


Unofficial translation

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 [Enriched pronunciation](#)

Pronunciation

COURT OF THE HAGUE

Civil rights

Court case number: 200.336.130/01

Court case number: C/09/657026 KG ZA 23-991

Judgment of February 12, 2024

in the case of

1 Oxfam Novib Foundation,

with offices in The Hague,

2 PAX Netherlands Peace Movement Foundation,

with offices in Utrecht,

3 The Rights Forum Foundation,

with offices in Amsterdam,

appellants in the principal appeal,
defendants in the cross-appeal,
lawyers: L. Zegveld and TJR van der Sommen in Amsterdam,

in return for

the State of the Netherlands (Ministry of Foreign Affairs) ,

based in The Hague,
defendant in the principal appeal,
appellant in the cross-appeal,
lawyers: RW Veldhuis and EV Koppe in The Hague.

The court will hereinafter refer to the parties as Oxfam Novib, Pax and The Rights Forum (together: Oxfam Novib et al.) on the one hand and the State on the other.

1 The case in brief

- 1.1 Parts for the F-35 fighter plane are distributed from Woensdrecht to a number of countries, including Israel. These parts are considered military goods, which means that a permit is required for export from the Netherlands. That permit was granted in 2016.
- 1.2 On October 7, 2023, Hamas launched an attack on Israel, deliberately killing, wounding and kidnapping many civilians. Israel responded to this attack by launching attacks in the Gaza Strip, the base from which Hamas operates.
- 1.3 Following Israel's attacks in the Gaza Strip, the Minister for Foreign Trade and Development Cooperation (hereinafter: the Minister) assessed whether the export license for F-35 parts to Israel could be maintained. The result of this assessment was that the Minister decided not to intervene in the permit.
- 1.4 Oxfam Novib et al. do not agree with the Minister's decision. Oxfam Novib et al. are of the opinion that Israel is violating the humanitarian law of war by its attacks in the Gaza Strip. According to Oxfam Novib et al., there are disproportionately many civilian casualties in Gaza, because Israel also attacks civilian targets and does not take sufficient account of the consequences for the civilian population in its attacks. Oxfam Novib et al. demand that the judge order the State to ensure that the export of F-35 parts from the Netherlands to Israel stops.
- 1.5 The court agrees with Oxfam Novib et al. that there is a clear risk that serious violations of humanitarian law of war are committed with the F-35. Under various international regulations to which the Netherlands is a party, the Netherlands must impose restrictions on the export of military goods in such a case. This means that the Netherlands is not allowed to export F-35 parts to Israel. In her decision not to intervene in the export license, the Minister wrongly failed to comply with these international obligations. The court therefore orders the State to prevent the further export of F-35 parts to Israel.

2 The process flow

- 2.1 The course of the procedure is evident from the following documents:
 - the judgment of the preliminary relief judge of the District Court of The Hague of December 15, 2023, hereinafter: the (contested) judgment, with the documents of the first instance;
 - the summons in turbo-speed appeal dated 29 December 2023 with which Oxfam Novib et al. appealed the contested judgment and in which they raised five grounds against that judgment and amended their claim (with Exhibits 47 to 81);
 - the statement of defense is also the statement of appeal in the State's incidental appeal (with exhibits 23 to 39);
 - exhibits 82 to 100 by Oxfam Novib et al.;

- the statement of defense in the incidental appeal of Oxfam Novib et al. (with exhibit 101).
- 2.2 The oral hearing took place on January 22, 2024. The lawyers have explained the case on the basis of pleading notes that they submitted.

3 The facts and background of this case

The F-35 program

- 3.1 The Netherlands is one of the countries participating as a partner in the F-35 Lightning II program for the production and maintenance of the F-35 fighter aircraft ('the F-35') produced in the United States (US). The Netherlands is one of the buyers of the F-35. Israel is also a customer of the F-35, but not a partner in the F-35 program.
- 3.2 Three 'hubs' have been set up worldwide for the maintenance of the F-35, in which parts (supplied by the US) are stored for delivery to countries that have the F-35. The F-35 parts present in the hubs are the property of the US and remain so until they are installed in the F-35. Such a hub is located in the Netherlands (Woensdrecht), the Logistics Center Woensdrecht. F-35 parts are supplied from the Dutch hub to Israel, among others.

Regulations regarding the export of (parts of) military goods

- national regulations

- 3.3 The parts for the F-35 (referred to under 3.2) are considered military goods. The transit or export of military goods from the Netherlands is prohibited under art. 5 paragraph 1 and art. 11 paragraph 1 of the Strategic Goods Decree **1** (Bsg) (based on the General Customs Act) is prohibited, unless a permit has been granted for this. In any case, such a permit will not be granted to the extent that it results from international obligations. **2** These international obligations include the Common Position of the European Council (see below 3.6 et seq.) and the Arms Trade Treaty **3** (the '*Arms Trade Treaty*'). **4** The Minister may exclude a person authorized to make a decision **5** from the use of a general transit permit or general export permit to protect essential security interests, public order or public safety (art. 6a paragraph 3 and art. 13 paragraph 3 Bsg respectively).
- 3.4 In 2016, the Minister established the General Permit Regulation NL009 (hereinafter: AV009) by ministerial regulation on the basis of the Bsg. **6** This general license only applies to the supply of military goods to parties affiliated with the F-35 program. AV009 is a general transit permit, a general export permit, and a general transfer permit. **7** To the extent relevant in this case, F-35 parts can be delivered to Israel from the Woensdrecht depot on the basis of AV009, without a separate permit being required for each separate delivery.
- 3.5 No end date has been set in AV009 with regard to its period of validity and it is therefore in principle valid as long as the F-35 project is ongoing. **8** Art. 8 of AV009 reads as follows:

"The General Permit NL009 may no longer be used if the registered user or authorized person has been informed by the Minister that integrated foreign policy or security considerations oppose continued use of the General Permit NL009. A notification for that reason can be made at any time."

The person authorized to make a decision is the person who is authorized to dispose of the military equipment (Article 1 Bsg). The user is the authorized person who has registered to use AV009. Israel as the country of destination is therefore not the authority or user within the meaning of AV009.

- EU regulations: the EUGS

- 3.6 On December 8, 2008, the Council of the European Union, pursuant to art. 15 (now: Article 29) of the Treaty on European Union established a Common Position (hereinafter: the EUGS). **9** The Member States have agreed that they will assess the export of military goods and technology against the standards included in the EUGS. The recitals in the EUGS include that States that export military goods have a special responsibility and that Member States are determined to establish high common standards that are seen as a minimum for exercising restraint in transfers of military goods by all Member States and resolve to prevent the export of military equipment that could be used for internal repression, international aggression or contribute to regional instability. The EUGS was amended in 2019, partly in connection with the entry into force of the Arms Trade Treaty, to which all Member States are parties. **10** The General Secretariat has published a User's Guide to the EUGS to assist Member States in implementing the EUGS (hereinafter: the User's Guide). **11**

3.7 The EUGS stipulates in art. 2 paragraph 2 includes:

"Criterion 2: Respect for human rights in the country of final destination and compliance with international humanitarian law in that country

(...)

- Member States shall evaluate the attitude of the recipient country towards key principles enshrined in instruments of international humanitarian law, and

(c) refuse an export license if there is a clear risk that the military equipment or technology to be exported will be used in the commission of serious violations of international humanitarian law."

- the Arms Trade Treaty

3.8 The Arms Trade Treaty entered into force on December 24, 2014. The preamble to the Arms Trade Treaty states the following (in the authentic English language):

" Acknowledging that peace and security, development and human rights are pillars of the United Nations system and foundations for collective security and recognizing that development, peace and security and human rights are interlinked and mutually reinforcing,

(...)

Bearing in mind that civilians, particularly women and children, account for the vast majority of those adversely affected by armed conflict and armed violence,

(...)

Recognizing the voluntary and active role that civil society, including non-governmental organizations, and industry, can play in raising awareness of the object and purpose of this Treaty, and in supporting its implementation,

(...)

Determined to act in accordance with the following principles;

Principles

(...)

- Respecting and ensuring respect for international humanitarian law in accordance with, inter alia, the Geneva Conventions of 1949, and respecting and ensuring respect for human rights in accordance with, inter alia, the Charter of the United Nations and the Universal Declaration of Human Rights ;"

3.9 Art. 7 Arms Trade Treaty reads (in so far as relevant here):

" Article 7. Export and Export Assessment

1. If the export is not prohibited under Article 6, each exporting State Party, prior to authorization of the export of conventional arms (...) under its jurisdiction and pursuant to its national control system, shall, in an objective and non-discriminatory manner , taking into account relevant factors (...), assess the potential that the conventional arms or items:

(...)

