

The Evaluation Challenge

*The subtle successes of strategic human rights litigation
against arms trade in the Netherlands*

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Abstract

From 2015 to 2017, three Dutch human rights organisations litigated against the extension of a license for arms export to Egypt by the Dutch government. The organisations challenged the extent to which the Dutch government had taken human rights standards into account in their decision to grant the license. The organisations were unable to get the government to retract the license. However, does this mean that the litigation effort was a failure? Strategic human rights litigation (SHRL) per definition has broader goals than winning the actual legal case. Therefore, evaluation of SHRL processes is more complicated than just a glance at the conclusions of the judgement. This paper aims to evaluate the litigation efforts of the three organisations against the Dutch government. In order to do so, a model for the evaluation of SHRL in the Dutch legal context is developed in accordance with existing literature. It is concluded that due to their preparation and adaptivity, the organisations were able to gather useful information for further proceedings in the court cases. However, due to the absence of an effective media strategy, the merits of the cases remained undiscussed both in courts as well as in the public debate.

Introduction

In May 2014, the Dutch section of the International Commission of Jurists (*Nederlands Juristen Comité voor de Mensenrechten*, NJCM) started a five-year pilot on strategic human rights litigation (SHRL) in the Netherlands. The resulting Public Interest Litigation Project (PILP) has been operating for five years now and has been involved in a number of human rights cases in the Netherlands.¹ Between 2015 and 2027, PILP partnered up with two Dutch NGOs (Stop Wapenhandel² and PAX for peace³) to litigate against a decision of the Dutch government to grant a license for the export of military technology to Egypt. This objection resulted in a number of court cases that are discussed in detail as a case study in this paper. Spoiler: the outcome of these cases was *not* the withdrawal of the export license to Egypt. However, does this mean that these cases should be considered a failure? Through exploring the different facets and purposes of strategic human rights litigation this paper explains that the evaluation of SHRL is more complex than just the outcome of a single case: evaluation is a challenge. The aim of the paper is to reflect on the extent to which the impact of SHRL can be measured and what it is that makes a strategic litigation procedure successful. While this topic of evaluation has been discussed in academia, this paper focusses specifically on the evaluation challenges of SHRL in the Netherlands. Strategic litigation on human rights is

¹ For example, strategic litigation for the housing rights of gypsies, strategic litigation for privacy rights, litigation against sexist advertisement and litigation for refugee rights. For more cases and information visit: <https://pilpnjcm.nl/en/>

² <http://www.stopwapenhandel.org/English>

³ <https://www.paxforpeace.nl/>

relatively new in the Netherlands⁴ and little attention has yet been given to the evaluation of strategic litigation processes in Dutch academia.

While aiming to comment on the wider evaluation challenge in SHRL, this paper is limited to the evaluation of one case study. The research question central to this paper is, therefore:

What factors have determined the success (or lack thereof) of strategic human rights litigation on arms trade in the Netherlands (between 2015 and 2017)?

The sub-questions needed to answer this research question are:

- What is strategic human rights litigation?
- What is impact evaluation of SHRL and what models exist for the evaluation of SHRL?
- How should an evaluation model be selected or designed for the present case study?
- How can the factors that determine the success of a litigation effort be identified through evaluation?
- What did the process of litigation against arms trade in the Netherlands between 2015 and 2017 look like?
- How can the proposed evaluation model be applied to the process of litigation?

In order to provide an answer to this question, the paper is split up into three chapters. The first chapter sets out a theoretical framework for the evaluation of strategic human rights litigation in the Netherlands. This part aims to explain the meaning of strategic human rights litigation and impact evaluation of SHRL and determine what kind of evaluation is appropriate within the Dutch legal framework. Finally, a model that can be used to evaluate a strategic human rights litigation process is presented. The second part of the paper sets out our case study. Using the case files and interviews with the parties involved, the process of litigation is reconstructed chronologically. In the third and last chapter, the framework for evaluation set out in the first chapter will be applied to the case study set out in chapter two.

⁴ Compared to legal systems like the American legal system, where law-reform litigation dates back to the abolitionist movement in the nineteenth century. Lobel, J., *Success Without Victory : Lost Legal Battles and the Long Road to Justice in America* (NYU Press 2004) p. 48.

Methodology

This paper comes at a relevant time as the PILP (a five-year pilot) has turned five years old. This birthday is an appropriate moment for reflection. The paper also contributes to scholarly debate on the impact and evaluation of SHRL⁵ by focussing on the Netherlands. In the Netherlands, the discussion on strategic litigation is gaining traction. Especially since the *Urgenda* cases, Dutch scholars increasingly publish on strategic litigation against climate change.⁶ Moreover, scholars have published on the position of civil society actors before Dutch courts and the division of powers in Dutch democracy.⁷ However, there is limited discussion on the potential of human rights cases more broadly brought by civil society organisations.⁸

This article limits itself to SHRL by civil society actors against the state. It, therefore, does not address litigation against companies or litigation where civil society actors play a supportive role to a clearly identifiable individual victim (in Dutch: *proefprocessen*).⁹ Non-governmental organisations and civil society actors play an important role in the instigation and organisation of SHRL.¹⁰ It is often these organisations that determine the strategy behind the litigation process and select the cases that are to be used to bring those strategies into effect. Moreover, SHRL by civil society actors is particularly interesting because they occupy

⁵ See e.g. Duffy, H. *Strategic Human Rights Litigation: Understanding and Maximising Impact* (Bloomsbury Publishing 2018); Budlender, S., Marcus, G. and Ferreira, N., *Public interest litigation and social change in South Africa: Strategies, tactics and lessons* (Atlantic Philanthropies 2014); Barber, C. 'Tackling the evaluation challenge in human rights: assessing the impact of strategic litigation organisations' (2012) 16(3) *The International Journal of Human Rights* 411.

