Public Interest Litigation Project

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June, 2015

Previous Dutch arms trade cases:

legal arguments and lessons learned

Introduction

This research was conducted for the Public Interest Litigation Project (PILP). PILP is looking into the legal possibilities of stopping arms trade to states that violate human rights. EU as well as international legal frameworks are taken into account. As a Netherlands-based organization, PILP also needs to keep the Dutch legal context in mind. In this paper, the following research question will be answered:

What lessons can be learned from previous Dutch arms trade cases to prevent arms trade to human rights violators?

Four cases will be presented including their legal arguments used and the verdicts reached. In the first case several parties tried to prevent the export of war ships to Indonesia. The second case concerns a collective of NGO's that asked the court to prohibit the use of nuclear weapons. In the third case NGO's asked the judge to impose an arms embargo on Israel. The final case concerns the individual criminal liability for war crimes resulting from arms trade. After an overview of these cases, an analysis will be made on the main lessons that can be learned for the anti-arms trade case that PILP might pursue.

1. The Indonesia case

In 1979 seventeen parties, including several NGO's, filed a civil case against the Dutch state in which they attempted to annul an export license of three corvettes (small war ships) to Indonesia.[1] Their reasons for detracting the license were based on humanitarian law, the Disarmament Notice (*Ontwapeningsnota Vrede en Veiligheid 1975*) and on UN Security Council resolutions concerning the annexation of East Timor by Indonesia. The Dutch government did not stop the order because according to them naval vessels could not be used against the East Timorese resistance.[2] The Dutch state added that a detraction would be against its commercial interests and mentioned the financial gains of the corvettes, employment, the credibility of the state as a contract partner and the legitimate needs of Indonesia. On February 21st 1980 the judge ruled that the case was inadmissible because it is not up to the civil court to sentence the state based on a legislative measure.

[1] Komitee Indonesië (1982). De overheid en de leverantie van korvetten. In: Handel in Onderdrukking. Nederlandse wapenexport naar de derde wereld, met nadruk op de militaire samenwerking tussen Nederland en Indonesië.
[2] European Network Against Arms Trade. Indonesia: Arms trade to a military regime

2. The nuclear weapons cases

NGO's *Vereniging van juristen voor de vrede* (lawyers for peace) and *Stichting miljoenen zijn tegen* (millions are against) asked the Court of First Instance in 1992 for a declaratory judgment concerning the use of nuclear weapons, including a prohibition on the first use of these weapons against civilians. The claimants were deemed inadmissible due to a lack of interest in the case by the Court of First Instance, the Court of Appeal and finally by the Supreme Court in 2001. To establish a sufficiently concrete interest, the Supreme Court decided that there needs to be 'a real and concrete threat of the use of nuclear weapons'[3]. Such an interest was not established because the Dutch state had never used nuclear weapons. The Supreme Court deemed it impossible to forbid acts that were never committed by the Dutch state.

Furthermore, the Supreme Court stated that it cannot give a general answer to the question under which circumstances the use of nuclear weapons would be illegal.[4] Although the unique qualities of nuclear weapons seem to be irreconcilable with international humanitarian law, the Court could not conclude with certainty that this is the case in each individual circumstance. Arguments in favor of the use of these weapons may be the right to self-defense (Art 51 UN Charter) and deterrence policies (the use of military threat to deter others from initiating violence). The state should be left a broad margin of appreciation because of the political nature of these strategies.

In 2009 NGO's *Stichting tribunaal voor de vrede* (tribunal for peace) and *Vereniging van juristen voor de vrede* (lawyers for peace) asked the Court of First Instance to declare that the 2001 judgment by the Supreme Court was "*misdadige rechtspraak"* (an unlawful court decision) as it declared that even a first use of nuclear weapons against civilians might not be illegal in all circumstances. The Court of First Instance decided that the claimants were inadmissible.[5] The NGO Tribunal for Peace was not a party in the earlier case and therefore did not establish an interest in this case. As for the other party, Lawyers for Peace, the Court of First Instance decided that using the argument of an unlawful court decision in order to have the same case judged again after a final ruling by the Supreme Court would be "irreconcilable with the closed system of legal remedies".[6] The Court of Appeals did go into the merits of the case and decided that the Supreme Court purposely refrained from making any judgment on the legality of nuclear weapons and therefore no new legal dogma was created. The Court of Appeals also affirmed that the first use of strategic nuclear weapons on civilian targets is, in principle, not in line with international humanitarian law.[7]