(b) could be used to:

(i) commit or facilitate a serious violation of international humanitarian law;

(...)

3. 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.”

- relationship between EUGS and Arms Trade Treaty

3.10 The EUGS was adjusted in 2019 in connection with (among other things) the implementation of the Arms Trade Treaty. **12** The court deduces from this that, in the Council's opinion, there are no substantive differences between the Arms Trade Treaty and the EUGS after that adjustment. The parties apparently also assume this. They made no distinction between the substantive provisions of the EUGS and those of the Arms Trade Treaty. In the following, the court therefore assumes that the parts of art. 2 paragraph 2 EUGS and art. 7 Arms Trade Treaty are in accordance with each other and that the 'clear risk that military goods to be exported will be used in the commission of serious violations of international humanitarian law' (EUGS) does not differ in content and scope from the 'overriding risk' that the military goods to be exported 'could be used to commit or facilitate a serious violation of international humanitarian law' (Arms Trade Treaty). **13** When the court hereafter refers to the EUGS, this must also be understood as the Arms Trade Treaty, unless the context indicates otherwise.

- art. 1 Geneva Conventions and art. 1 paragraph 1 First Additional Protocol to those Conventions

3.11 Oxfam Novib et al. have invoked, among other things, common art. 1 of the 1949 Geneva Conventions (and the equivalent Article 1(1) of the First Additional Protocol to those 1977 Conventions). This provision reads:

"The High Contracting Parties undertake to respect and to ensure respect for the present Convention [this Protocol] in all circumstances."

3.12 The common article 1 of the Geneva Conventions and art. 1 paragraph 1 First Additional Protocol contains customary international law. **14** It is a provision that contains more than an incentive to the contracting parties: it is a binding obligation for the parties to the treaty. **15** The predominant view in the literature is that the obligation 'to ensure respect' has not only an internal but also an external dimension, in the sense that the contracting parties have an obligation to ensure that another state acts in accordance with (including) international humanitarian law. **16** This has been confirmed by the International Court of Justice. **17** This means that states must take positive steps to induce other states to act in accordance with the Geneva Conventions and the Additional Protocol, at least where serious violations are involved. **18** The more serious the violation of international humanitarian law, the more another state is expected to stop the violation. This is a best-efforts obligation: a state is obliged to do what is reasonably within its power in the given circumstances. **19** More specifically, it must be assumed that the obligation of art. 1 entails that if a state is aware that another state is committing serious violations of international humanitarian law using the weapons supplied by the first state, it is contrary to art. 1 to continue these arms deliveries. **20**

Developments since October 7, 2023

3.13 On October 7, 2023, Hamas launched attacks on Israel from the Gaza Strip, deliberately killing approximately 1,200 people, mainly civilians including young children. Hamas also took approximately 240 people as hostages, many of whom have not been released to this day. There is (rightly) no dispute between the parties that Hamas has thus committed war crimes.

3.14 Israel responded to this attack by launching attacks on targets in the Gaza Strip. Bombings were carried out and Israeli troops entered Gaza. As a result of these attacks, (at least) 19,000 people have now died, including 7,700 children. More than 52,000 people have been injured.

3.15 In connection with these developments, the Minister has investigated whether, as provided for in art. 8 AV009, integrated foreign policy or security considerations preclude continued use of this permit. The Minister has concluded that this is not the case. This position has not changed subsequently. The Minister has taken the following considerations into account in her decision: (i) Israel must be able to respond to (terror) threats from the (fundamentally unsafe) region for its survival and has a great interest in preventing the conflict from spreading to the region. due to, among other things, the deterrent effect of the F-35, (ii) the possible risk that the F-35 parts could be used in serious violations of international humanitarian law, but it has not been established that Israel is violating international humanitarian law, (iii) stopping the supply of F-35 parts to Israel would cause serious damage to the good relations of the Netherlands with Israel and the United States and would also damage the confidence of other allies participating in the F-35 project, and (iv) based on AV009 it is not possible to exclude a specific country as a destination from deliveries; All suppliers to Israel would then have to be excluded, but that would mean that those suppliers would no longer be allowed to supply to other countries, so that individual permits would have to be applied for each time, which would be an obstacle. **21**

The claimants: Oxfam Novib et al

- 3.16 Oxfam Novib is a foundation whose statutory objective, among other things, is "to promote a world society in which the socio-economic contradictions between rich and poor are broken down, in which the prosperity of the world is distributed fairly, and in which people and population groups can get to know each other's cultures and respect and cooperate for their development on the basis of common responsibility and mutual solidarity" (art. 2.1). The statutes further state that Oxfam Novib tries to achieve its goal, among other things, by generally promoting everything that could lead to the establishment of a world legal order, of which a universal development strategy forms an integral part (art. 2.3 under g). Oxfam Novib has employees who reside in Gaza and are involved in humanitarian aid and development cooperation in collaboration with Palestinian organizations.
- 3.17 Pax is a foundation whose statutory objectives include "protecting civilians against war violence, ending armed conflicts and contributing to peaceful and just societies, promoting human rights as well as contributing to the international legal order and a culture of peace in The Netherlands and worldwide and everything that is related to the above or can be conducive to this, everything in the broadest sense of the word."
- 3.18 The Rights Forum is a foundation that, according to its statutes, is committed to "ending the conflict between Israel and the Palestinians through the conclusion of peace on the basis of international law: treaties, United Nations resolutions, rulings of the International Court of Justice, that the parties to this conflict, even as long as a peace settlement is not reached, behave in accordance with international humanitarian law and with respect for human rights, that the government of the Netherlands takes seriously the task given to it by the Constitution to develop the international legal order, including in Israel and the occupied Palestinian territories, and that the European Union, also encouraged by the Netherlands, fully takes its responsibility as an economic and therefore political superpower by requiring the parties to this conflict to refrain from violations of international law."

The positions of the parties in brief

- 3.19 Oxfam Novib et al. have filed this summary proceedings against the State because they do not agree that the State allows F-35 parts to be exported from the Netherlands to Israel. Oxfam Novib et al. are of the opinion that the State should prevent the (further) export of F-35 parts from the Woensdrecht depot. In short, Oxfam Novib et al. argue the following. Israel is guilty of violations of international humanitarian law when attacking targets in Gaza, or at least there is a clear risk that Israel is guilty of such violations. Israel attacks civilian targets in violation of humanitarian law and causes disproportionate damage to civilians when attacking military targets. According to Oxfam Novib et al., there is also a reliable indication of a serious risk of impending genocide. In view of this, according to Oxfam Novib et al., the State is obliged on the basis of the EUGS, the Arms Trade Treaty and other treaties and international law obligations to prevent the further export of F-35 parts.
- 3.20 The State rejects the position of Oxfam Novib et al. The State firstly argues that Oxfam Novib's claims are inadmissible because, according to the State, Oxfam Novib does not represent the interests it claims to represent in these proceedings in accordance with its articles of association. In addition, neither the EUGS nor the Arms Trade Treaty oblige a state to reassess a license once it has been issued based on circumstances that arise later. Furthermore, the Minister was allowed under art. 8 AV009 make a broader assessment, in which other interests such as the relationship with Israel and the US are also taken into account. The assessment made by the Minister can only be assessed to a limited extent by the court, because the State has a wide policy and discretion in the areas of (national) security and foreign policy. The State further disputes that it could be taken as a starting point that the F-35 fighter planes are involved in violations of international humanitarian law. There is insufficient information available about the precise role of the F-35s and about the circumstances and considerations regarding concrete combat operations, such as bombings. According to the State, it has also not been demonstrated that there is a risk of genocide.

4 The procedure

- 4.1 In these summary proceedings, Oxfam Novib et al. claim, in summary and insofar as still relevant on appeal, that the State be ordered to cease the (actual) export and transit of F-35 parts to Israel and to no longer allow any new export or transit thereof until this is no longer in conflict with the obligations of the State. Oxfam Novib et al. also demand that the State be ordered to bring the export and transit on the basis of the AV009 with final destination Israel into compliance with the international obligations of the State, such as the EUGS and the Arms Trade Treaty. The State has contested these claims.
- 4.2 The preliminary relief judge rejected the claims of Oxfam Novib et al. The judgment of the preliminary relief judge boils down to the following.
- (i) Oxfam Novib is admissible in its claim. In view of its statutory objective, Oxfam Novib also represents the interests of (Palestinian) civilians in Gaza who are or are at risk of becoming victims of war violence and

can stand up for the general interest that is served by compliance with international humanitarian law, human rights and the prevention of genocide. Moreover, Oxfam Novib has its own interest in connection with the workers who reside in Gaza and who fear for their lives there.