⁶ See e.g.: Cox, R. 'A climate change litigation precedent: *Urgenda Foundation v The State of the Netherlands*' (2016) 34(2) *Journal of Energy & Natural Resources Law* 143; van Geel, O. 'Urgenda and Beyond: The past, present and future of climate change public interest litigation' (2017) 3 *Maastricht University Journal of Sustainability Studies* 56; Peel, J. and Osofsky, H. 'A Rights Turn in Climate Change Litigation?' (2018) 7 *Transnational Environmental Law* 37; Roy, S. and Woerdman, E. 'Situating *Urgenda v the Netherlands* within comparative climate change litigation' (2016) 34(2) *Journal of Energy & Natural Resources Law* 165.

⁷ See e.g. Uzman, J. and Boogaard, G. 'Make it a better place': Transnational public interest litigation and the separation of powers' in ten Napel, H. and Voermans, W. (eds) *The Powers that be – Rethinking the Separation of Powers* (Leiden University Press 2015). Teunissen, J.M.H.F. 'De algemeen belangorganisatie als bestuursrechtelijk (pseudo-) Openbaar Ministerie? Pleidooi voor afschaffing van de actio popularis en van het actierecht van algemeen belangorganisaties en bestuursorganen ex artikel 1:2 Awb' (2003) 17(4) *Gemeentestem*; Schlössels, R.J.N. 'Wie beschermt de beschermelingen tegen hun beschermers? Enige publiekrechtelijke kanttekeningen bij algemeen belangacties' in Jongbloed, A.W. (ed) *Samen Sterk* (Boom Juridisch 2002); van Ettekovén, B.J. 'Bestuursrechtspraak voor Jan & Alleman? Op weg naar een stelsel van subjectieve rechtsbescherming' in Schueller, B.J., van Ettekovén B.J. and Hoekstra, J., *Rechtsbescherming in het omgevingsrecht* (Instituut voor Bouwrecht 2009).

⁸ See e.g. Schuurmans, Y.E. and Stolk, R. 'Het proefproces als collectieve actie' (2017) 2(1) *Nederlands Tijdschrift voor Bestuursrecht* 6; de Graaff, R. 'Mensenrechtenbescherming in beweging. Een verslag uit Straatsburg' (2015) 40 *Nederlands Tijdschrift voor de Mensenrechten: NJCM Bulletin* 7.

⁹ Schuurmans & Stolk (n8).

¹⁰ Stolk R. 'De legitimiteit van strategisch procederende belangenorganisaties' in Stolk R., van der Meulen, L., Wolfrat M. and de Meulder, K. (eds), *Strategisch procederen in het bestuursrecht* (Boom Juridisch 2018, preadviezen Jonge VAR 16) 9-64, p. 4; Chayes, A. 'The role of the judge in public law litigation' (1975) 89 *Harvard Law Review* 1281, p. 1288.

a unique position within the Dutch legal framework. In addition, the case study used in this paper is one where a number of civil society organisations litigate against the government. This distinction is necessary as the full range of possibilities of SHRL in the Netherlands is simply too large to address completely.

At first glance, the case of the Dutch arms trade might look like an example of a failure of strategic litigation. It is this feature which makes it especially interesting in terms of evaluation. Although the direct outcome of the case might not be a 'win', there are more aspects of this process which should be considered in terms of impact. The case on arms trade is also appropriate for evaluation because it concerns a human rights issue other than climate change and appeals to an interest which cannot be directly linked to an individual or group of individuals. The case is, therefore, representative of human rights cases on behalf of a general interest which is the focus of the present paper.

The data

This research project was carried out in cooperation with the PILP. Together with the PILP, the case study was selected and the general approach of the paper was outlined. However, I advanced the angle on evaluation in the current paper. For an evaluation like this, it is important to stay as independent as possible. I was dependent, however, on the PILP to give inside information about the case, access to their case files and to put me in contact with the right people for my interviews.

I conducted interviews with three people involved. The main purpose of these interviews was to gain insight into the way in which the litigation project against arms trade was set-up, what the various objectives were from the different parties involved, and how the parties reflect on the project. I asked all participants similar questions with regards to three stages in the process: the preparations, the process and the reflection. My aim was to interview a representative from each party involved in the cases. There was only a small team of people who were involved in the case on a regular basis and I limited my interviews to interviews with these people in order to focus on gathering the information needed for the evaluation. I spoke with Jelle Klaas from the PILP/NJCM, with Wendela de Vries from Stop Wapenhandel and with Frank Slijper from PAX for peace. I also intended to conduct an interview with a representative of the Dutch ministry of foreign affairs who had been involved in the case, however, this proved impossible within the given timeframe. The process of trying to arrange an interview at the ministry delayed my schedule significantly and, in the end, I decided to finish my analysis without this data. Unfortunately, this limits the completeness of the evaluation to some extent as I am unable to address the ways in which the case might have impacted practice at the ministry.

The interviews I did conduct were informal in nature, two were held in-person and one via the phone. The interviews were semi-structured, I used a list of open questions but wanted mostly to just let the interviewee talk about the litigation process. Since it has been over a year since the latest developments in the case, I gave the interviewees time to reflect

and remember. I did not record the interviews since I the purpose of the interviews was not to note specific information but to get a broad sense and understanding of the individual reflections on the litigation process.¹¹ I took notes during the interview noting down keywords and sentences and summarized each interview immediately after conducting it. Using this method, I was able to gather essential information while maintaining an informal and friendly setting for my interviews.

The other research I conducted was mainly based on the literature on strategic human rights litigation and evaluation as well as an analysis of the legislation on human rights and arms trade. I gathered literature by using databases as well as identifying a number of key publications which directed me to further literature.¹² I first gathered the publicly available case files online and I then looked for documents that I was still missing in the paper case file at the PILP office. I took notes of what I considered interesting information that was included in this private file.

Limitations

This paper aims to comment on the evaluation of SHRL in the Netherlands as a whole but only contains one case study. In order to make conclusive remarks about how SHRL *should* be evaluated, more cases would have to be included. However, the aim of this paper is not to suggest a conclusive model for evaluation, rather, I want to present a version of what such a model *could* look like and test to see how it works by applying it to a single case. In addition, the evaluation of multiple cases would not have been feasible in the time given to conduct the project.

¹¹ Turley, S. 'To see between: Interviewing as a legal research tool' (2010) 7 *Journal of the Association of Legal Writing Directors* 283, p. 302.

