is: yes. That commandment or prohibition does not place an impossible or disproportionate burden on the State in the given circumstances.
74. The UN and many experts have emphasized that the cessation of arms exports must be included in the negative and positive duties of the state.
75. During the International Conference of the Red Cross and Red Crescent in 2003, the States Parties declared that the obligation under Common Article 1 of the Geneva Conventions also applies to arms exports:

> "In recognition of States' obligation to respect and ensure respect for international humanitarian law, controls on the availability of weapons are strengthened … so that weapons do not end up in the hands of those who may be expected to use them to violate international humanitarian law."

76. In the words of Amnesty International's Secretary General:

> "In the face of the unprecedented civilian death toll and scale of destruction in Gaza, the US and other governments must immediately stop transferring arms to Israel that more likely than not will be used to commit or heighten risks of violations or international law. To knowingly assist in violations is contrary to the obligation to ensure respect for international humanitarian law. A state that continues to supply arms being used to commit violations may share responsibility for these violations.

77. The Director of Human Rights Watch at the UN speaks of 'complicity in war crimes' for countries that export weapons:

> "By continuing to provide Israel with weapons and diplomatic cover as it commits atrocities, including collectively punishing the Palestinian civilian population in Gaza, the US risks complicity in war crimes."

78. There are many more calls from authoritative organisations that emphasise without exception: stop arms exports to Israel or you support the violations Israel is committing.
79. The treaties oblige us to take measures that are actually suitable to avert the impending danger as much as is reasonably possible.
80. Stopping arms exports is actually appropriate. Prime Minister Netanyahu has said since the very beginning that he relies on supplies from other countries for his war.
81. The Dutch Defence Attaché in Tel Aviv endorses this in the confidential memo:

> "Israel is currently rapidly running out of supplies of ammunition and... air defence missiles, making it highly dependent on long-lasting US support for replenishment of supplies. […] These replenishments are in addition to previously agreed deals between the United States and Israel for advanced weapons, such as F-35 fighter jets, CH-53 heavy helicopters and KC-46 tankers for mid-air refuelling."

82. The UN Special Rapporteurs have repeatedly pointed out the problematic nature of arms supplies and that Israel's allies also bear responsibility:

> "We are also profoundly concerned about the support of certain governments for Israel's strategy of warfare against the besieged population of Gaza, and the failure of the international system to mobilise to prevent genocide."
>
> "The time for action is now. Israel's allies also bear responsibility and must act now to prevent its disastrous course of action."

83. On 6 December 2023, the UN Secretary General said in an exceptional letter on the basis of Article 99 of the UN Charter that states must do everything they can:

> "The international community has a responsibility to use all its influence prevent further escalation and end this crisis"

84. What can be expected of a state varies essentially from one state to another according to the International Court of Justice. But the law is a factor in this importance: what you can do and what you are allowed to do. The weighing of interests therefore does not take place outside the law to.
85. Every country is responsible for its part. Politically, the Netherlands is small. Conversations with Israel can play a role diplomatically, but is not necessarily the most important appropriate measures that can be expected to be effective. In addition, a positive obligation does not mean that you can continue to violate the negative one. It's 'both-and'.
86. The State has an essential role as a distribution centre for F-35 parts for Israel in this war. A ban on continuing exports is an effective measure can be expected from the State.
87. It is in accordance with the specific responsibility of the State and its capabilities. Moreover, the action is concrete.
88. It has not been proven that there are other routes, as pointed out by the State, and at least these are not so concrete, let alone that they can be considered effective.
89. In fact, what we do see that they are not effective. The State has requested restraint and protection of the civilian population. Israel does not do this and instead intensifies attacks with 'dumb' bombs. The State has argued for "massively more aid", but also after more than 3 months, that aid is just a drop in the ocean. The State announced the evacuation of injured children. We never heard anything about it again. The state continues to argue for a two-state solution, but Netanyahu no longer even keeps up appearances on this matter. Even

when asked by the State about the death of a Dutchman in Gaza, Israel refuses to provide information.

90. In addition, the action, or rather the refusal to supply F-35 parts, is reasonable and the State authorised to do so.
91. This case therefore differs essentially from the case about the return of the IS women, on which the court has based its decision. Not only are the facts different, that case also involved a best-efforts obligation. Numerous relatively complicated actions were required of the State, which had a fairly high foreign policy character. This case concerns an abstention, a negative obligation, namely stopping the delivery of weapons used to kill civilians.
92. There is also an explicit and clear framework for assessing exports. Intervening in a permit, temporary or otherwise, is customary and a simple quickly implemented measure that the State has taken with regard to numerous high-risk countries. That adjustment can be made at any time, as confirmed by the State at the hearing judged by the court. The State has not objected to this part.
93. In addition, after the intervention in Regulation NL009, there is also a simple and clear alternative, namely the individual permit. The first F-35 memorandum of 19 October indicates that if use is made of the authority under Article 8 of Regulation NL009 than:

> "companies must also submit individual permit application to customs for transactions under the F-35 program if goods are going to Israel."