(ii) AV009 was assessed against the criteria stated in the EUGS prior to its adoption. Although there are now new circumstances due to the flare-up of the Israeli-Palestinian conflict, neither the EUGS nor the Arms Trade Treaty contains an obligation to reassess a license once it has been issued if circumstances change.

(iii) The State does have the obligation to assess whether the continued use of AV009 can be maintained as far as Israel is concerned, but it has the freedom to make a broader assessment than just assessing it against the criteria of the EUGS. In this (broader) assessment, the State is given a large margin of policy and assessment, because it concerns questions that are closely related to questions of (national) security and foreign policy.

(iv) With regard to the question of how the exported F-35 parts are used, it is relevant whether the parts to be exported are used in the commission of serious violations of international humanitarian law. If the F-35 contributes to the ability to carry out bombing raids by other aircraft, this requirement is met. Given the advanced features of the F-35, it is very likely that the F-35 will make this contribution where violations occur.

(v) The State's position that specific information about the concrete combat actions is lacking is not incomprehensible. The Minister's assessment exclusively concerns the use of the F-35. The consequences of other war acts by Israel, however reprehensible they may be, cannot be included in this assessment.

(vi) The Minister's reasoning that the F-35, partly due to its deterrent effect, is also of great importance for Israel to prevent the conflict from spreading to the region is not incomprehensible. The Minister could also reasonably consider that a violation of AV009 will have a negative impact on relations with the countries that collaborate within the program, including the US and Israel.

(vii) Art. 8 AV009, contrary to what the State argues, appears to offer the option of notifying only a (registered) user (Israel) that continued use of the permit is no longer permitted. It is likely that a change in the logistics chain of the program will result in deteriorated operational readiness and could therefore have a negative impact on the national security of the countries involved in the F-35 project.

(viii) The conclusion is that the Minister could reasonably have reached her decision.

4.3 On appeal, Oxfam Novib et al. changed their claim. They now claim, by judgment declared provisionally enforceable:

I. To order the State to immediately cease all (actual) export and transit of F-35 parts with final destination Israel, in any case until the bottom court has ruled or until such time as the export and transit no longer take place. conflicts with obligations incumbent on the State; at least to order the State to now (re)assess whether the continued (actual) export and transit of F-35 parts to Israel may proceed;

II. To prohibit the State from immediately allowing new export and transit of F-35 parts with final destination Israel, in any case until the bottom court has ruled or until the moment that the export and transit is no longer in conflict with obligations that rest on the State; at least to order the State to (re)assess whether new export and transit of F-35 parts with final destination Israel can be permitted;

III. To order the State to immediately bring the export and transit on the basis of the General Permit Regulation NL009 with final destination Israel into compliance with the international obligations of the State that follow from, among other things, the Common Position and the Arms Trade Treaty, at least within a period that it court deems appropriate;

IV. At least to take such measures as the court deems appropriate;

V. To order the State to pay the costs of these proceedings, or at least to compensate the parties' costs, with the provision that if these costs are not paid within fourteen days after the date on which the judgment was delivered, statutory interest will be due.

4.4 Oxfam Novib et al. have submitted five grounds of appeal against the judgment of the preliminary relief judge. In ground for appeal 1 , Oxfam Novib et al. argue that the preliminary relief judge uses an incorrect assessment framework by only examining whether the State could have reasonably arrived at its actions. European and international obligations of the State must lead to a cessation of the export of F-35 parts. In ground for appeal 2 , Oxfam Novib et al. argue that the facts qualify as violations of humanitarian law, as genocide and as human rights violations, or at least as a real risk of such violations, committed with the aid of F-35s. Ground 3 means that the State is obliged to cease the export of F-35 parts based on its obligations under general international law, the Geneva Conventions, the Genocide Convention and various human rights treaties. Oxfam Novib et al. argue in ground 4 that the State is obliged to stop the export of F-35 parts to Israel on the basis of the EUGS and the Arms Trade Treaty. Oxfam Novib et al. dispute that AV009 was assessed against the EUGS when it was adopted in 2016 and, moreover, according to Oxfam

Novib et al., the State should have assessed AV009 against the EUGS again after October 7, 2023, which should have led to a negative assessment. In addition, AV009 is contrary to higher regulations and is therefore undeniably non-binding. With ground 5, Oxfam Novib et al. contest the assessment by the preliminary relief judge of the weighing of interests made by the Minister. If such a weighing of interests were to be assumed, the preliminary relief judge did not sufficiently take into account that there is a clear risk of serious violations of the laws of war due to the deployment of F-35s. He wrongly or too much weighted the circumstances taken into account by the preliminary relief judge.

- 4.5 The State contested the grievances in a statement of defense and lodged a cross-appeal. The State firstly argues that the preliminary relief judge wrongly declared Oxfam Novib admissible in its claims. Furthermore, the State is of the opinion that the preliminary relief judge used an incorrect assessment framework. In short, this (incidental) complaint means that the civil court cannot (in summary proceedings) assess the actions of the State regarding arms exports, or only to a very limited extent, against the EUGS and the Arms Trade Treaty.

5 Assessment of the appeal

A. Admissibility of Oxfam Novib

- 5.1 The court will first address the State's incidental complaint, in which it argues that the preliminary relief judge wrongly deemed Oxfam Novib admissible in its claims. The complaint means that Oxfam Novib claims to stand up for the interests of (Palestinian) civilians in Gaza who are, or are at risk of becoming, victims of war violence and for the general interest that is served by compliance with humanitarian law, human rights and the prevention of genocide and the Dutch legal framework on export policy. According to the State, these interests do not fall under Oxfam Novib's statutory objective. According to the State, it is not clear how the ban on the export of F-35 parts promotes a global society. In addition, the State believes that Oxfam Novib cannot be accommodated in its claims as an employer, because Oxfam Novib's interests in these proceedings are already represented by Pax and The Rights Forum. According to the State, the law would not allow individual victims to act as a party in a procedure in which their interests are already represented by a collective representative.
- 5.2 The complaint fails. First of all, it is obvious that a 'world society' implies that countries and peoples live in peace with each other. It is clear that this is currently not the case in Gaza. The interest pursued by Oxfam Novib in this case is that Israel stops the violations of international humanitarian law (alleged by Oxfam Novib). That interest falls under the goal of promoting a (peaceful) world society. Secondly, Oxfam Novib's articles of association stipulate that it seeks to achieve this goal, promoting a world society, among other things by promoting the establishment of a world legal order (art. 2.3 under g). With this lawsuit, Oxfam Novib wants to ensure that the Netherlands no longer contributes to violations of international humanitarian law because the Netherlands neglects its international law obligations in the field of arms exports. That goal can undeniably contribute to the creation of a world legal order.
- 5.3 The conclusion is that Oxfam Novib is already admissible in its claims on these grounds. The court therefore does not have to address the question of whether Oxfam Novib is also admissible in its capacity as employer.