¹² Duffy (n5); Stolk (n10); Open Society Justice Initiative, *Strategic Litigation Impacts: Insights from Global Experience* (Open Society Foundations 2018).

Chapter 1: The promises and pitfalls of strategic human rights litigation

The aim of this first chapter is to set up an evaluative framework for strategic human rights litigation. Starting with a brief definition of strategic human rights litigation, I explore various models suggested by scholars on measuring and evaluating SHRL. I argue that it is necessary to evaluate litigation efforts in reference to the institutional and legal context in which it exists. Therefore, this chapter also includes a brief exploration of the Dutch legal framework on strategic litigation and the ways in which this framework further defines the criteria by which a litigation process can be measured and evaluated. The chapter finally combines insights from the models presented and the analysis of the Dutch legal framework to propose a model for evaluation.

1.1. What is strategic human rights litigation?

Strategic human rights litigation, public interest litigation, impact litigation:¹³ the idea that legal action can be used to achieve goals beyond the interests of the parties to an individual case has many names. In this paper, I analyse the practice of strategic human rights litigation and I will try to delineate what I mean with that. I use a definition offered by Helen Duffy in her recent book *Strategic Human Rights Litigation*. This definition comes closest to the processes that I want to investigate and describe in this article.¹⁴ According to Helen Duffy, strategic human rights litigation is:

“Litigation that pursues goals - or which concerns interests - that are broader than only those of the immediate parties. SHRL uses the courts to advance human rights.”¹⁵

Two things stand out in this definition: i) the centrality of having certain ‘goals’ which are human rights-related, and ii) the difference between these goals and the interests of the immediate parties. Therefore, a focus on broader human rights-related goals sets SHRL apart from other types of ‘normal litigation’ that are traditionally more client-oriented.¹⁶ A distinguishing factor is, therefore, the position of the client or victim.¹⁷ While normal client-focused human rights litigation might also want to effect changes beyond the individual scope, the goals of the client come first.¹⁸ In order for a process to qualify as a SHRL process the parties must have broader goals that are human rights-related. However, goals in SHRL

¹³ Open Society Justice Initiative (n 12) p. 25.

¹⁴ Another, comparable, definition: “(SHRL) is legal action in a court that is consciously aimed at achieving rights-related changes in law, policy, practice, and/or public awareness above and beyond relief for the named plaintiff(s).” Open Society Justice Initiative (n 12) p. 25.

¹⁵ Duffy (n5) p. 3.

¹⁶ Chayes (n10) p. 1288.

¹⁷ Stolk (n10) p. 3. According to Stolk, in Public interest litigation cases the aim is to bring to effect societal, political or legal changes.

¹⁸ Duffy (n5) p. 48.

are often vague and change during the process.¹⁹ Therefore, it is hard to determine what goals are and are not indicative of a SHRL process.

In her definition, Helen Duffy leaves out any reference to the word 'strategic'. So, what does strategic then mean? The Open Society Justice Initiative conceptualises 'strategy' as being the "conscious process" of determining advocacy objectives and the means to accomplish them."²⁰ They point out that a *strategic* litigation decision can also be the decision *not* to litigate, to settle or to delay litigation.²¹ However, the Open Society Justice Initiative points out that cases that were not intended to be strategic but still had a large impact on human rights in a broader sense can still be considered SHRL.²²

The definition of SHRL in academic literature, therefore, is rather open-ended. The definition depends to some extent on the envisioned goals of the process, however, these goals cannot be concretely defined. The definition is also related to strategy, however, not all SHRL cases have to have a predetermined strategic focus. Because of these uncertainties, Duffy argues, there is no sense in making sharp distinctions in what qualifies as SHRL and what does not.²³ According to Duffy, it is better to focus on the *impact* of litigation and figure out when SHRL makes a difference and why it does.²⁴ However, I do believe that evaluation can be complicated by the open-endedness of the existing definitions of SHRL, as it is hard to come up with an actual model which can be applied to SHRL processes across the board if these processes vary widely. For the purposes of this paper, I, therefore, focus on one type of strategic human rights litigation cases (by NGOs against the Dutch government) and focus (as suggested by Helen Duffy) on the *impact* rather than on classifications.

1.2. Measuring the impact and success of SHRL

There has been an effort among human rights scholars to develop models to measure the impact of human rights.²⁵ Human rights NGOs have also developed models to evaluate their practices in order to show to what extent their work has an actual impact (in a positive or

¹⁹ Barber (n5) p. 416.

²⁰ Open Society Justice Initiative (n 12) p. 25.

²¹ Open Society Justice Initiative (n 12) pp. 25-26.

²² Open Society Justice Initiative (n 12) p. 27.

²³ Duffy (n5) p. 49.

²⁴ Duffy (n5) p. 49.

²⁵ Different studies have been undertaken to approximate the impact of international human rights law on for example state behaviour, national law or the internalisation of human rights ideas by communities. See e.g. Merry, S.E. and Conley, J. 'Measuring the world: Indicators, human rights, and global governance' (2011) 52(3) *Current Anthropology* 83; Harrison, J. 'Human rights measurement: reflections on the current practice and future potential of human rights impact assessment' (2011) 3(2) *Journal of Human Rights Practice* 162; Hathaway, O. 'Do human rights treaties make a difference' (2001) 111 *Yale International Law Journal* 1935; Landman, T. 'Measuring human rights: principle, practice, and policy' (2004) 26 *Human Rights Quarterly* 906; Heyns, C. and Viljoen, F (eds), *The impact of the United Nations human rights treaties on the domestic level* (Martinus Nijhoff Publishers 2002).

negative sense).²⁶ This process of evaluation is not always a straightforward process. In this section, I explore a number of questions related to the development of an impact evaluation model for strategic human rights litigation and discuss some models that have been used or proposed by NGOs and scholars.

What is impact?

