

The Netherlands, Fighting in the Chora District (Afghanistan)

The night of the 16-17 of June 2007 the Dutch forces bombed a qala (a walled residential complex) in the Chora district in Afghanistan. Prior to the attack the Dutch forces had identified an “ISIS Snapshot” in the close vicinity of the qala and received fire from that direction. The attack resulted in civilian casualties. Relatives and the next of kin of the people that lost their lives during the attack sued the Netherlands in front of the Hague District Court. The Court found that the Netherlands did not respect its IHL obligations, specifically the rule on distinction, and ordered compensation in favor of the plaintiffs.

Acknowledgments

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N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

THE HAGUE DISTRICT COURT, JUDGEMENT

[Source: The Hague District Court, Case number - C/09/581972 HA ZA 19-1099 and C/09/604819 HA ZA 20/1244, Judgment of 23-11-2022; available at <https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBDHA:2022:12424> (unofficial translation)]

[...]

1. Introduction

1.1. This case concerns the bombing of an Afghan qala (a walled residential complex) during the battle of Chora in mid-June 2007. It is undisputed that the Netherlands is responsible for this bombing. In this case, the court answers the question whether the State is also liable and liable to pay damages to plaintiffs, who lived in this qala at the time of the bombardment and/or are surviving relatives of an occupant of this qala.

1.2. The plaintiffs argue that the bombing violated, inter alia, the principle of distinction under the International Humanitarian Law of War (IHL). This entails that the quala - a civilian object - could only be bombed if, at the time of the bombing, it was a military target or could be considered as such.

[...]

2. Proceedings

[...]

3. The facts

General

3.1. After al-Qaeda carried out four terrorist attacks in the United States (US) on 11 September 2001, the US demanded the extradition of al-Qaeda leader Osama Bin Laden, who was holed up in Afghanistan. However, Afghanistan, which was ruled by the Taliban at the time, refused to extradite Osama Bin Laden. During Operation Enduring Freedom, conducted by the US, some allies and a coalition of Afghan opponents of the Taliban, the Taliban was ousted.

3.2. In late November/early December 2001, after the fall of the Taliban, 25 Afghan leaders met in Bonn under the auspices of the United Nations (UN). The meeting - which resulted in the Bonn Agreement of 5 December 2001 - decided, among other things, to deploy an international peacekeeping force in Kabul and agreed on the establishment of the Afghan interim government headed by Hamid Karzai.

3.3. By resolution 1386 of 20 December 2001, the UN Security Council authorised the deployment of the International Security Assistance Force (ISAF) in Afghanistan to support the Afghan interim government in maintaining security in Kabul and its immediate surroundings, using force if necessary ("all necessary measures"). After individual countries had commanded the ISAF mission on a rotational basis, the North Atlantic Treaty Organisation (NATO) took over from August 2003.

[...]

Chora and the stand and fight decision

[...]

3.9. Since February 2007, the Military Intelligence and Security Service (MIVD) had evidence that the Taliban and other militias were preparing an attack in the Chora Valley. TFU [1st Dutch/Australian Task Force Uruzgan] requests to the Afghan authorities to expand the Afghan National Security Forces presence in this

area had little result. The TFU commander then decided on 26 April 2007 to permanently station two to three platoons (of 20 to 30 soldiers each) in Chora. In the month of May 2007, intelligence became available that a major Taliban attack could be expected. From 6 June 2007, Taliban fighters came to the Chora Valley area from different directions. During reconnaissance, this led to combat contacts between ISAF and the Taliban.

3.10. In the early morning of 16 June 2007, troop build-up towards Chora took place by large numbers of Taliban fighters. That same morning, the Taliban attacked the Chora valley from the east and west across three axes. Initially, the police posts of Kala Kala, Niazy and Sarab were attacked. The Dutch platoon supporting the Afghan National Police (ANP) in the west was immediately attacked by Taliban and eventually pushed back towards the White Compound. The two Dutch platoons already on the White Compound took positions in directions east and west. Intelligence suggested that the aim of the attack was to capture the White Compound. Reports also came in that the Taliban were committing atrocities against civilians. The ANP was forced to give up police posts in the west after a day of fighting by the Taliban. Around 6.30pm that evening, the intensity of combat contacts subsided and the situation near the White Compound stabilised. ISAF units had been pushed back to an area of about four square kilometres around this compound.