B. Clear risk of serious violations of international humanitarian law?

- 5.4 An important basis for the claims of Oxfam Novib et al. is the position that there is a clear risk that the F-35 parts to be exported to Israel will be used to commit serious violations of international humanitarian law within the meaning of art. 2(2)(c) EUGS (hereinafter also: the 'obvious risk'). According to Oxfam Novib et al., the existence of this clear risk leads to the obligation of the State to put an end to the export or transit of F-35 parts from Woensdrecht to Israel.
- 5.5 To assess whether there is a 'clear risk', the court will first briefly describe what obligations international humanitarian law imposes on warring parties (b.1). The court will then explain which facts and reports it is based on (b.2). At the end of this Chapter B, the court will examine what the role of the F-35 is (or has been) in the warfare in Gaza (b.3).

b.1. obligations under humanitarian law

- 5.6 International humanitarian law is the law that applies in, in short, war situations and serves to protect persons who do not or no longer participate in hostilities. In principle, 'international humanitarian law' and 'humanitarian law of war' have the same meaning. The two terms are used interchangeably below. The rules of humanitarian law are laid down in particular in the Geneva Conventions of 1949 and in the First Additional Protocol to these Conventions of 1977. The Netherlands is a party to the Geneva Conventions and the First Additional Protocol. **22** Moreover, a significant part of the rules of the First Additional Protocol are customary international law. **23**

- 5.7 There appears to be no difference of opinion between the parties regarding the standards of humanitarian law against which Israel's military actions in the Gaza Strip must be assessed. These standards obviously also apply to Hamas and it has already been noted that it is not in dispute that Hamas committed war crimes with its attacks on October 7, 2023. However, the fact that Israel responds to these crimes with its attacks on Gaza and claims to be acting in self-defense does not mean that the State no longer has to check whether Israel complies with the norms of humanitarian law. The fact that it is likely that Hamas is using civilians as human shields, however reprehensible - and unauthorized - that may be, does not mean that the rules regarding the protection of civilians no longer apply. **24**
- 5.8 On the basis of humanitarian law, a distinction must be made between military objectives (*combatants* and *military objectives*) on the one hand and civilian objectives (*civilians* and *civilian objects*) on the other. *Military objectives* are defined as ' *objects which by their nature, location and purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage* ' . **25** Only military objectives are legitimate targets of armed attacks.
- 5.9 So-called ' *indiscriminate attacks* ', attacks that do not distinguish between military targets and civilian targets, are prohibited. **26** Civilian targets may not be attacked. If there is any doubt about whether something is a military objective or a civilian objective, it must be assumed that it is a civilian objective. **27** If a military target is attacked, an assessment must be made as to whether such an attack will cause additional damage (' *collateral damage* ') to civilian targets. If such ' *collateral damage* ' is ' *excessive in relation to the concrete and direct military advantage anticipated* ' , the attack may not take place. **28** When conducting military operations, constant care must be taken to spare civilians and civilian targets, including providing effective advance warning, unless circumstances do not permit this. **29** Attacking ' *agricultural areas* ' and ' *drinking water installations* ' , among other things, is prohibited. **30**
- b.2. facts and reports on which the court bases itself in these summary proceedings*
- 5.10 The court bases itself on the following facts, which have been stated by Oxfam Novib et al. and which have not been refuted or refuted with insufficient substantiation by the State:
- almost half of the bombs dropped by Israel on Gaza are 'dumb bombs', i.e. unguided bombs that are generally not or less precise; **31**
 - 60% of all housing units in Gaza have been destroyed or damaged; 1.9 million people, almost 85% of Gaza's population, are displaced; **32**
 - IDF (Israeli Defense Force, court) spokesperson Rear Admiral Daniel Hagari has stated, according to the IDF website: **33**

"These neighborhoods are densely populated urban areas that Hamas thought they could use for their purposes, using the Gazan population as human shields. These strikes are only the beginning when it comes to the city of Gaza. The IAF [Israeli Air Force, court] continues to strike every neighborhood we even have a chip of intelligence regarding terrorist activity in."
 - OCHA (*United Nations Office for the Coordination of Humanitarian Affairs*) reported that as of December 19, 2023, the death toll in Gaza was 19,667 (Palestinian) persons, including 5,153 women and 7,729 children, and the number of injured 52,586; **34**
 - the same OCHA report shows: 44% of households in Gaza report ' *very severe hunger* ' , 11% ' *severe hunger* ' and 31% ' *moderate hunger* ' ; eleven bakeries are reported as destroyed; no bakery has been operational since November 7, 2023 and the last operational grain mill was bombed on November 15, 2023; **35**
 - the same OCHA report shows: ' *hospitals are under heavy strikes* ' and ' *the number of functional hospitals has dropped from 36 to 8* ' ; The Dutch government also points out that many of the 36 hospitals in Gaza no longer function due to, among other things, a lack of fuel and damage from shelling, while according to humanitarian law, hospitals are spared and protected at all times; **36**
 - Israel bombs water supplies; **37**
 - an article by +972 Magazine states that Israel previously only attacked ' *power targets* ' after civilians living there had been evacuated, but that in the current conflict in Gaza no evacuation is expected; the Chief of Staff of the Israeli Air Force confirms that the previously applicable " *roof knocking policy* " , with which civilians were warned to leave the building being attacked, is no longer applied. **38**
- 5.11 The court also takes into account the following reports and alerts from (agencies of) the United Nations and international human rights organizations:
- two reports from Amnesty International dated October 20, 2023 and December 5, 2023 **39** , in which Amnesty International concludes, based on on-site investigations, that civilian targets have been attacked, or at least that there have been ' *indiscriminate attacks* ' , that not all possible precaution had been taken to

spare civilians and that these attacks should be investigated as war crimes because there is ' *damning evidence* ' that Israel is committing war crimes;

b. [Rapporteur 1], *Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health of the UN Human Rights Council* , has said, according to a press release from the United Nations of 7 December 2023, **40** that in Gaza at least at least 364 attacks on health services have been recorded, that the Al-Indonesi hospital has been bombed 35 times, that "*the healthcare infrastructure in the Gaza strip has been completely obliterated*" and that there have been an untold number of violations of the special protection afforded to civilians, children and medical personnel under international humanitarian law;

c. the United Nations Security Council adopted a resolution on 15 November 2023 expressing deep concern about the disproportionate impact of the situation in Gaza on children and calling on all parties to comply with their obligations under international humanitarian law; **41**

d. [Rapporteur 2], *UN Special Rapporteur on the right to adequate housing* , has condemned, according to a press release dated November 8, 2023, the attacks on civilian targets in Gaza (' *domicide* ' according to him) and pointed out that also ' *combatants* ' (Hamas fighters, court) take refuge in civilian homes it is prohibited to attack an entire apartment building if this leads to disproportionate damage; **42**

e. According to a press release dated October 19, 2023, nine UN experts (including [Rapporteur 3], *Special Rapporteur on the situation of human rights in the Palestinian Territory occupied since 1967*), have pointed out the ' *willful and systematic destruction of civilian homes and infrastructure, known as 'domicide'* ', and declared that Israel commits ' *crimes against humanity* ' for which there is no justification or exception; **43**

f. According to a press release dated December 8, 2023, a large number of UN Experts have noted that the ' *massive bombardment* ' carried out by the Israeli army is incompatible with international humanitarian law and that the army has not spared hospitals, schools, refugee camps, homes, markets and religious buildings . **44**

5.12 The State has questioned Amnesty International's findings. The State wonders whether Amnesty International itself was able to visit the Gaza Strip. The State also states that an assessment of the legitimacy of the use of force requires specific operational information that an NGO such as Amnesty International does not have. The court states that findings by NGOs such as Amnesty International must be taken very seriously, especially when it comes to the question of whether international humanitarian law has been violated. This is apparently also the view of the Minister of Foreign Affairs in her letter to the House of Representatives of 18 November 2023. **45** It is also apparent from the preamble to the Arms Trade Treaty (3.8 above) that NGOs can play a role in the implementation of that treaty. In addition, according to the User Guide, reports from international NGOs can be used additionally when applying criterion 2 of the EUGS. **46** This means that in these summary proceedings the court assumes that Amnesty International has relied on information that it considers reliable. This concerns in particular Amnesty International's finding that numerous civilians have been killed, while no presence of military activity could be detected on site.