3. The Israel case

In 2002 a total of 22 NGO's applied at the civil court to stop (1) export, (2) transit and (3) re-export of arms from the Netherlands to Israel. [8] In their plea the NGO's claimed that Israel structurally violated

[3] Supreme Court 21 December 2001, NJ 2002, 217 rov 3.2.2

[4] Supreme Court 21 December 2001, NJ 2002, 217 rov 3.3. The Court refers here to an advice by the International Court of Justice dated July 8th 1996.

[5] Court of First Instance The Hague 1 April 2009, 295689/HA ZA 07-3039

[6] Court of First Instance The Hague 1 April 2009, 295689/HA ZA 07-3039 Rov. 4.3; An exception to this can only be made when there is a breach of fundamental principles of law; For more information on this topic see the Köbler case and other case law on unlawful jurisprudence under art. 6 ECHR.

[7] Court of Appeals The Hague 14 September 2010, 200.041839-01 Rov. 13.

[8] Court of First Instance The Hague 29 May 2002, KG 02/571; Pleitnota E.J. Daalder; Pleitnota A.H.J. van den Biesen en J.H.A. van der Grinten.

human rights law and humanitarian law.[9] These claims were supported by Amnesty International and Defense for Children reports. According to the claimants, these violations should be taken into account and should lead to an arms embargo for Israel, based on the 1998 European Union Code of Conduct on Arms Exports. In 2008 the Code of Conduct has been transformed into a legally binding Common Position.[10] The Dutch State pleaded that the fact that the Code of Conduct was used as a point of reference should not mean that its provisions have legal effect. According to the Dutch state, the Code of Conduct did not create rights for individuals to be invoked in court.

The Dutch state announced that given the conditions at the time, the Dutch criteria for arms export would indeed not be met. However, it was not prepared to place an arms embargo on Israel, since such an embargo was not put on Israel from Europe or internationally. The court decided that since both parties agreed that at that moment arms should not be exported to Israel, the claimants did not successfully establish interest in the case. Regarding transit and re-export of arms, the court decided that an interest was established but the claimants were still not deemed admissible since these concerned decisions that should have been appealed at the administrative court. If decisions are not appealed at this court, they have formal legal force and can no longer be challenged.

4. The Van Anraat cases

Van Anraat is a Dutch business man who supplied precursors which were used for the production of chemical weapons. These weapons were used in the 1980s against inhabitants of Iran during the war between Iran and Iraq and against Kurdish inhabitants in Northern Iraq. Van Anraat was charged with complicity of being an accessory to genocide[11] (count 1) and war crimes (count 1 alternatively; count 2). Both Dutch and international law was used in the charges.[12] Van Anraat was acquitted from count 1, but found guilty of count 1 alternatively and count 2 by the Court of First Instance in 2005, the Court of Appeals in 2007[13] and the Supreme Court in 2009[14].

An important factor in this case was the legal degree of intention required. Dutch law requires as a minimum standard of intention that one willingly and knowingly accepts the reasonable chance that a certain consequence or a certain circumstance will occur[15]. The intention of the accessory should be focused on the intention of the perpetrator as well. The court decided that this criterion had not been met for the count of genocide. Van Anraat's intention was not targeted at the genocidal intention of the perpetrators, because at the time he did not have the information needed to know

[9] In particular international customary law through the violation of Articles 3, 5 and 9 of the Universal Declaration of Human Rights, the Convention against Torture, Articles 4, 11, 12 and 13 of the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the Fourth Geneva Convention (1949) Article 23, 27, 31, 32, 33, 34, 49, 50, 51, 53, 55, 56, 76 and 147 and the First Protocol (1977).