3.11. The TFU commander and the BG [Battle Group] commander assessed the situation as very threatening. On 16 June 2007 around 7.30 pm, the TFU commander had to make the decision to either leave Chora or stay and defend Chora. By 8 pm, the TFU commander decided that Chora should be retained with the deployment of "all necessary means" (hereinafter: the stand and fight decision). A particular factor in that decision was that it was feared that the Taliban would kill civilians who were on the Afghan government's side or who did not want to fight with the Taliban. It was further feared that withdrawing from Chora would damage the credibility of the ISAF mission and that withdrawing would give the Taliban both a strategic, and a psychological advantage. The Dutch Force Commander agreed with this decision, as did the RC(S) [Regional Command South] commander.

[...]

The battle of Chora and the plaintiffs' quala

3.14. [...] A total of 28 guided bombs were dropped by F-16s in the early morning of 17 June 2007, when fighting had subsided somewhat, 18 of them on six or seven qualas in the populated area of Chora. This air weapon deployment was always accommodated in the form of a positive identification by one of the JTACs [Joint Terminal Attack Controller] present in the valley, namely Windmill 66, Windmill 67 or Windmill 68. The latter was located on the roof of the White Compound. The FW [Fixed Wing] destroyed the intended targets that night and did not hit any non-intended targets.

3.15. The quala in which the plaintiffs and their relatives lived had been numbered in advance by TFU, as had been done with almost all infrastructure in the Chora Valley, and was given number 4131. This quala will

hereafter be referred to as quala 4131. [...] Quala 4131 was destroyed on the night of 16-17 June 2007. This resulted in the death of [plaintiff 1]'s mother, a sister and sister-in-law. His father, a sister and two brothers of [plaintiff 1] were injured. His father is the [testator], who died in 2017 and thus also lost family members. The destruction of quala 4131 further resulted in the death of [plaintiff 2]'s wife, three brothers and an uncle. He himself was hit in the arm by a bullet as he tried to leave his burning house and became paralysed in that arm as a result. [Plaintiff 3] lost his wife, two daughters, three sons and a daughter-in-law that night. [Plaintiff 4] is a son of [plaintiff 3] and thus also lost family members.

3.16. TFU's Chief Joint Fires led the air support. His report states that quala 4131 was bombed as enemy firing position at 03:10, 03:32 and 03:43 on 17 June 2007 after positive identification by JTAC Windmill 68. That identification means that the quala the pilot had in his sights was also the one previously identified as the target. The Post Mission Report of JTAC Windmill 68 records about quala 4131: "[...] enemy firing position[...] in compound" and as Method of target acquisition: "By own troops in front".

3.17. Prior to the deployment of the air weapon and fire support on 16 June 2007, warnings were issued to the Afghan authorities, namely Governor Munib, the police chief, the district chief, the ANP and the tribal leader of [place of residence]. Although the exact wording in which these warnings were given can no longer be traced, they were to the effect that civilians should leave the so-called engagement area [...] The tribal leader of [residence] informed TFU prior to said engagement that civilians had left the area just referred to. [...]

Circumstances regarding quala 4131 prior to the bombing

3.19. An "ISIS Snapshot" - a map prepared by BG duty officers showing a snapshot of combat operations at 06:58 on 16 June 2007 - shows a red lozenge on vertical 22 just above the river on which quala 4131 was located. A red lozenge was used to indicate enemy units. The area around quala 4131 was identified as an enemy position at that time. It is not clear from which exact spot these enemy units were observed at the time.

[...]

4. The dispute

[...]

4.2. Plaintiffs argue that the State acted unlawfully by carrying out heavy air raids on, inter alia, [place of residence], as a result of which family members of plaintiffs' lives, destroying plaintiffs' homes and killing livestock. These airstrikes were carried out in violation of the (customary) rules of International Humanitarian Law (IHL), namely the principle of distinction, the principle of proportionality and the obligation to take precautionary measures, including effectively warning the civilian population. Moreover, the claimant

[claimant 1] and some of his family members were injured as a result of the attack, which violated their right to physical integrity.

[...]

5. The assessment

[...]

Unlawful bombardment?

5.17. The claimants rely, inter alia, on the principle of distinction under IHL, which has been elaborated. [sic] It is not in dispute that this principle applied to Dutch troops during the Battle of Chora, which was conducted in the context of a non-international armed conflict within the meaning of IHL.