5.13 The State has also disputed the findings of the UN experts. According to the State, the *UN Special Rapporteur on the right to adequate housing* has no special expertise in international humanitarian law and does not have adequate information to make such a complex assessment. The State states that other positions of the *Special Rapporteurs* do not constitute valid legal judgments about the use of the F-35 or the Israeli armed actions. However, the court assumes that the *Special Rapporteurs* must be considered quite capable of assessing the actual situation in Gaza and whether civilian targets have been hit and whether the damage caused is proportionate. It is in itself correct that a definitive legal judgment cannot be derived from these sources as to whether Israel has violated international humanitarian law, but that is not necessary. After all, the question in these summary proceedings is whether there is a 'clear risk' of such violations.

b.3. deployment of F-35

5.14 With regard to the deployment of the F-35 over Gaza, the court assumes the following facts, which have not been refuted or have not been refuted with sufficient reasons by the State:

a. the State confirms that the F-35 is being deployed in support of the Israeli ground forces present in Gaza; **47**

b. In an interview, an F-35 pilot stated, among other things, that the air force has now been carrying out attacks and defenses for about a month, especially in Gaza, and that 'we' have carried out very important attacks that have undermined the Hamas regime. seriously damaging the Gaza Strip and in recent days working side by side with the ground forces and providing them with an air umbrella with enormous firepower; **48**

c. an interview with an F-35 pilot on January 13, 2023 shows that she bombs targets in Gaza, and that the definition of incidental damage has changed significantly after October 7, 2023 (in the sense that the

possibility of incidental damage is less likely to lead to of the target) and that, since the ground troops entered Gaza, there is no longer any room to 'smallish' a neighborhood because the ground troops move from house to house; **49**

d. Air Force Lt. Gen. [Lt Gen] (USAF) has stated that the F-35 is being used in operations against Hamas and that the F-35 Program has provided *surge support* to Israel since early October, including by supplying parts. **50**

- 5.15 Contrary to what the State has argued, the court is of the opinion that the fact that the interview referred to under b only talks about the air force in a general sense cannot be seen separately from the person interviewed, an F-35 pilot. The only conclusion that can be drawn from this context is that it confirms that the F-35 is used in Gaza. Based on the aforementioned facts and circumstances, the court therefore assumes that the F-35 is actively deployed by Israel in the conflict in Gaza, not only in providing support to ground troops but also in carrying out bombings.

b.4. conclusion regarding the 'obvious risk'

- 5.16 The court concludes that there are many indications that Israel has violated the humanitarian law of war in a not insignificant number of cases. In itself it is correct that a final judicial decision on the question of whether humanitarian law *has* indeed been violated in all these cases can only be given if a careful factual investigation has taken place, which also examines what information the commander who ordered the attack in question had. gave and could dispose. However, such a definitive judgment is not necessary for an assessment of the 'clear risk'. The assessment of whether a clear risk exists concerns possible future use of the military goods to be supplied and there is a certain degree of uncertainty inherent in this. When assessing the likelihood of that future use, significance will be given, among other things, to the behavior of the country of destination in the recent past. The requirement cannot be made that conduct in the recent past could only play a role in assessing the clear risk if it has been definitively established that this conduct violated international humanitarian law. That would make the condition that there must be a 'clear risk' largely meaningless.
- 5.17 The facts show that large numbers of civilian casualties have been caused, including thousands of children, that thousands of homes have been destroyed, that 'dumb bombs' are used, that every residential area is attacked if there is even the slightest indication of terrorist activity taking place, that Previously applied limits regarding ' *collateral damage*' in the current conflict have been expanded, the policy of warning civilians before an attack has been abandoned, drinking water supplies, bakeries and a grain mill have been destroyed, and a hospital (the Al-Indonesi Hospital) has been opened. has been bombed and many of Gaza's hospitals are no longer functioning. It is not plausible that this destruction was inflicted exclusively on military targets or constituted legitimate ' *collateral damage*' , not only in view of its unprecedented scale, but also in view of the statements made by Israeli soldiers themselves. Based on the foregoing, the court also concludes that the violations of international humanitarian law for which there is a clear risk are 'serious'.
- 5.18 The court feels supported in this conclusion by the conclusions of Amnesty International and various experts affiliated with the United Nations. Based on what has been considered above with regard to the deployment of F-35s over Gaza, the court also concludes that in these summary proceedings it has become sufficiently plausible that the F-35 was used in these violations of international humanitarian law. The facts stated above provide sufficient evidence that the F-35s participated in attacks and bombings on Gaza. However, even if it is assumed that the F-35s only provided support to the ground troops, this does not change the conclusion. There is no reason to consider the clear risk only present if it can be demonstrated that the F-35s themselves have directly committed serious violations of humanitarian law. Now that Israel's war actions in the Gaza Strip have involved a clear risk of serious violations of humanitarian law and the F-35s have been deployed in support of those war actions, there is a clear risk that the F-35 parts to be exported will be used in committing serious violations of international humanitarian law. In this context, the court points to art. 7 Arms Trade Treaty, in which the prohibition applies not only if the military goods to be exported ' *could be used to commit a serious violation of international humanitarian law* ', but also if they ' *could be used to facilitate a serious violation of international humanitarian law* '.
- 5.19 The conclusion is that there is a clear risk that F-35 parts to be exported to Israel will be used to commit serious violations of international humanitarian law within the meaning of art. 2(2)(c) EUGS.
- C. Does the 'clear risk' mean that the State must stop the export of F-35 parts to Israel?*
- 5.20 In this Chapter C, the court addresses the question to what extent the State, given the clear risk that in the situation that will arise after October 7, 2023, the F-35 parts to be exported will be used in the commission of serious violations of international humanitarian law, can be held to prevent the export of F-35 parts to Israel. Oxfam Novib et al. argue that, following the events after October 7, 2023, the Minister was obliged to reassess AV009 **against** the EUGS. In addition, Oxfam Novib et al. argue that the Minister's

decision not to intervene in AV009 was arrived at in a defective manner because the Minister did not apply the correct test and incorrectly weighed the interests taken into account.

5.21 The court will first examine (c.1) whether under international law, in particular the EUGS and the Arms Trade Treaty, the State is obliged to (again) comply with the (compulsory) criteria of the EUGS and the Arms Trade Treaty. The court will answer that question positively. Subsequently (c.2) the court will address the State's argument that citizens cannot derive any rights from such obligations because the EUGS and the Arms Trade Treaty do not have direct effect and do not intend to grant rights to citizens, so that the Minister's decision not to intervene in AV009 cannot be assessed by the Dutch (civil) court. The court will conclude that that defense does not apply. Finally (c.3), the court will examine whether the State has correctly complied with its obligations under the EUGS, Bsg and AV009. The court answers that question negatively.

c.1. did the Minister have to reassess AV009 against the criteria of the EUGS (and the Arms Trade Treaty) on the basis of international law?

5.22 The court will first address (i) the question whether the EUGS (or the Arms Trade Treaty) imposes an obligation to reassess AV009 in the light of new relevant circumstances. The court will further examine (ii) what the consequence is if such a reassessment finds that one of the mandatory grounds for refusal of art. 2 EUGS occurs.

5.23 The State argues that art. 1(1a) EUGS only provides that if new information becomes available, each Member State is *encouraged* to reassess export licenses already granted, and that art. 7 paragraph 7 Arms Trade Treaty is a comparable provision. The State deduces from this that there is no obligation under either the EUGS or the Arms Trade Treaty to reassess AV009 against the EUGS if new relevant circumstances arise.

5.24 The court does not agree with the State. Although the EUGS and the Arms Trade Treaty may not contain an obligation to reassess every license granted if new circumstances arise, that obligation does exist in the present case. The present case is characterized by the following circumstances: (i) AV009 is a permit that has been granted for an indefinite period, (ii) AV009 was adopted in 2016, so the most recent assessment against the EUGS took place more than seven years ago, and (iii) it concerns changed circumstances that consist of a clear risk of serious violations of international humanitarian law, a compelling ground for refusal under the EUGS. A reasonable interpretation of the EUGS in the light of its objectives means that in this case a new assessment against the criteria of the EUGS must take place. The State's position that there is no obligation to carry out a new assessment would lead to the unacceptable result that the purpose of the EUGS could be completely undermined by granting permits for an indefinite period that would never have to be assessed again, not even if serious violations of international humanitarian law were committed by the country of destination at a later date with the exported military goods. That clearly cannot be the intention of the EUGS or the Arms Trade Treaty. It would not be in accordance with the wish of the Member States to establish 'high common standards (...) as a minimum' for arms exports in the EUGS **52** or with the obligation of the States under art. 5 paragraph 5 Arms Trade Treaty to have an effective and transparent *control system*.

5.25 The State's position also goes against the scope of art. 1 Geneva Conventions (including art. 1 paragraph 1 First Additional Protocol), which imposes the obligation on states to ensure ' *in all circumstances* ' that another state acts in accordance with international humanitarian law. With art. 1 Geneva Conventions is incompatible with the idea that a state that has granted a license for arms exports could turn a blind eye to serious violations of international humanitarian law in the country of destination and refuse to attach consequences to the license. The EUGS User Guide refers to the Geneva Conventions and the First Additional Protocol to clarify what should be considered a 'serious violation of international humanitarian law'. **53** Reference is also made to the Geneva Conventions in the preamble to the Arms Trade Treaty (under ' *principles* '). It is therefore obvious to interpret the standards of the EUGS and the Arms Trade Treaty in such a way that no conflict arises with the obligations under art. 1 Geneva Conventions or art. 1 paragraph 1 First Additional Protocol.