94. So that's possible. That is important in your decision. The follow-up question will then be, as the memorandum makes clear:

> "A licence application [will] then be assessed against the eight criteria of export control policy. A rejection must be substantiated with a "clear risk that the goods (F-35s) will be used in... serious violations of humanitarian law. In DJZ's vision this clear risk exists now."

95. The comparison is therefore more valid with the Urgenda case: the future of a people is at stake and with it our values of humanity; the credibility of international law and thus also national law and law as such will be seriously affected if you do not intervene. When our government is guided solely by self-interest, applies double standards and believes it can jeopardise a reputation built up over many years as a matter of necessity, the judge must uphold the standards and ban the Dutch contribution to the bloodshed.

8. Weighing other interests: the objectionability of ceasing F-35 exports

96. Finally, how should the other interests stated by the State be weighed?
97. The Minister has determined that there is a "clear risk" that Israeli F-35s are involved and/or are involved in violations of humanitarian law." The EU Common Position and the various relevant treaties leave no room for others interests to prevail. That must certainly be the conclusion, now that these interests are not convincing, and the State does not substantiate them.
98. About the latter. In the letter from Foreign Affairs officials to your Court we read that there is no real, substantive and concrete weighing of interests on this file:

> "It has not gone unnoticed internally that the regular rules do not generally apply to this file, which has also led to some internal unrest. The concerns below expose that

> the Ministry of Foreign Affairs has a deviating and special weighing of interests in advice to the ministers on files concerning Israel and the Palestinian Territories."

99. The officials mention several elements that lead to this different attitude: the Dutch sense of guilt in relation to the Second World War, the Transatlantic relationships, and the personal career ambitions of protagonists. These must be protected at all costs" and weigh "more heavily (...) than other interests, including the responsibility of the Netherlands to promote the international legal order."
100. What is special about the weighing of interests that the State uses is that The Ministry of General Affairs (AZ) determines the course of events, above the Ministry of Foreign Affairs, which is the line ministry in this file. The write about the role of AZ civil servants:

> "The role that the Ministry of General Affairs plays in this dossier is extremely important and remarkable. A request from the Ministry of General Affairs to the Management Legal Affairs at Foreign Affairs reads as follows: "What can we say so that it appears that Israel is not committing war crimes?" […]
>
> "At the same time, it is widely known that from the Ministry of Foreign Affairs was advised to vote for a ceasefire during a second one vote at the UNGA 12 December 2023 and that the Ministry of General Affairs ignored this until the last moment." […]

101. The officials continue:

> "This leads to a situation in which official advice is determined by the political line that has already been chosen, instead of the advice being the outcome of a well-considered weighing of interests."

102. What this shows, and what the entire file shows, is that the State, applies a different assessment framework now that it concerns Israel. As a judge you cannot go along with that.
103. While the State would have you believe that intervention in the NL009 with regard to Israel would "have consequences for the Dutch position in the world", appear to have other interests to be predominant.
104. Then to the substantive arguments. I say here that all the interests that the State mentions are also included in the EU Common Position, but not given the weight that the State gives them, or are interpreted in another way. Under the EU Common Position, these interests must therefore be rejected in any case as a reason to continue deliveries. I refer you to our documents in the first instance. So I will now only discuss the substantive tenability of the stated interests, in case and to the extent that you decide should it come to pass that the EU Common Position as a whole should be dismissed as irrelevant.
105. On regional security we point out the warnings of the defence attaché Tel Aviv:

> "One of the explanations used to explain the current actions of the IDF (in terms of destruction of civilian infrastructure and numbers civilian casualties) in Gaza is the deterrent effect it would have on Hezbollah and Iran."

106. It needs little explanation that the destruction of Gaza is not a legitimate means to enhance Israel's regional security. The same applies to the right to self-defence of Israel, that right is subject to rules and cannot lead to the destruction of Gaza.
107. In addition, you do not have to fear that if the claim is granted, Israel will be deprived of weapons, nor of allies who in the event of actual threats from the region will take action.

Israel will always be able to rely on the US and the US has by far the largest number of F-35 aircraft parts. What is achieved is that the State ceases its unlawful actions, which can also have a signalling function to allies, and perhaps also Israel.