5.18. For the content of the principle of distinction, the court, following the parties, follows what is included on that subject in the (not directly applicable) First Additional Protocol to the Geneva Conventions (AP I), which is to be considered as codification of customary international law applicable during all conflicts. Article 48 AP I provides that parties to a conflict must at all times distinguish between civilian populations and combatants and between civilian objects and military targets, and that they may direct their operations only against military targets. Article 52 AP I provides, inter alia, that attacks should be strictly limited to military targets and that military targets are only those objects which, by their nature, location, destination or use, make an effective contribution to the martial operations and whose total or partial destruction, capture or disabling would, under the circumstances of the time, confer a clear military advantage. Furthermore, that article provides that in case of doubt as to whether an object normally serving civilian purposes, such as a house or other type of dwelling, is being used to make an actual contribution to the warfighting operations, it should be assumed that it is not being used for the latter purpose. And finally, Article 57 AP I stipulates that before an attack is carried out, all practicable steps should be taken to ascertain, that the targets to be attacked are not civilians or civilian objects and do not enjoy special protection, but constitute military targets. This obligation applies up to the time the attack is carried out.

5.19. In answering the question whether (the principle of distinction from) IHL has been respected, the touchstone is whether the commander in charge - in this case C-TFU - could reasonably have decided to deploy the force; the reasonable commander test. Of course, the answer to that question only involves the information available to that commander at the time the force was used. It does not involve an assessment with hindsight.

5.20. The claimants contend that the bombing of Qala 4131 did not adequately respect the principle of distinction. The plaintiffs argue that this Qala is a residential complex from which no combat was fought, so

that this quala did not therefore involve a military target and that there were insufficient facts and circumstances on the basis of which C-TFU could nevertheless reasonably have assumed that this quala involved a military target.

[...]

5.22. With the State, the Court is of the opinion that in the assessment, special attention must be paid to the extreme circumstances under which decisions had to be taken during the fighting in the period from 16 to 19 June 2007 around Chora. TFU faced a large-scale Taliban attack that posed risks not only to its own troops, and in particular to the troops on the White Compound, but also to the part of the local population that seriously feared very violent Taliban reprisals.

5.23. However, the foregoing does not alter the fact that even, or perhaps especially, under difficult circumstances during an armed conflict, the principles of IHL must be respected. The court's task is to ascertain, taking into account the relevant facts and circumstances of the case, including the (time) pressure that lay upon the decisions, whether this was also done in respect of the quala of the plaintiffs. In doing so, it applies that in this case, where the quala was deliberately bombed after the battle had already subsided some hours before, the State, in the context of its challenge to the plaintiffs' contentions, must provide as precise an insight as possible into the circumstances that prompted the responsible commander to qualify and bomb this quala as a military target.

5.24. The plaintiffs argue that the Taliban did not operate from quala 4131 and that there was no, or at least insufficient, reason to nevertheless qualify and bomb this quala - a walled residential complex - as a military target at the time of the bombardment. In doing so, they have in principle fulfilled their duty to propose.

5.25. The State believes that quala 4131 could reasonably be qualified as a military target and bombed. According to the State there was sufficient reason to consider quala 4131 as a Taliban fighting position (enemy firing position, cf. 3.16), so that according to its use, the quala made an actual contribution to the war effort. The State considers it relevant that this quala was in a strategically favourable position in relation to the choke point and the dry riverbed. That riverbed could serve as an alternative to TFU-controlled roads around the Green Zone and at times when TFU passed the narrow choke point, TFU was vulnerable to enemy fire. The court weighs what the State argues about the strategic location of the quala.

5.26. The court further considers relevant for the assessment the "ISIS Snapshot" with the snapshot of combat operations on 16 June 2007 at 06:58 on which enemy units are drawn in the area around quala 4131. It also considers relevant the hostile fire that more or less opened from the direction of quala 4131 around noon on 16 June 2007 on platoon 1.2 of TFU which was near the choke point at that time.

[...]