5.26 From the mere fact that the EUGS and the Arms Trade Treaty in general contain an encouragement to the signatory states to carry out a new assessment if circumstances have changed, it cannot be deduced *contrario* that there would never be any obligation to do so. In a commentary on art. 7 paragraph 7 of the Arms Trade Treaty, it is noted that licenses are granted for a certain period, usually for 1 to 5 years. **54** This is therefore a completely different situation than in the present case.

5.27 If this mandatory reassessment leads to the conclusion that a compelling ground for refusal under art. 2 EUGS, such as that of art. 2(2)(c) EUGS, the consequence should be that the Member State concerned must put an end to the further export of military goods under that licence, for example by withdrawing or amending that licence. Otherwise, the obligation to re-test under the circumstances prevailing here would have no real meaning. The mandatory ground for refusal of art. 2(2)(c) In such a situation, EUGS becomes a mandatory ground for terminating further exports under that permit.

- 5.28 However, even if, contrary to what was considered above, the Minister was not obliged to reassess on the basis of the EUGS, the Minister would still have had to comply with the mandatory ground for refusal of art. 2 paragraph 2 under c) EUGS must be assessed. After all, it is an established fact that the Minister reassessed AV009 following the events after October 7, 2023 and that the Minister also assessed the criteria of the EUGS in that assessment **55**. The Minister has therefore apparently responded to the encouragement of art. 1 paragraph 1 bis EUGS (and art 7 paragraph 7 Arms Trade Treaty) to reassess AV009 in the light of the new circumstances. The court is of the opinion that a reasonable interpretation of the EUGS means that *if* a Member State decides to reassess a granted permit on the basis of new relevant information, this Member State must in any case (also) assess the criteria laid down in the EUGS. Once a Member State proceeds with a reassessment, whether this is an assessment against the EUGS or (also) an assessment against other standards (such as those of Article 8 AV009), that Member State must in any case (also) meet the mandatory criteria of the EUGS, such as art. 2 paragraph 2 under c) tests. There is no reason to assume that if a Member State does not comply with the encouragement of art. 1 paragraph 1 bis EUGS, other criteria would apply than those included in the EUGS. This means that in this case too ('voluntary reassessment') further export under an existing license must be terminated if a compelling ground for refusal such as that of art. 2 paragraph 2 under c) EUGS appears to occur.
- 5.29 The conclusion is that, following the situation that arose after October 7, 2023, on the basis of the State's obligations under international law, the Minister had to (again) assess AV009 against the mandatory criteria of the EUGS. This means that if one of the mandatory grounds for refusal of the EUGS occurs during the reassessment, export to the relevant country of destination may no longer be permitted. Art. 2(2)(c) EUGS is such a compelling ground for refusal: export must be refused if there is a clear risk of serious violations of international law. It has been noted that this clear risk occurs in this case.
- c.2. Can the court assess the State's actions or omissions against these obligations under the EUGS and the Arms Trade Treaty?*
- 5.30 The State has argued that the provisions of the EUGS (and the Arms Trade Treaty) do not have direct effect and that Oxfam Novib et al. cannot rely on the provisions of the EUGS and the Arms Trade Treaty in this case. This argument is invalid for two reasons.
- 5.31 Firstly, art. 5 paragraph 4 Bsg (for transit) and art. 11 paragraph 3 Bsg (for export) states that a permit will in any case not be granted insofar as this results from international obligations. It is not in dispute that the EUGS and the Arms Trade Treaty are international obligations within the meaning of these provisions. Now that national (Dutch) law refers to the EUGS and the Arms Trade Treaty, the standards from these international instruments have been imported into the Dutch legal order, the court can assess this and the question of whether those standards have direct effect is no longer relevant. **56** The explanation of the aforementioned provisions of the BSG explicitly states that in practice the EUGS is always assessed against 'can be carried out at any time', the Bsg expressly states that the various permits will not be granted if this would otherwise conflict with international obligations. **57** The explanation then continues: "The criteria of the Treaty as well as (possibly future) other international obligations in this area have become assessment criteria in the context of the decision " (court's emphasis).
- 5.32 Secondly, art. 8 AV009 and the Bsg, on which AV009 is based, are interpreted as meaning that the State is not acting in conflict with its international law obligations towards other states. The court's obligation to provide 'interpretation in accordance with the treaty' exists regardless of whether the obligation in question has direct effect within the meaning of art. 93 Constitution and arises from the principle that a norm of national law may never be interpreted or applied in a way that causes the State to violate its obligations under international law. **58** Although the State has raised questions about the precise status of the EUGS, it also recognizes that the EUGS creates obligations between states and that the State is obliged to the other Member States to comply with the EUGS. **59** This is sufficient to conclude that the court is obliged to interpret national provisions in accordance with the EUGS as far as possible. This also applies to the Arms Trade Treaty.
- 5.33 It is very possible that the Bsg, more specifically art. 6a paragraph 3 and art. 13 paragraph 3 Bsg, and art. 8 AV009 in accordance with the EUGS, the Arms Trade Treaty and art. 1 Geneva Conventions (including art. 1 paragraph 1 First Additional Protocol). Art. 6a paragraph 3 and art. 13 paragraph 3 Bsg stipulate that the Minister can exclude a person authorized to make a decision from the use of a general transit permit or general export permit to protect essential security interests, public order or public safety. In art. 8 AV009 includes the Minister's authority to inform the registered user or person with powers of disposal that integrated foreign policy or security considerations oppose continued use. It is quite possible to understand 'essential security interests' and 'integrated foreign policy or security considerations' as including, where appropriate, the standards under which exports of military goods may take place, such as the standards arising from the EUGS, the Arms Trade Treaty and art. 1 Geneva Conventions. After all, the security considerations mentioned in these international law provisions are closely related to the regulation of arms exports, as the Arms Trade Treaty recognizes with its reference in the preamble to art. 26 of the Charter of

the United Nations " *which seeks to promote the establishment and maintenance of international peace and security with the least diversion for armaments of the world's human and economic resources* ". That art. 8 AV009 does not prevent such an interpretation, which is also confirmed by the fact that the Minister herself in her reassessment of AV009 on the basis of art. 8 of them have taken the EUGS criteria into account. Treaty-compliant interpretation also means that if a new assessment takes place on the basis of the EUGS or the Arms Trade Treaty and one of the mandatory grounds for refusal occurs, the Minister is obliged to use her broad powers under art. 6a paragraph 3, art. 13 paragraph 3 Bsg and art. 8 AV009. The fact that these provisions have been formulated as powers does not make it impossible to interpret the BSG and AV009 in such a way (in accordance with the treaty) that the Minister is obliged to make use of these powers under the circumstances stated in the EUGS, and no longer by further export to allow.

5.34 The State's defense regarding the lack of direct effect with regard to the provisions of the EUGS and the Arms Trade Treaty is contradicted by this. The judge can assess the Minister's decision not to intervene in AV009 against art. 6a paragraph 3, art. 13 paragraph 3 Bsg and art. 8 AV009, interpreted in accordance with the criteria of the EUGS and the Arms Trade Treaty.

c.3. Has the State fulfilled its obligations regarding reassessment of AV009?

5.35 The question then is whether the Minister has carried out the renewed assessment correctly and whether, as she was obliged, she has correctly tested against the criteria of the EUGS. The court has come to the conclusion that this is not the case and explains this as follows.

5.36 The court will deduce how the Minister came to her decision not to intervene in AV009 from what the State has stated about this, because there is no written record of that decision itself. The motivation for the Minister's decision is shown above (3.15). The Minister has appealed to more general foreign policy interests, such as Israel's right to defend itself and its interest in preventing the conflict from spreading to the region, as well as the Netherlands' wish not to undermine good relations with the United States and Israel. to damage. The Minister also indicated that the current situation is complex and that it is therefore not possible to determine whether Israel has violated international humanitarian law by using the F-35. The Minister has thus misjudged (i) that the issue is not whether it can now be 'established' that Israel is (intentionally) violating humanitarian law of war **60** by using the F-35, but whether there is a ' *clear risk* ' that the F-35 -35 is used for such serious violations. It does not appear that the Minister tested this criterion. In addition, the possible complexity of the situation should not be a reason to test art. 2(2)(c) EUGS on the clear risk of not being implemented. The EUGS simply requires this test to be carried out. Furthermore, the Minister has failed to appreciate (ii) that if such a serious risk exists, she is already *obliged* under the EUGS to prevent the export of F-35 parts to Israel, regardless of any other foreign policy considerations such as good relations with Israel and The United States.