108. In addition, everyone agrees that Israel's military objectives cannot be achieved, that Hamas cannot be destroyed and that the war cannot therefore be won, at least not militarily. I refer to the memo written by the Dutch Defence Attache Tel Aviv: “First, there will be no clear military victory over Hamas,” it says written. For that reason too, the State should not contribute to further destruction.
109. A second argument that the State mentions is damage to good relations, “with corresponding loss of influence on Israel in particular.” However, the State itself has stated that its diplomatic role is “limited”.
110. The third argument is that intervening in the onward delivery process would affect all partner countries of the F-35 program, because these countries would also have to apply for an individual permit. This is simply not true. The second F-35 memoranda states without any further ado that Regulation NL009 can be amended so that Israel can is excluded as a destination. And the Minister recently confirmed this again to the House of Representatives. The fact that this is not possible because of the current Regulation NL009 is not relevant. It is a ministerial regulation that can be easily adjusted. The fact that the State does not want to in this case is something else.
111. This also eliminates the argument that a user should be excluded, which would have a “disruptive” effect “on the entire delivery system.” This is all reasoned within the current ministerial regulation, which can be easily and effectively amended. If this were otherwise, the permit would not be valid and, for example, Article 8 Regulation NL009 can never be applied in practice, without leading to the alleged disruption.
112. Damage to relations with other F-35 partners is therefore not a valid argument. They are not affected.
113. By the way, if we are talking about maintaining good relations with other countries, it is more appropriate to point out the rather isolated position that Netherlands occupies with regard to Gaza. On 12 December 12 2023, the UNGA voted on an immediate humanitarian ceasefire, with the demand that all parties internationally comply with law. The resolution was adopted by 153 of the 186 countries. 10 countries voted against and 23 countries abstained, including the Netherlands. Among the countries that voted in favour were many (also European) allies of the Netherlands: Australia, Belgium, Canada, Finland, France, Denmark, Japan, Norway, Portugal, Spain, Sweden, Switzerland. It is notable that most of these countries that voted in favour of the resolution are partners in the F-35 project.
114. The case that South Africa is conducting before the International Court of Justice against Israel regarding genocide on the Palestinians is supported by 62 states. The State wants to portray the South Africa move as isolated, but that is a different matter.
115. The future will tell, but it is more than likely that the present position of the Netherlands and the increasingly smaller group of countries that, despite everything, continue to stand “firmly behind Israel” will result in a political, and perhaps also economic, backlash from other important global players.
116. Back to the interests put forward by the State to leave Regulation NL009 unaffected. The bottom line remains: the reputation of the State and its business case. This will now put in slightly larger terms on appeal: “risk to the continued existence of the European Regional Warehouse (ERW) in Woensdrecht”.
117. We are the first to admit that it is an embarrassment to the State if you order it to stop allowing exports of F-35 parts to Israel. But compared to this potential reputational damage,

the real shame and the most painful reputational damage of course has been going on for over 3 months.

118. Economic trade relations are becoming increasingly prominent in a globalised world. But arms trade comes with responsibilities. Human rights violations that manifest as a result should not be ignored.
119. In addition, speaking of the business case, the costs for rebuilding Gaza are huge and only increasing. The State currently has already committed 101 million EUR pledged for reconstruction. This partly concerns destruction caused by the F-35s for which the State approves the export of F-35 parts.

9. Conclusion and request for ruling as soon as possible

120. In summary:
    - There are serious violations of international law in Gaza by Israel;
    - The State contributes directly and actively to this by allowing the supply of parts for fighter planes that Israel deploys over Gaza to commit violations ; the State does this knowingly and intentionally.
    - The international treaties contain that provide the framework for assessing exports contain fundamental standards on the protection of human beings.
    - These standards are also laid down in export regulations, the EU Common Position, which provide a clear framework for the assessment of the export.
    - The State has never tested Regulation NL009 against the Eu Common Position, not in 2016, not after 7 October, not at any other time. This Regulation NL009 is therefore in conflict with higher regulations that were established and has been in conflict with them ever since.
    - Now that the State has actually allowed the export license to continue after 7 October, the framework for this should be the EU Common Position; the State cannot do replace it with its own national framework.
    - Based on the EU Common Position, you must give priority to the protection of fundamental standards, in particular the mandatory Criterion 2(a) and 2(c) of the EU Common Position.
    - Stopping the supply of weapons equipment that contributes to the commission of violations can reasonably be expected of the State. This does not place an impossible or disproportionate burden on the State in the given circumstances.
121. In the words of the Commissioner General of UNRWA on 19 December 2023:

    [Image V: Commissioner General of UNRWA on 19 December 2023, exhibit 63 Oxfam Novib et al.]

    "This crisis is a test of our collective humanity. How we respond today determines the future. The universality of human rights and international humanitarian law, as well as the credibility of our international institutions, are at stake. If we cannot uphold these principles in practice, we will compromise peace and security in the region and beyond. We must turn the tide of this crisis, and our chance to do so is rapidly running out."

122. I request that a decision be made as soon as possible.