[10] http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2010/02/10/kamerbrief-over-de-aanvaarding-van-de-eu-gedragscode-tot-het-eu-gemeenschappelijk-standpunt-m-b-t-het-wapenexportbeleid.html

[11] Article 1 Genocide Convention Implementation Act in conjunction with Article 48 Penal Code

[12] Article 47, 48, 49 (old) and 57 Penal Code; Article 1 Genocide Convention Implementation Act; Article 8 Criminal Law in Wartime Act; international customary law (in particular the prohibition on the use of chemical weapons and/or the prohibition on the use of poison or poison weapons and/or the prohibition on the use of asphyxiating, poisonous or other gases and/or the prohibition on inflicting unnecessary suffering and/or the prohibition on carrying out attacks which do not distinguish between military and civilians); the stipulations of the Geneva Gas Protocol (1925); the stipulations of Article 147 of the Geneva Convention on the Protection of Civilian Persons in Time of War ("Fourth Geneva Convention", 1949); the stipulations of the "common" Article 3 of the Geneva Conventions of 12 August 1949.

[13] Court of Appeals The Hague 9 May 2007, NJFS 2007, 183

[14] Supreme Court 30 June 2009, NJ 2009, 481

[15] Conditional intention; Voorwaardelijk opzet.

that the perpetrators had this intention. Regarding the other counts, the court considered that Van Anraat must have known that (i) the precursors supplied by him would serve for the production of poison/mustard gas in Iraq, and (ii) Iraq was involved in a long lasting war with Iran and in a conflict with the Kurdish population. Van Anraat accepted the reasonable chance that the gas would be used in the ordinary cause of events. He intentionally provided the occasion and the means for the use of mustard gas and has therefore intentionally been an accessory to committing war crimes.

The Court of Appeals sentenced Van Anraat to seventeen years of imprisonment, which was higher than the fifteen years sentence that the Court of First Instance decided on. The height of the sentence was due to the essential role Van Anraat played in the grave violation of international humanitarian law. The Court took into account that Van Anraat acted exclusively in pursuit of large gains and did not show any guilt or compassion for the numerous victims of the mustard gas attacks. The Court also mentioned that punishment should prevent people or companies who participate in arms trade from getting involved in serious crimes. The sentence was shortened by the Supreme Court to sixteen years and six months because the Court had exceeded the reasonable time limit of Art. 6(1) ECHR. Complaints by Van Anraat at the European Court of Human Rights were deemed inadmissible.[16]

The criminal case was used by the public prosecutor to consequently claim forfeiture of illegally obtained profits. The public prosecutor claimed that Van Anraat should pay his profits of the amount of € 1.086.976,58 to the Dutch state. Forfeiture proceedings were applied to criminal law in wartime. An important element in this case was causality and the question which profits were illegally claimed. The Court of First Instance decided that the profits should be calculated based on each attack in which he was found an accomplice and came to the amount of € 3.493,00.[17] The advocate general claimed in the Court of Appeals that the calculation should be based on a different standard of causality: reasonable attribution.[18] According to the advocate general the common profit of all deliveries should be calculated. The Court of Appeals pursued the midway between these two stances: it calculated the profit rising out of twenty deliveries to the Iraqi regime from 1985 to 1988, ordering Van Anraat to pay € 545.370,00 to the Dutch state.

Complicity in war crimes was established in the criminal proceedings of 2007. In 2013, seventeen victims from Iran and Iraq asked the civil court to establish tort based on the 2007 decision. In accordance with private international law tort cases should be based on the substantive law of the state where the wrong was committed, the *lex loci delicti* .[19] Thus Iraqi and Iranian law was applied in these cases. The judge decided that the facts of the 2007 case led to joint and several responsibility for damages owed to the Iraqi victims. The term of limitation was suspended by the court during the time the victims lived in Iraq and Saddam Hussein was still in power. The Iraqi legal expert in this case stated: “I regard the existence of the Saddam Hussein regime as being the type of excuse, akin to *force majeure*, that renders the pursuit of a claim in Iraq impracticable and that would therefore merit a suspending of the fifteen year limitations claim”. The Iranian legal expert also considered Van Anraat liable, due to a strong causal link: “had he not sold the chemicals to the Government of Iraq, there would be no loss suffered by chemically injured persons. Therefore, causation, in the sense accepted under Iranian law, is present in this concern, and as far as other elements of civil responsibility (fault and loss) are also ascertained, we should find the Respondent as liable and

[16] ECHR 20 June 2010, *Van Anraat v. The Netherlands* (dec.), no. 65389/09

[17] Court of First Instance The Hague 16 December 2010, 09-751003-04; Article 36e(4) (old) and 91 Penal Code; Article 2 Criminal Law in Wartime Act.