5.37 The foregoing leads to the conclusion that the Minister had to test AV009 against the criteria of the EUGS after October 7, 2023, including mandatory law art. 2 paragraph 2 under c). If the Minister has not carried out this mandatory test, this is in conflict with the EUGS. To the extent that it must be assumed that the Minister has carried out the required test, this has been done on the basis of an incorrect assessment framework, as it has been sufficiently shown that they did not correctly meet the criterion of art. 2(2)(c) EUGS has assessed that it has not given this mandatory legal requirement priority over any other considerations of a foreign policy nature.

5.38 The foregoing means that the Minister was obliged to assess the export and transit of parts of the F-35 to Israel and that she should have come to the conclusion that this export and transit on the basis of art. 2(2) (c) EUGS was no longer permitted.

D. Other defenses of the State

5.39 Insofar as the State's defenses have not yet been addressed above, the court will now address them.

5.40 The State argues that the civil court (in summary proceedings) in a claim such as that of Oxfam Novib et al. cannot assess the actions of the State in the context of AV009 against the EUGS and the Arms Trade Treaty. This would follow from the creation and object of these regulations. As can be seen from the foregoing, the court does not assess against the EUGS or the Arms Trade Treaty, but against the BSG and AV009, as interpreted in accordance with these international law instruments. The State's statement that the EUGS and the Arms Trade Treaty have no direct effect and are not intended to grant any rights to citizens is not relevant in this regard.

5.41 The State further takes the position that the provisions of the BSG and AV009 do not aim to protect the interests that Oxfam Novib et al. claim to defend in these proceedings, namely the protection of the (civilian) population in Gaza, or the interests that the State complies with the regulations in the field of arms exports. This defense does not hold. Due to the reference in art. 5 paragraph 4 and art. 11 paragraph 3 BSG to 'international obligations' (which, according to the State, also includes the EUGS and the Arms Trade Treaty), the BSG (partly) aims to prohibit the export of military goods insofar as (there is a clear risk that) they are used when committing serious violations of international humanitarian law. The same applies

to the AV009, based on the Bsg, which - interpreted in accordance with the treaty - also aims to achieve this objective. Oxfam Novib et al. are public interest organizations that pursue, among other things, the aim that no serious violations of international humanitarian law are committed with weapon parts supplied by the Netherlands and that as such are admissible in these proceedings. The standards of the Bsg and AV009 therefore indeed serve to protect the interests that Oxfam Novib et al. are defending in these proceedings.

5.42 A subsequent defense of the State means that the State could attach decisive weight to (i) the importance of the F-35 for the security of Israel, (ii) the expected damage to the good relations of the Netherlands with Israel, the United States and the other countries in the F-35 program if the export of F-35 parts is stopped and (iii) the risk to the continued existence of the European Regional Warehouse in Woensdrecht. This defense does not hold. The interests stated by the State are not interests that carry as much weight as under art. 8 AV009 and the Bsg (interpreted in accordance with the treaty) are tested against the mandatory criteria of art. 2(2)(c) EUGS.

5.43 The court nevertheless notes the following about Israel's interest in being able to defend itself with the help of the advanced F-35 in a possible war against countries or other fighter groups in the region. Such a war is not currently occurring, but if it were to become reality, the State would in principle have the authority to grant a (new) license for the export of F-35 parts to Israel, provided that this is subject to the condition that Israel F-35 not deployed in its operations in Gaza. The State naturally also has the authority to amend AV009 in that sense.

5.44 The State further argues that art. 8 AV009 does not offer the option to exclude exports to one country of final destination (such as Israel). Art. 8 AV009 would only allow a registered user (i.e. (legal) persons who are authorized to dispose of military equipment in the Netherlands) to be excluded. The only way in which Israel uses art. 8 could be excluded, according to the State, would be to deny all users who supply F-35 parts to Israel the use of AV009. This defense fails. If the State can do more (completely exclude a user), it cannot be seen that it should or cannot do less (exclude a user to the extent that he supplies to Israel). The State can of course also amend AV009, a ministerial regulation, at any time in such a way that Israel is excluded as a country of destination, but that is up to the State.

5.45 The State also points out that the actual interest of Oxfam Novib et al. in these proceedings is limited, if not nil, because Israel will receive the F-35 parts in a different way (perhaps with a delay), for example through direct delivery by the USA. The court cannot speculate on or anticipate the question of whether other countries will supply the F-35 parts to Israel if the Netherlands no longer does so, and the court cannot assess whether this would be lawful. After all, these other countries also have to deal with the (customary law) obligations arising from art. 1 Geneva Conventions and with possible other national or international obligations. The interest of Oxfam Novib et al. in preventing the unlawful export of military goods from the Netherlands to Israel is not lacking because other countries may also act unlawfully by taking over the supplies. **61**

5.46 The State has appealed in general terms to the great freedom that the State is entitled to in assessing issues related to (national) security and foreign policy. This freedom exists where the State has policy freedom, but not in a case like this in which art. 2(2)(c) EUGS and Articles 5(4) and 11(3) of the Bsg respectively prescribe mandatory cases in which a permit *must* be refused. In this case, the State only has a certain degree of freedom in assessing the facts. In this case, as discussed above, the Minister could not have come to an assessment other than that there is a clear risk of serious violations of international humanitarian law with the F-35. Art. 5 paragraph 4 and art. 11(3) Bsg also does not, as the State argues, create 'exclusively a power' for the Minister. These provisions prescribe that a permit will *in any case* not be granted to the extent that this results from international obligations. As discussed above, this mandatory legal ground for refusal when granting a permit also applies if a permit such as this one is reassessed as a result of new circumstances, in the sense that in the latter case further export under that permit must be prevented.

5.47 The State has argued that the Netherlands has committed itself to the US that F-35 parts can be supplied without restriction from the Netherlands. A ban on the export or transit of F-35 parts from the Netherlands to Israel would therefore result in the Netherlands violating its international obligations towards the US. This defense also fails. As the State rightly notes, in the event of a conflict between treaty provisions, the court must weigh all the interests involved to determine which treaty takes precedence in the relevant case. **62** The court recognizes the interest that the State has in ensuring that the Netherlands fulfills its international obligations towards the US, an important ally. The interest in compliance with the international obligations of the State under international instruments relating to the regulation of the arms trade and compliance with the standard of art. 1 Geneva Conventions (including art. 1 paragraph 1 First Additional Protocol) carries more weight.

E. Conclusion

- 5.48 The conclusion is that the State is acting unlawfully by not intervening in AV009 and by not preventing the export and transit of F-35 parts to Israel. The grievances succeed to that extent. Oxfam Novib et al. have no interest in the handling of the other bases of their claims. The judgment of the preliminary relief judge cannot be upheld.
- 5.49 The claim of Oxfam Novib et al. to order the State to immediately cease all (actual) export and transit of F-35 parts with final destination Israel is allowable, although the court will give the State a period of 7 days. to take the necessary measures to this end. In addition, Oxfam Novib et al. have no interest in their other claims.
- 5.50 The State has requested that any order or order be declared provisionally unenforceable. The State also points out that if the goal of Oxfam Novib et al. is that Israel no longer receives the F-35 parts, that goal cannot be achieved with these summary proceedings because the US will then supply the parts to Israel from another place. On the other hand, granting the claim would have immediate, irreversible and immense consequences for the State and for the Dutch position in the world, in particular relations with the US and Israel. The State further states that intervening in the delivery process puts great pressure on the present form of defense cooperation, and more generally cooperation in the field of defense, and leads to doubts about the reliability of the Netherlands in this area, with a corresponding effect on the security of The Netherlands, Europe and participating countries in the F-35 project. According to the State, the survival of the location in Woensdrecht would also be at stake.
- 5.51 The court is not convinced by the State's arguments. The importance of Oxfam Novib et al. has already been discussed above, as well as the stated importance of good relations with the US and Israel. These good relations are important, but do not outweigh the importance of the Netherlands fulfilling its obligations under the EUGS, the Arms Trade Treaty and art. 1 complies with the Geneva Conventions. It must also be possible to explain to these states that the independent judge has a different view than the government about the scope and weight of these obligations. The alleged disruption of the delivery process of F-35 parts from Woensdrecht has also been discussed above. The State has not made it plausible that it is not possible to prevent the delivery of F-35 parts only to Israel, while deliveries to other countries can continue as usual. Finally, the court does not see that the mere fact that the judge holds the State to international agreements made by the State itself would put pressure on the reliability and security of the Netherlands and other countries. The State has not sufficiently substantiated this.
- 5.52 The court will declare its decision provisionally enforceable, as is generally customary in summary proceedings. **63** If the court were to declare its ruling unenforceable provisionally, this would imply that the claims of Oxfam Novib et al. lack urgent interest. Oxfam Novib cs do have that urgent interest and the State as such has not disputed it.
- 5.53 The court will not impose the restriction on the order that it applies 'until the moment that the export and transit is no longer in conflict with the obligations incumbent on the State', as Oxfam Novib et al. claim. After all, it is not immediately clear what obligations Oxfam Novib cs mean by this. Such a restriction is also not necessary. After all, a judicial ban or order is always given on the assumption that the essential grounds on which it is based continue to exist. If circumstances change in such a way that, in the light of the ruling, it must be assumed that unlawful conduct no longer exists, it must be assumed that a stated ban or order no longer applies. **64**
- 5.54 The State will be ordered to pay the costs of the proceedings in both instances, including those of the cross-appeal.