Right off the bat, it is hard to define exactly what is meant by impact. This is because impact encompasses so many different types of results and outcomes. The simplest solution to this would be to state that impacts in SHRL are all outcomes related to the previously developed strategy. However, the Open Society Justice Foundation argues that there is not always a causal relationship or correlation between strategy and impact.²⁷ Goals and strategies are subject to change during the process of litigation and sometimes cases without previously determined strategies are most impactful. A given impact (for example a change in the law) can have many different causes, and “a strategy is often essential to secure impact, but strategy alone is not sufficient.”²⁸

It remains very difficult to determine a correlation, let alone a causal relationship between a strategic aim and a specific result.²⁹ “Society changes in so many ways that it is hard to pick out the causal contribution of particular legal acts in many situations.”³⁰ Often litigation is just one of many tools that are all trying to obtain the same objectives. Therefore, one should be very careful in evaluating strategic litigation in isolation from other methods used to achieve the same goals.

Why measure the impact of SHRL?

The central purpose of measuring the impact of SHRL is evaluation. Since strategic litigation processes are defined by their attention to goals other than those of the immediate parties, an evaluation of the extent to which those goals have been met is logical and necessary to learn from past experiences. The extent to which strategic litigation processes have had positive or negative impacts also reflects upon the legitimacy of organisations in getting involved in strategic litigation. Therefore, evaluation is necessary in order to ensure the accountability of SHRL.

²⁶ Gorvin, I. ‘Producing the evidence that human rights advocacy works: First steps towards systematized evaluation at Human Rights Watch’ (2009) 1(3) *Journal of Human Rights Practice* 477.

²⁷ Open Society Justice Initiative (n 12) p. 26.

²⁸ Open Society Justice Initiative (n 12) p. 27.

²⁹ Open Society Justice Initiative (n 12) p. 28.

³⁰ Open Society Justice Initiative (n 12) p. 28, citing Friedman, L.M, *Impact: how law affects behaviour* (HUP 2016) p. 57.

SHRL has been criticised for being very expensive and very slow.³¹ Therefore, it is important for organisations choosing to use methods of SHRL that there is an added benefit to SHRL as opposed to other, possibly cheaper and potentially more effective, methods.³²

However, SHRL has also been hailed as a potentially very effective method as SHRL demands a decision by a judge.³³ The voice of the judge is authoritative and it is harder to overturn a judicial ruling than ignore a political demonstration.³⁴ Moreover, and very importantly, human rights are intended to be enforced by courts if governments fail to realise them for their citizens. SHRL can, therefore “make rights real.”³⁵ SHRL can also have many impacts beyond the ruling of the judge itself, for example by creating publicity, mobilising citizens, disclosing information and improving the negotiating position of civil society actors.³⁶

How to measure the impact of SHRL and evaluate it?

There are many different ways in which to evaluate SHRL. In this section I present three different ideas on measuring and evaluating strategic human rights litigation: i) the goals-based model by Barber, ii) Duffy’s wide-angle approach, and iii) NeJaime’s winning through losing argument.

i) Goal-based analysis

Catherine Barber presents her model for measuring and evaluating SHRL within the context of what she calls “the evaluation challenge in human rights.”³⁷ According to Barber, human rights organisations struggle to show to the outside world that their work directly improves the situations that they focus on.³⁸ Barber suggests that human rights organisations should take on goal-oriented evaluation in order to reflect on their own work in the short and long term.

Barber notes some points of critique on engaging in goal-based evaluation: i) one has to identify ‘measurable goals’, ii) it is impossible to establish causality between an act and an outcome, and iii) goal-based evaluation is descriptive and pays little attention to negative results.³⁹ Barber acknowledges that in the human rights field it is often so that “goals are

³¹ Open Society Justice Initiative (n 12) p. 36.

³² Open Society Justice Initiative (n 12) p. 38.

³³ Open Society Justice Initiative (n 12) p. 34.

³⁴ Open Society Justice Initiative (n 12) p. 34.

³⁵ Open Society Justice Initiative (n 12) p. 36.

³⁶ Bleeker, T.R. and Stolk, R. ‘Toegang tot de rechter: strategisch procederen in het milieurecht’ (2018) 67(6) Milieu & Recht 383, p. 383.

³⁷ Barber (n5).

³⁸ Barber (n5) p. 411.

³⁹ Barber (n5) p. 416.

symbolic rather than substantial, deliberately vaguely worded and contain contradictory components.”⁴⁰

Nonetheless, Barber maintains that goal-based evaluation is the best way to measure impact and assess success or failure in the field of strategic human rights litigation. If anything, it is something that NGOs, according to Barber, should strive towards. This is because strategic litigation is often used in combination with other non-legal methods and strategies,⁴¹ and because strategic litigation involves a wide variety of actors.⁴² Therefore, defining clear and explicit goals can help human rights organisations determine why they are employing what method at what time and what impact the strategy might have on which stakeholder.⁴³

Barber’s goal-based evaluation method works as follows: i) human rights organisations develop explicit goals that are either general or specific, ii) for each goal the organisation develops impact or output indicators, and iii) the organisation evaluates to what extent these indicators have lived up to the goals. Barber defines output as a short term intervention, or, “what staff do on a day-to-day basis”.⁴⁴ Impact, according to Barber, indicates a shift in systemic problems, the actual effect of the work done on the problem identified.⁴⁵ While impacts, according to Barber, are most difficult to measure, they are the most important as they have a life-changing potential⁴⁶

Barber concludes her article by stating that human rights organisations need to start clearly defining their litigation goals at the onset of the project.⁴⁷ Moreover, organisations should set different goals for every project or case, as different cases have different indicators of ‘success’.⁴⁸ Further research should spend more time on the meaning of evaluation and measurement and should include a focus on the failures of strategic litigation.⁴⁹

ii) Wide-angle approach

In her book *Strategic Human rights Litigation: Understanding and Maximising Impact*, Helen Duffy proposes that the measuring and evaluation of SHRL should occur through a lens with a wide-angle. According to Duffy, “no one frame can capture the complexities of the impact SHRL litigation can have.”⁵⁰ This wide frame applies a multi-dimensional concept of impact,⁵¹

⁴⁰ Barber (n5) p. 416.

⁴¹ Barber (n5) p. 417.

⁴² Barber (n5) p. 417.

⁴³ Barber (n5) p. 417.

⁴⁴ Barber (n5) p. 418.

⁴⁵ Barber (n5) p. 418.

⁴⁶ Barber (n5) p. 419.

⁴⁷ Barber (n5) p. 430.