[18] Court of Appeals The Hague 14 November 2012, 22-000119-11 PO.

[19] Art. 3(1) Wet Conflictenrecht Onrechtmatige Daad.

responsible for compensating the loss". Van Anraat was found responsible for the damages of 3 Iraqi and 13 Iranian victims and was ordered to pay 25.000 euro to each of them. This judgment was affirmed by the Court of Appeals on April 7th, 2015.[20]

5. Analysis

Five main lessons that can be learned from the four previous cases concerning arms trade will be discussed in this section: the limitations of the judiciary power due to the separation of powers, the necessity for direct effect of international legal provisions, the priority of the administrative court over the civil court, the obstacles to establishing criminal liability of the state and the possibility to claim damages after tort or criminal liability is established.

Trias politica

In exploring the possibilities to start a case to prevent arms trade, one has to realize that the case would be politically charged. The Netherlands has a strict separation of powers that prevents the judge from making a decision that would essentially result in law-making.[21] The creation of law by a judge can only be justified in cases where the system of the law is sufficiently clear. When a case is politically charged, the judge may decide to leave the matter to be decided within the political realm. The limitations set by the separation of powers were implicitly mentioned in all cases where the state was a party. In the nuclear weapons case and the Israel case, the courts mentioned that judging the legality of nuclear weapons respectively weapons trade in general would exceed its powers. The Indonesia case was not judged upon its merits because it concerned a legislative measure. In order to prevent the PILP case from being deemed inadmissible because it is considered too political, the case should be as concrete and factual as possible. A real and concrete threat of arms being used to commit human rights violations should be established, preferably using reports of internationally acclaimed human rights organizations.

International law in the Dutch legal order

In the Israel case, the Dutch state pleaded that the provisions in the Code of Conduct on Arms Exports did not have legal effect. With that the state referred to the direct effect of international law, meaning the possibility for individuals to invoke international provisions in court. In the PILP case the direct effect of each international provision that is invoked should be established in order to prevent a case from failing due to a lack of direct effect. Generally it is dependent on states whether they allow treaty provisions to be applied in court as a direct source of law. Provisions in European Union law can be invoked by individuals before the national court as a direct source of law as long as the wordings of the provision are sufficiently clear and precise and unconditional.[22] When an international rule has direct effect it has supremacy over all domestic laws.[23] Thus in this case an analysis would have to be made whether the EU Common Position creates rights for organizations that can be invoked in court.

[20] Court of Appeals The Hague 7 April 2015, 200.132.424-01.
[21] ARRvS 21 december 1999, AB 2000, 78 (Tegelenarrest).
[22] ECJ Van Gend & Loos Case 26/62 5 February 1963.
[23] Art. 93 and 94 of the Dutch constitution.

Administrative v. civil court

According to the civil court in the Israel case, if the government decides to allow export, transit and re-export of arms it concerns a decision. If decisions can be appealed before the administrative court, and the claimant has established an interest in the case, then the administrative court has priority over the civil court.[24] The claimant needs to have a personal and direct interest in the case. The statutory objectives of an NGO can be cited as its interest.[25] The decision is made public through governmental reports to the Dutch house of representatives and needs to be appealed within six weeks. It is important to note that a judge at the administrative court does not have the capacity to decide on the legality of the decision; it may only judge the case based on whether it is in line with the legal framework surrounding arms trade. In conclusion, it is likely that a case against the Dutch state that concerns a decision to export arms should be brought before the administrative court. At this court, the interest of PILP should be based on its statutory objectives and the wrongfulness of the decision to export arms should be shown through incompatibility with the legal framework surrounding arms trade, e.g. the Arms Trade Treaty, the EU Common Position, human rights law and humanitarian law.