6 Decision

The Council:

- sets aside the judgment of the preliminary relief judge of December 15, 2023, and reaffirms:
- orders the State to cease all (actual) export and transit of F-35 parts with final destination Israel within 7 days after service of this judgment;
- rejects the more or otherwise advanced;
- orders the State to pay the costs of the proceedings in both instances, to date estimated on the part of Oxfam Novib et al. *in the first instance* at € 676 in court fees and € 129.14 in summons costs, and at € 1,079, -- to the lawyer's salary, and *in (principal and incidental) appeal* to €798 in court fees and €129.14 in summons costs, and to €4,249 in lawyer's salary, and to €178, -- to additional salary for the lawyer, to be increased by € 92, -- if this judgment has not been complied with amicably within fourteen days of notification and subsequent service of this judgment has taken place, and stipulates that these amounts must be paid within 14 days of the day of the judgment or, with regard to the amount of € 92, after the date of service, must have been paid,

failing which these amounts will be increased by the statutory interest as referred to in Article 6:119 of the Dutch Civil Code from the date of delivery. end of the said period of 14 days until the day of payment;

- declares this judgment provisionally enforceable.

This judgment was given by mrs. SA Boele, AEAM van Waesberghe and HJM Burg, and pronounced at the public hearing on February 12, 2024, in the presence of the clerk.

1 Stb. 2008, 252, last amended by Decree of August 31, 2021, Stb. 2021, 420.

2 Art. 5 paragraph 4 and art. 11 paragraph 3 Bsg.

3 Trb. 2013 no. 143.

4 The explanatory memorandum to the Decree of 3 February 2015 (Stb. 2015, 71) amending the Bsg states that these international instruments are assessed against these international instruments when granting permits.

5 A person with power of disposition is a natural or legal person who is authorized to dispose of military equipment (Article 1 Bsg).

6 Regulation of July 14, 2016, Stcrt. 2016, 44509, amended by Regulation of July 16, 2021, Stcrt. 2021, 36915.

7 Each time as defined in art. 1 Bsg. In this case, the general transfer license is not important because it relates to exports to the European Member States and some countries that are considered equivalent (not including Israel).

8 Oxfam Novib et al. stated uncontested at the hearing that the F-35 project will run until 2065.

9 Council Common Position 2008/944/CFSP of 8 December 2008 establishing common rules for the control of exports of military goods and technology, OJ. EU L 335/99.

10 Council Decision (CFSP) 2019/1560 of 16 September 2019, OJ EU L 239/16.

11 User Guide 12189/19 dated September 16, 2019.

12 Council Decision (CFSP) 2019/1560 of 16 September 2019, OJ. L. 239/16, preamble under (4).

13 In a similar sense, the State in response no. 5.6 and User Guide p. 53-54.

14 Geiß, The Obligation to Respect and to Ensure Respect for the Conventions, in: The 1949 Geneva Conventions, a Commentary, A. Clapham et al., Oxford, 2015, p. 113.

15 Geisse, p. 113.

16 Geiß p. 120, 122, 123; ICRC Commentary of 2016 on art. 1 of the First Geneva Convention, par. 160.

17 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p. 136, par. 159.

18 Geiß p. 123, 124-125.

19 Geiß p. 127.

20 Geiß p. 131; M. Sassòli, State responsibility for violations of international humanitarian law, 84 *IRRC* 846 (2002) p. 413; ICRC Commentary of 2016 on art. 1 of the First Geneva Convention par.162.

21 Conclusion of answer nos. 11.6-11.9. See also pleadings from Mr. Veldhuis in appeal nos. 8.1-8.4.

22 In the Arms Trade Treaty system, it is relevant whether the *exporting country* is a party to an international agreement that includes provisions of international humanitarian law. Moreover, in art. 7 Arms Trade Treaty ' *a serious violation of international humanitarian law* ' is broader than just the principles laid down in a treaty. Cf. The Arms Trade Treaty, A Commentary, S. Casey-Maslen et al., Oxford 2016, nos. 6.167 and 7.42.

23 M. Sassòli, International Humanitarian Law, 2019, par. 4.16.

24 Art. 51 paragraphs 7 and 8 First Additional Protocol; V. Rusinova, Human Shields (para. 14), in: The Law of Armed Conflict and the Use of Force, F. Lachenmann and R. Wolfrum eds., Oxford 2017, p. 457.

25 Art. 52 paragraph 2 First Additional Protocol.

26 Art. 51 paragraph 4 First Additional Protocol.

27 Art. 50 paragraph 1 and art. 52 paragraph 3 First Additional Protocol.

28 Art. 51 paragraphs 4 and 5 First Additional Protocol.

29 Art. 57 paragraphs 1 and 2 (c) First Additional Protocol.

30 Art. 54 paragraph 2 First Additional Protocol.

31 Appellate Summons No. 26; production 49 Oxfam Novib et al

32 Appeal summons no. 26.

33 Appeal summons no. 26 footnote 23.

34 Exhibit 53 Oxfam Novib et al

35 Appeal summons no. 34.

36 Report of a written consultation, answer 33 (exhibit 3 State).

37 Appeal summons no. 30.

38 Production 40 Oxfam Novib csp 18-19.

39 Exhibits 55 and 54 Oxfam Novib et al

40 Exhibit 60 Oxfam Novib et al

41 Exhibit 21 Oxfam Novib et al

42 Exhibit 24 Oxfam Novib et al

43 Exhibit 25 Oxfam Novib et al

44 Exhibit 48 Oxfam Novib et al

45 Exhibit 3 State p. 2.

46 p. 42.

47 Memorandum of Reply No. 6.7.

48 Interview of November 2, 2023, exhibit 87B Oxfam Novib et al

49 Exhibit 88B Oxfam Novib et al

50 Exhibit 69 Oxfam Novib et al. and appeal summons 46 with footnotes 90 and 91.

51 Oxfam Novib et al. have disputed that AV009 was tested against the EUGS in 2016; the court will presumptively assume that this has happened.

52 Recital (3).

53 User guide 12189/19 of September 16, 2019 par. 2.10 and 2.11.

54 The Arms Trade Treaty, A Commentary, S. Casey-Maslen et al., Oxford 2016, no. 7,125.

55 Conclusion of answer no. 11.6 and 11.9.

56 A. Nollkaemper, Core of public international law, 9th ed. (2022) p. 495-496.

57 Stb. 2015, 71.

58 Fleuren, in: T&C Constitution and Statute, art. 93 no. 6 and the case law mentioned there.

59 Memorandum of Reply No. 5.4.

60 Cf. statement of defense no. 4.17. 'Intent' is not a condition for a (clear risk) of serious violation of international humanitarian law. See this sentence with regard to the Arms Trade Treaty: The Arms Trade Treaty, A Commentary, S. Casey-Maslen et al., Oxford 2016, nos. 7.39 and 7.44.

61 HR December 20, 2019, ECLI:NL:HR:2019:2006; NJ 2020, 41 (Urgenda), para. 5.7.7.

62 HR March 30, 1990, ECLI:NL:HR:1990:AD7494; NJ 1991, 249 (Soering).

63 Asser Procedural Law/Boonekamp 6 2024/153.

64 Van der Helm, The court order and ban as a remedy 2023/537.