⁴⁸ Barber (n5) p. 430.

⁴⁹ Barber (n5) p. 431.

⁵⁰ Duffy (n5) p. 37.

⁵¹ Duffy (n5) p. 39.

assesses litigation in its political and social context,⁵² assesses impact over time,⁵³ and steps away from the notion that winning a case is equal to success.⁵⁴

Important in Duffy's understanding of SHRL evaluation is the emphasis she puts on impact rather than goals.⁵⁵ Duffy argues that focussing on goals set before litigation "we may risk excluding from our analysis the many cases that have turned out (...) to have had a great impact on multiple levels, perhaps beyond what anyone could have anticipated at the time."⁵⁶ According to Duffy, goals are an important starting point for litigation and should be continuously monitored, but only in an ideal world would goals and impact coincide.⁵⁷

In terms of impact, Duffy is hesitant to create an exhaustive list or 'checklist' of types of impact SHRL could have. She does make an indication of different categories of impact, namely: i) victim/claimant impact, ii) impact on legal development, iii) policy impact, iv) societal and cultural impact, v) institutional impact, vi) democratic and rule of law impact and vii) negative impacts.⁵⁸ Duffy's model can be used in conjunction with the 'multidimensional impact model' presented by the Open Society Justice Foundation (OSJF).⁵⁹ This model argues that it is necessary to get away from a binary, win or lose, conception of evaluation. The OSJF differentiates between three different kinds of impact: material impact (e.g. compensation, disclosure of information), instrumental impact, (e.g. changes in policy, law, institutions), and non-material impact (e.g. victim empowerment, the behaviour of policymakers). To a large extent, the impact categories identified by Duffy fit into these larger sub-categories.

The extent to which an SHRL process is 'successful' does not seem to interest Duffy very much, but she suggests that evaluation should occur by identifying the different level of impact. The success of a case (in terms of the levels of impact it was able to achieve) will depend on many factors. However, there are a number of choices involved in the process of SHRL which could maximise impact: i) identifying goals and realistically assessing risks, ii) considering the timing of the litigations process, iii) using the media to your advantage, iv) selecting the right case, v) selecting the right forum, and vi) managing the role of the victim in the process.⁶⁰

iii) Winning through losing

Not so much a model for the evaluation of SHRL as a complementing theory to existing models, NeJaime's article 'Winning Through Losing' sets out a few scenarios in which losing

⁵² Duffy (n5) p. 39.

⁵³ Duffy (n5) p. 42.

⁵⁴ Duffy (n5) p. 45.

⁵⁵ Duffy (n5) p. 47.

⁵⁶ Duffy (n5) p. 47.

⁵⁷ Duffy (n5) p. 48.

⁵⁸ Duffy (n5) p. 50.

⁵⁹ Open Society Justice Initiative (n 12) p. 42.

⁶⁰ Duffy (n5) p. 233.

a court case can be beneficial to the social movements that are litigating for change.⁶¹ According to NeJaime, litigation loss can help movements internally by constructing identity and mobilising constituents.⁶² Moreover, litigation loss can be used by social movements to appeal to state institutions or the public, by emphasizing the disadvantaged position they are in.⁶³

Catherine Albiston criticizes this approach by NeJaime and claims it is important not to lose sight of the potential negative side-effects of using litigation as a strategy.⁶⁴ She argues that using litigation has the potential of deradicalizing social movements and supports the status quo.⁶⁵ Albiston also lists more common objections to the use of litigation as a strategy, namely that it diverts resources from other strategies, it discourages collective action and can mobilise the opposition.⁶⁶

While NeJaime and Albiston approach strategic litigation from a social movements theory perspective, not a human rights perspective, their insights can to some extent be translated to human rights as well. Moreover, Albiston's concerns can also be considered a possible negative impact of SHRL. While the radicalisation of movements may only a concern for some organisations considering human rights litigation, the idea that spending money on expensive court procedures could be less effective than other methods of activism is common among human rights activists.⁶⁷ Moreover, the idea that strategic litigation can mobilise the opposition is reflected in the phenomenon of SLAPP-litigation.⁶⁸

1.3. Strategic human rights litigation in the Netherlands

There is some diversity in opinions on the meaning of strategic human rights litigation and the ways in which it can be measured or evaluated. This could be because authors tend to consider the evaluation of SHRL within the framework of their own legal system (or legal experience).⁶⁹ Therefore, I am sceptical of the possibility of deriving general conclusions about measuring the impact and success of strategic human rights litigation directly from these publications without considering the national legal context. What is considered impactful in one legal system is not necessarily impactful in another legal context. Therefore, I think that any attempt at providing a model for the evaluation of SHRL should be firmly

⁶¹ NeJaime, D. 'Winning Through Losing' (2011) 96 Iowa Law Review 941.

⁶² NeJaime (n61) p. 972.

⁶³ NeJaime (n61) p. 988.

⁶⁴ Albiston, C. 'The dark side of litigation as a social movement strategy' (2011) 96 Iowa Law Review Bulletin 61.

⁶⁵ Albiston (n64) p. 67.

⁶⁶ Albiston (n64) p. 67.

⁶⁷ Open Society Justice Initiative (n 12) p. 33; Interview Stop Wapenhandel.

⁶⁸ Donson, F. 'Libel cases and public debate—some reflections on whether Europe should be concerned about SLAPPs' (2010) 19 Review of European Community & International Environmental Law 83.

⁶⁹ For more on the ability of legal scholars to approach legal phenomena outside of their own legal experience see scholarly commentary on comparative legal research, see e.g. Van Hoecke, M. 'Methodology of comparative legal research' (2015) Law and Method 1, p. 8.

placed within the legal context in which it is taking place.⁷⁰ The specific structure of the Dutch legal framework has a significant impact on the ways in which SHRL is possible and therefore changes the possible impacts and perceptions on what can be considered a success or not. In this section, I set out two characteristics of the Dutch legal framework that are of influence on the evaluation process of SHRL in the Netherlands, namely: i) the absence of constitutional review, and ii) the task division between the civil and administrative judge.

i) Absence of constitutional review or a constitutional court

The Netherlands does not have a constitutional court that reviews Dutch legislation against the Dutch constitution.⁷¹ Moreover, the Dutch constitution does not allow judges to review concrete legislation against the Dutch constitution.⁷² This makes the Dutch legal framework very different from many other constitutional democracies. According to de Poorter, this difference is explained by the historical context of the creation of the Dutch Constitution.⁷³ At the time of creation, the Dutch bourgeoisie resisted the establishment of a judicial review since the judiciary mostly consisted of the aristocracy and this would limit popular sovereignty.⁷⁴ The Dutch legal system is therefore aimed at safeguarding the legislative power.