5.28. It has thus only been established by relevant circumstances that fire was fired from the vicinity of quala 4131 about 20 hours and about 15 hours before the bombing. In the first place, it does not follow that there was firing from quala 4131. This is of particular importance, because it is not in dispute that the Taliban was making a (mobile) advance towards the White Compound that also passed quala 4131. This is in line with the statements made by [claimant 2] (apparently claimant sub 2 in case I) before a local Afghan journalist, which read in poor English translation: "Well Taliban was there only for few minutes than they left [...] my cousin saw them [...] while they Taliban wanted to fire and run, he told them don't fire they will bomb our houses, [...] in the presence of Taliban they bombing was not started yet". In addition, these circumstances were too recent to reasonably justify the bombing. There was no evidence of any verification of the assumption that quala 4131 included a combat position.

5.29. On behalf of the State, it was rightly, because in accordance with IHL, acknowledged during the first oral hearing that only the circumstances listed under 5.26 could not have justified the bombardment of quala 4131, and that more recent information on the status of quala 4131 was a prerequisite for this. In that context, the State submitted that it was plausible that intelligence was available that one or more persons had been identified who were part of the Taliban's command structure and were holed up in quala 4131. In doing so, he further submitted in general terms that not all communications and intelligence would have been recorded.

5.30. However, what the State puts forward about the possibility the existence of intelligence is insufficiently concrete. In this respect, the Court observes, together with plaintiffs, that the State does not take the position that it has been established that this intelligence actually existed and cannot, for instance, be linked to a (later) time of day or night. Nor does the State argue that the content of certain information cannot be made concrete because this could, for example, jeopardise the safety of informants. The State's position that it cannot be other than that intelligence was available constitutes an insufficiently substantiated challenge to plaintiffs' assertion that the quala was not a military objective at the time of the bombardment and could not reasonably be regarded as such. The court takes into account that in the situation where the State bombs a quala - a walled residential complex - in a targeted manner, it must be able to explain which circumstances justified the assumption that there was a military objective. [...]

[...]

5.32. In view of this insufficiently substantiated challenge to the plaintiffs' contentions, the court should therefore assume that at the time of the bombardment of quala 4131, there was insufficient data on the basis of which a reasonable commander would be allowed to designate this quala as a military objective. It is also significant that it has not been made clear whether the warnings to leave the area, if they reached the population at all, were relevant to quala 4131 [...]

5.33. The court should therefore hold that quala 4131 was bombed without observing the principle of

distinction, which is unlawful and should lead to compensation for the plaintiffs' damages. In this respect it is of importance that it is not disputed between parties that this act should be attributed to the State, which has always maintained full command over its own troops and moreover has been a red card holder with regard to the deployment of those troops. Finally, that there is a (*condicio sine qua non*) causal connection between the act and the damages of plaintiffs is also not in dispute.

5.34. For the sake of completeness and in order to prevent misunderstandings, the Court considers that in doing so it has not given an opinion on the qualification of the bombardment as a war crime. Apart from the fact that disregard for IHL does not automatically lead to such a crime and, moreover, such a judgement is not for the civil court to make, it is important to emphasise that the court did not find that the quala was not a military target and that at the time of the bombing of quala 4131 there was insufficient data on the basis of which a reasonable commander would be entitled to classify this quala as a military target. It only ruled that in view of the State's insufficiently substantiated challenge, it should be assumed that at the time of the bombardment of quala 4131, there was insufficient data on the basis of which a reasonable commander would be allowed to designate this quala as a military target, because the State did not refute that claim by plaintiffs with sufficient grounds.

[...]

5.36. Given the opinion on the principle of distinction, there is insufficient interest in a (further) assessment of the violation of the principle of proportionality and the principle that precautionary measures should be taken, as alleged by plaintiffs. This also applies with regard to the claim of plaintiffs that their right to physical integrity has been violated.

[...]

6. The decision

The court in both cases 6.1. Rule that the State acted unlawfully towards [testator] and the plaintiffs in Case I by bombing quala 4131 on 17 June 2007 and that the State is liable for the damages suffered by [testator] and the plaintiffs in Case I as a result of the unlawful conduct, to be increased by statutory interest;

6.2. orders the State to compensate the heirs of [testator] and the plaintiffs in Case I for the damage thereby incurred by [testator] and the plaintiffs in Case I, to be assessed by the State and to be settled in accordance with the law;

[...]