Criminal liability of the state

The Van Anraat case proves that criminal liability for arms trade can be established on an individual level. But criminal liability cannot necessarily be applied to the state. The Supreme Court has in the past granted immunity to the Dutch state. In the 1994 Volkel-case, it was decided that actions of the state are presumed to serve the general interest. Members of the government should account for their actions in parliament and can be charged criminally in the case of abuse of powers. The court decided that this elaborative system did not allow for criminal liability for the state. In 2006, parliamentary steps have been made to change the law in order to undo the state immunity for criminal prosecution.[26] The changes have been accepted by the House of Representatives but have yet to be voted on by the Senate. Thus, this form of state immunity may be abolished in the near future. When this is the case, PILP could consider starting a criminal case against the Dutch state for complicity in human rights violations. However, there will still be some obstacles. For example, it has been pointed out that a criminal procedure is dependent upon the public prosecution service and whether the public prosecutor will deem it in the general interest to prosecute the state.[27]

State responsibility for damages

The civil case against Van Anraat shows that criminal liability for arms trade can lead to responsibility for damages. Once tort has been established, the Dutch state can be ordered to pay damages. According to Dutch law, a tort can be committed by the state if it takes a decision that was deemed wrongful by the administrative court or if the state is liable for the consequences of a decision.[28] In the former case, compensation for damages can be claimed.[29] In the latter case, the decision itself

[24] Article 6:2 jo. 1:3 Awb
[25] Article 3:305a BW
[26] Initiatiefvoorstel-Recourt, Oskam en Segers Opheffing strafrechtelijke immuniteiten publiekrechtelijke rechtspersonen en hun leidinggevers.
[27] Ten Voorde, J. (2013). Criminal liability of the state will not necessarily lead to convictions. Leiden Law Blog.
[28] Art. 6:162 BW; Di Bella, L. (2014). De toepassing van de vereisten van causaliteit, relativiteit en toerekening bij de onrechtmatige overheidsdaad. Leiden University p 8.
[29] Titel 8:4 Awb: Wet nadeelcompensatie en schadevergoeding bij onrechtmatige besluiten.

need not necessarily be wrongful. Such a situation could in the case of arms trade exist if the Dutch state licensed a trade of arms that were later used by a government to commit war crimes. In such an event a tort case against the state could be considered.

Conclusion

The research question *What lessons can be learned from previous Dutch arms trade cases to prevent arms trade to human rights violators?* can now be answered by providing the legal arguments, the verdicts and their consequences for the PILP case. The legal arguments that were used were mainly based on humanitarian law and international customary law. The use of chemical and biological weapons is prohibited by the 1972 Biological Weapons Convention and the 1993 Chemical Weapons Convention. Willful killing, torture and inhuman treatment of civilians during wartime are deemed grave breaches of the Fourth Geneva Convention of 1949. Regarding the verdicts, all three civil cases in which NGO's sued the state were deemed inadmissible because the case was either to abstract or too politically charged.

A criminal case against the state is currently impossible due to state immunity, but the Van Anraat case shows that criminal liability and tort for arms trade can be established. In the criminal case against Van Anraat, the defendant provided chemical weapons to a regime that committed these crimes and he was therefore found to be an accomplice. Should state immunity be lifted, the Dutch state might be found an accomplice to war crimes if it provides arms to a state that commits war crimes through the system of licenses. In the absence of criminal law liability, if violations of humanitarian and international customary law are committed with arms that can be traced back to the Netherlands, the Netherlands might be liable for a tort vis-à-vis the victims of the unlawful attacks, similar to the civil case against Van Anraat.

Of course, it would be better to prevent the violations altogether. To prevent the Dutch state from granting licenses to states that violate human rights, these decisions should be appealed at the administrative court by referring to the domestic and international position the state upholds concerning its adherence to human rights. As we saw in the nuclear weapons case and the anti-arms trade to Israel and Indonesia cases, the Dutch court is not allowed to take political decisions and will show restraint in limiting governmental decisions. However, if a strong case can be made that arms trade to a particular state will lead to human rights violations, the administrative judge may decide to deem the granting of the particular license unlawful.

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Burgerlijk Wetboek; art. 3:305a, art. 6:162.

Constitution; Art. 93, Art. 94.
Grondwet; art. 93, art. 94.

Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.
Verdrag tegen foltering en andere wrede, onmenselijke en onterende behandeling of bestraffing (1984).

Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction.
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Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction.
Verdrag tot verbod van de ontwikkeling, de productie, de aanleg van voorraden en het gebruik van chemische wapens en inzake de vernietiging van deze wapens (1993).

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Verdrag inzake de Rechten van het Kind (1989).

General Administrative Law Act; Art. 1:3, Art. 6:2.
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