This particular legal context, with relative legislative supremacy, has some concrete effects for civil society actors wanting to litigate against the state. First, while Dutch laws are not subject to constitutional review, international norms are directly applicable in Dutch courts. This means that international and European (human rights) norms are the only instruments that can be invoked directly in court to challenge a Dutch law.⁷⁵ Civil society actors wanting to challenge a law as well as Dutch judges must, therefore, have an advanced understanding of these norms to substantiate their argumentation. Secondly, since legislative proposals are not subject to binding constitutional review before passing as a law,⁷⁶ the only option to review a law for a general human rights violation is to bring a concrete case to a Dutch court. This makes SHRL an important tool for civil society actors wanting to change a law. Moreover, civil society actors are important actors in organising

⁷⁰ To some extent, the same argument could be made in relation to political, social and cultural context which can each have an influence on the potential impact of SHRL. In this paper I choose to highlight the influence of the legal framework because the case study used deals mostly with questions that are particular to the Dutch legal system.

⁷¹ Stolk (n10) p. 2.

⁷² The Constitution of the Kingdom of the Netherlands 2008 (*Nederlandse Grondwet*) Article 120.

⁷³ De Poorter, J. 'Constitutional review in the Netherlands: a joint responsibility' (2013) 8 *Utrecht Law Review* 89, p. 91.

⁷⁴ De Poorter (n73) p. 92.

⁷⁵ The Constitution of the Kingdom of the Netherlands 2008 (*Nederlandse Grondwet*) Article 93; De Poorter (n73) p. 101.

⁷⁶ The Dutch Council of State does have an Advisory Division which gives advice to the Dutch Parliament on the constitutionality of a bill, this advice however only plays a role in the political process and is not legally binding. De Poorter (n73) p. 92.

these review processes by for example selecting the right cases that demonstrate a more structural human rights violation or by funding the endeavour. Thirdly, the engrained division of power between the legislator and the judiciary in the Netherlands means that the judge is not allowed to make ‘political decisions’. This is illustrated by article 11 *Wet algemene bepalingen* (Law general decrees) which holds that judges are not allowed to judge the desirability or the intrinsic value of a law, they must judge according to the law.⁷⁷ This law is followed rather strictly in the Netherlands, and any discussion of SHRL where a judge is asked to judge a law based on human rights considerations often becomes part of a bigger debate on the division of power between the legislator and the judiciary.⁷⁸

ii) *Task division civil and administrative judge*

Within the Dutch legal framework there is an emphasis on individual litigation, also when it concerns cases against the government.⁷⁹ Strategic human rights litigation is, however, per definition larger than the individual. Any successful strategic litigation case in the Netherlands will, therefore, have to be translated into a case which is admissible before a Dutch court.⁸⁰ In the Netherlands, actions against the government can be brought before an administrative judge (*bestuursrechter*) or a civil judge (*civiele rechter*).

a) *Administrative judge:*

The purpose of the administrative judge is to protect individual access to justice, not necessarily to protect general interests.⁸¹ However, according to Rowie Stolk, the administrative judge has a number of advantages above the civil judge for strategic litigation purposes. The administrative judge is cheaper, faster and the judge is more likely to take a ‘leading’ inquisitorial role, than the civil judge, who is more hesitant and will judge only the facts brought before it by the parties.⁸²

The admissibility requirements for bringing a case to an administrative judge can be rather strict for civil society organisations. The admissibility of civil society organisations as an ‘interested party’ before an administrative judge is determined by article 1:2(3) of the General Administrative Law Act (GALA). According to this article, legal entities are admissible so long as “their interests are deemed to include the general and collective interests which they particularly represent in accordance with their objects and as evidenced by their actual activities.”⁸³ With regards to general interest claims (claims based on the general interest of the population at large), civil society actors will, therefore, have to

⁷⁷ Law General Decrees (*Wet Algemene Bepalingen*) Article 11.

⁷⁸ Bauw, E. ‘De bakens verzet (?!): De civiele rechter in milieuzaken tegen de overheid’ (2018) 4 Tijdschrift voor Omgevingsrecht 160, p. 161.

⁷⁹ Stolk (n10) p. 2.

⁸⁰ Stolk (n10) p. 3.

⁸¹ Stolk (n10) p. 5.

⁸² Stolk (n10) p. 6.

⁸³ General Administrative Law Act (*Algemene Wet Bestuursrecht*) Article 1:2(3).

show that their factual activities and statutory goals correspond to the interest they are pursuing.⁸⁴ In practice, this is usually not a big problem, and it seems that following this article the admissibility requirements for civil society actors are not so strict at all.

However, article 8:3 of the GALA prohibits objections and appeals before an administrative judge an order such as a general rule or a policy rule. This is highly limiting to civil society actors because, in terms of SHRL, they are likely to want to challenge rules that have a general impact rather than individual decisions.⁸⁵ Moreover, civil society actors also cannot challenge a general rule by trying to litigate against an individual decision based on that rule, since these cases represent an individual interest – not a general or collective interest.⁸⁶ This means that civil society actors will have no standing before an administrative judge in cases like these.

b) Civil judge

The civil judge is a *restrechter* (auxiliary judge) which means that any civil society organisation which does not have standing before the administrative judge can turn to the civil judge.⁸⁷ Civil society actors can bring claims to a civil judge under article 3:305a of the Dutch Civil Code as part of collective action.⁸⁸ In theory, the possibilities for a civil society actor to litigate for a general interest before a civil court are bigger than before an administrative court.⁸⁹ This is because if a wrongful act (*onrechtmatige daad*) is detected, the civil judge automatically has jurisdiction.⁹⁰

However, a procedure before a civil judge is slower and more expensive than an administrative procedure.⁹¹ Moreover, a claim before a civil judge will be inadmissible if an individual procedure before an administrative judge is possible.⁹² It is possible for parallel procedures to occur when a class action is brought before a civil judge and an individual case on the same issue is brought before the administrative judge, therefore, diverging judgements may occur. Therefore, the civil judge will not rule on cases that can also be brought as individual claims before the administrative judge.⁹³ Stolk explains that in practice it is this rule that presents most problems for civil society actors trying to bring a case before a civil judge.⁹⁴

c) Dividing the tasks

⁸⁴ Stolk (n10) p. 7.