Discussion

I. Classification of the Situation and Applicable Law

1. (Paras 3.1-3.3, 5.17)

1. How would you classify the situation in Afghanistan in 2007? (GC I-IV, Art. 3; P I, Art. 1(2))
2. Does the Netherlands' involvement in Afghanistan influence the classification of the conflict? What rules of IHL apply to the Netherlands in Afghanistan?
3. Does the classification of the conflict as international or non-international matter in determining whether IHL was violated in this case? Why/Why not?

2. What do you think of the phrase "*International Humanitarian Law of War*"? (para. 1.2) Is it an usual wording?

II. Conduct of Hostilities

3. General (paras 3.19, 5.18, 5.19, 5.22, 5.25, 5.26, 5.28, 5.34)

1. Did the Hague District Court apply directly Arts 48, 52 and 57 of Additional Protocol I? Why? Why not? Could it have done so? Is it self-evident to state that Additional Protocol I is to be considered as codification of customary law applicable during "all" conflicts?
2. Are distinction, proportionality and precautions "rules" or "principles"? What do these wordings change?
3. Which people and which objects can be targeted during an armed conflict? Does the answer depend on the classification of the conflict as an IAC or a NIAC? (P I, Art. 48; CIHL Rule 1)

4. Distinction (paras. 5.19, 5.22, 5.25, 5.26, 5.32, 5.33, 5.34, 5.36)

1. What is the definition of a military objective? (P I, Art. 52(2); CIHL Rule 7; CIHL Rule 8) Are an "actual contribution to the war effort" or a "strategically favourable position" parts of the military objective definition?
2. In order to determine whether the rule on distinction was respected, which test did the Court apply? Is this test an emanation of IHL rules on the conduct of hostilities?
3. Why does the Court say that "of course" the answer to the question of whether the commander in charge could reasonably have decided to deploy the force "only involves the information available to that commander at the time the force was used"?
4. In your opinion, was quala 4131 a military objective at the time of the attack? Was the existence of an "ISIS Snapshot" in the proximity of quala 4131 enough to turn the quala into a military objective? The hostile fire that opened more or less from the quala? Does it matter that both of these pieces of evidence were observed 20 hours before the attack against the quala 4131?
5. What was the overall conclusion of the Court regarding the attack? Under what main argument? Do you agree with this conclusion? How is it possible to state on the one hand that "the court did not find that the quala was not a military target" but to conclude that "quala 4131 was bombed without observing the principle of distinction"? Was really the principle of distinction violated or were the precautionary measures insufficient? (PI, Arts 48, 51(2), 52 and 57(2)(a(i)))
6. What do you think about the statement according to which: "*in the assessment, special attention must be paid to the extreme circumstances under which decisions had to be taken during the fighting*"? Are

not armed conflicts circumstances always “extreme”?

7. Is the Court right in observing that “[g]iven the opinion on the principle of distinction, there is insufficient interest in a (further) assessment of the violation of the principle of proportionality and the principle that precautionary measures should be taken”? If an attack is unlawful under the rule relating to distinction, is it necessary to check whether the rules relating to proportionality and precautions were respected? Then, why did the Court mention that “[i]t is also significant that it has not been made clear whether the warnings to leave the area, if they reached the population at all, were relevant to quala 4131”?
8. Would you say that the attack against quala 4131 amounts to a war crime? Why do you think the Court specifies that to “prevent misunderstandings, the Court considers that in doing so it has not given an opinion on the qualification of the bombardment as a war crime”? What would have to be proven or what is missing for the classification as a war crime?

5. Proportionality (paras. 3.15, 4.2)

1. Assuming that the rule on distinction was respected, would that attack have complied with the rule on proportionality as well? (CIHL Rule 14)

6. Precautionary measures (paras. 3.17, 5.30, 5.32)

1. Were the Dutch forces under an obligation to give warnings prior to the attack? To whom? Is it sufficient that they issued warnings to the Afghan Authorities? (P I, Art. 57; CIHL Rule 20)
2. Did the Dutch forces, according to the Court, everything within their power, to verify that the attack was directed against a military objective and not against civilians? (CIHL Rule 16)
3. Must a State explain why it considered an object presumed to be civilian to be a military objective?

III. State Responsibility

7. (Para. 1.1, 3.16)

1. Why does the Court believe that it is undisputed that the Netherlands bear the responsibility for the attack against quala 4131? (CIHL Rule 149)
2. Which forces destroyed quala 4131? Does the judgement specify whether these air assets that bombed the quala were exclusively Dutch?