⁸⁵ Stolk (n10) p. 11.

⁸⁶ Stolk (n10) p. 9.

⁸⁷ Stolk (n10) p. 5.

⁸⁸ Dutch Civil Code (*Burgerlijk Wetboek*) Article 3:305a.

⁸⁹ Stolk (n10) p. 13.

⁹⁰ Bauw (n78) p. 160.

⁹¹ Stolk (n10) p. 1.

⁹² Stolk (n10) p. 11; Bauw (n78) p. 161.

⁹³ Stolk (n10) p. 13.

⁹⁴ Stolk (n10) p. 13

Without going into different ideas in case law on what purpose the task division between the two judges *should* serve,⁹⁵ it has become clear that there is not a clear-cut task division between the administrative and the civil judge in the law when it comes to the admissibility of civil society actors. It is not uncommon for civil society actors to be going back and forth between the two judges. Moreover, there is an important aspect of effective judicial protection and access to justice connected to these limitations.

1.4. Designing a model of evaluation

In order to successfully evaluate a process of SHRL, a model of evaluation is needed. A model offers a way to approach a process in a structured manner and thereby draw conclusions about the process that can be evaluated. In designing a model, I argue below, it is important to keep in mind (i) the purpose of the evaluation, (ii) the national legal and institutional context, and (iii) an emphasis on impact. These criteria are considered when using the models of evaluation discussed earlier to construct a model that is tailored to evaluating a SHRL process in the Netherlands. Finally, I explain how this model can help identify factors that influence the success of a litigation effort.

How to design a model of evaluation?

The study of evaluation is a field of scholarship in itself.⁹⁶ While I am not an expert in this field (and therefore cannot provide a complete overview of evaluation design theories) some insights from evaluation studies are still useful in determining an appropriate model of evaluation. In this paper, I subscribe to the ideas of Hanne Foss Hansen on the design of evaluation models.⁹⁷ According to Hansen, the design of the evaluation model should be dependent on the *purpose* of the evaluation. If the purpose of the evaluation is to learn more about the process and come up with ways in which the process could be improved, Hansen suggests using a *process model*.⁹⁸ Process models are models that focus on the entire process, following it from early phases to implementation and reception among stakeholders. The main aim of the model is to explain the different processes behind the different stages of the object of evaluation.⁹⁹ On the other hand, if the goal is to control performance, Hansen suggests using a *results model*.¹⁰⁰ Results models focus on the results of a given programme. The classic results model is a goal-attainment model, which evaluates according to what extent previously set goals have been met.¹⁰¹

⁹⁵ An overview of case law can be found in Stolk (n10), pp. 13-14.

⁹⁶ See for example the academic journal *Evaluation*, published by SAGE.

<https://journals.sagepub.com/home/evia>

⁹⁷ Foss Hansen, H. 'Choosing evaluation models: a discussion on evaluation design' (2005) 11(4) *Evaluation* 447, p. 447.

⁹⁸ Foss Hansen (n97) p. 452.

⁹⁹ Foss Hansen (n97) p. 450.

¹⁰⁰ Foss Hansen (n97) p. 452.

¹⁰¹ Foss Hansen (n97) p. 449.

I believe that when designing an evaluation model for SHRL, the national legal and institutional context in which the litigation has taken place should be taken into account. This is because a certain type of impact might be valued differently in different legal systems. There are several conclusions that we can draw from the Dutch legal framework discussed above that impact the evaluation model design.

Finally, SHRL evaluation should, in accordance with Helen Duffy, focus on identifying what impacts the litigation process has had. According to Duffy, SHRL exists in so many different ways that it is difficult to make claims about the structure or the goals of SHRL.¹⁰² Instead, evaluation should focus on impact assessment.

The proposed model of evaluation

i) Purpose

The purpose of this particular evaluation exercise (in accordance with the research question) is to learn. To find out what has gone well and what has gone wrong at the different stages of the process “from idea to decision and implementation to reaction.”¹⁰³ The evaluation model proposed here, therefore, should follow the three stages of strategic litigation: preparation, implementation and reflection.

ii) National legal and institutional context

In the Netherlands, there are complex and strict rules with regard to the position of civil society organisation before a judge. Therefore, the procedural knowledge on what judge to take your claim to is an important part of the strategy behind SHRL. Moreover, the discussion on strategic litigation or human rights tends to be part of a larger discussion on the position of the judge vis-à-vis the legislator. How does this impact our proposed model of evaluation? First, it means that goals for SHRL must be set according to expectations that are realistic and risks must be carefully evaluated within the context of a legal framework that does not leave much room for civil society organisation as litigators for general human rights issues. Second, since judges might be hesitant to make decisions, SHRL is less likely to have a direct material impact than instrumental and non-material impact. Strategies should be formulated accordingly. This could mean that, since a case is unlikely to provide direct redress, the role of the media in effecting impact becomes more important than the actual case itself. Third, SHRL cases will often have a strong procedural dimension and relate to questions of access to justice and the right to a remedy. This can be taken into account when formulating goals and during argumentation in court.

iii) Emphasis on impact

As the proposed model is a process model, we can exclude the goal-based analysis as proposed by Barber, which is a results model in Foss Hansen’s terms and more appropriate

¹⁰² Duffy (n5) p. 49.

¹⁰³ Foss Hansen (n97) p. 449.

for control purposes rather than learning purposes.¹⁰⁴ This is because a mere goal-based analysis presupposes a certain causality between goals and outcomes while a process model is more likely to include unanticipated impacts or implicit goals as well as negative impacts. The wide-angle approach proposed by Duffy fits more neatly within a process model since it rejects the idea that previously set goals and impacts always coincide. The idea that a SHRL model should be judged based on its impacts, not the extent to which it has been able to achieve previously set goals therefore fits very well within in rationale of a process-based model.

In order to identify different impacts, it is useful to maintain a categorisation of impacts. Since the types of impact suggested by Duffy roughly fit within the three-prong categorisation proposed by the Open Society Justice Initiative, I stick with the distinction between material, instrumental and non-material impact. Moreover, in order to analyse not only the reflection phase on the litigation process (as this is when impacts will become determinable) I incorporate the factors identified by Duffy which could maximise the impact of a litigation process: i) identifying goals and realistically assessing risks, ii) choosing the right forum, iii) correct timing of the litigation process, iv) selecting the right case, v) using the media to your advantage, and (vi) managing victim representation well. Moreover, keeping in mind Nejaime and Albiston, we must not forget to critically assess whether there have been any negative impacts.¹⁰⁵

Based on the previous, I suggest the following model of evaluation:

Table 1. Evaluation model of SHRL processes in the Netherlands

Process stage	Criteria	Dutch context
Preparation	How was the case selected? Was the right forum selected? Were clear goals identified and were risks realistically assessed?	Were goals set in accordance with the limitations and possibilities of the Dutch legal framework? Specifically considering the admissibility of civil society actors, the selection of a case (contesting a general rule or an individual decision) and the selection of a forum (civil or administrative judge).

¹⁰⁴ There are further objections an isolated goal-based analysis, which have to some extent been identified by Barber herself. E.g. : i) one has to identify ‘measurable goals’, ii) it is impossible to establish causality between an act and an outcome, and iii) goal-based evaluation is descriptive and pays little attention to negative results. See page 10 of this paper.

¹⁰⁵ The biggest criticism on SHRL, namely that there might be cheaper and more effective alternatives to achieve the same result, requires an analysis that goes beyond the scope of this paper. This would require the comparison of different methods and possibly a cost-effectiveness analysis. Even then, I am not sure whether it would be possible to arrive at a conclusion that is not mostly speculative.

Implementation	Was timing considered? How was the media involved? Did the victims feel represented and empowered?	Were alternative means to impact than litigation (like the media) considered enough? Did the parties reference access to justice in their arguments?
Reflection	Did the case have any material/non-material/instrumental impact? Has this impact been positive or negative? To what extent have the parties achieved their previously set goals?	Material impact should not be valued more than non-material or instrumental impact.

How can the factors that determine success be identified through evaluation?

In order to identify the factors that have been most influential to the success (or lack thereof) of a SHRL process, this model will answer two questions in particular. First, what have been the main impacts of the process and have they been positive or negative (reflection phase)? Second, what steps have been taken during the preparation and implementation phases to maximise the impact of the SHRL process? This includes the extent to which previously set goals (and the realistic nature of those goals) have been achieved.

Chapter 2: The arms trade file

This chapter sets out the case study used for this research project: the line of case law on Dutch arms trade between 2015 and 2017. To this effect, the chapter starts with an introduction into the current state of International European legislation on arms export control and trade licensing. I then set out a timeline of the cases between 2015 and 2017,

2.1. The use of human rights standards in arms trade licensing

Before exploring the line of case law that makes up the case study in this research project, some background knowledge on the human rights issues at hand is necessary. This section, therefore, explains the broader human right context of arms trade licensing as well as the developments in the applicable international, EU and Dutch legislation.

Human rights issues

In the process of arms trade, many human rights are at stake. There are of course the right to life and security of the person of the people involved in the conflict in which the military equipment is used.¹⁰⁶ In terms of the human rights obligations of the Dutch state these rights are also relevant as well as the obligation to provide those wishing to challenge the extension of a license to a Dutch company with access to justice.¹⁰⁷ Dutch companies also have human rights obligations in line with the (non-binding) UN Guiding Principles on Business and Human Rights. In line with principle 13, business enterprises should avoid contributing to adverse human rights impacts through their own activities and mitigate impacts that are directly linked to their products, services or business relationships.¹⁰⁸

International and EU legislation

In the international realm, the United Nations Arms Trade Treaty (ATT) is one of the most influential documents and the most relevant when it comes to the protection of human rights. Article 7(1) of the ATT lays down the obligation for states to take into account a number of criteria before authorizing the export. One of these criteria is the potential that the conventional arms or items commit or facilitate a serious violation of international human rights law.¹⁰⁹

The most influential EU legislation on arms trade export control is the 2008 Common Position.¹¹⁰ The Common Position stipulates that each Member States shall assess

¹⁰⁶ International Covenant on Civil and Political Rights (ICCPR) 1954, article 6; European Convention on Human Rights (ECHR) 1950, article 2.

¹⁰⁷ ECHR, articles 6 and 13.

¹⁰⁸ UN Guiding Principles on Business and Human Rights 2011 HR/PUB/11/04, principle 13.

¹⁰⁹ United Nations Arms Trade Treaty 2013, Article 7(1) criterion ii.

¹¹⁰ Council Common Position 2008/944/CFDP of 8 December 2008 defining common rules governing control of exports of military technology and equipment [2008] OJ L335/99

applications for export licenses to export military items on a case-by-case basis, using the list of criteria contained in article 2 of the EU Common Position. The second criterion of article 2 is to “deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used for internal repression” and “exercise special caution in issuing licenses (...) to countries where serious violations of human rights have been established by the competent bodies of the United Nations, by the European Union or by the Council of Europe.”¹¹¹

There is separate EU legislation on ‘dual-use’ items, which are items that can be used for both civil and military purposes. In this paper, I will focus on arms trade. However, in cases where an item serves both military and civil purposes the judge might also have to apply dual-use regulations.¹¹² The existing regulation on dual-use items does not pay much attention to human rights, but the European Commission tabled a proposal in 2016 which called for the inclusion of stricter human rights standards in exercising export control on dual-use items.¹¹³ Such standards include, for example, a due diligence obligation of European businesses to notify their government if they suspect that items might create adverse human rights impacts.¹¹⁴

Dutch legislation

The export control on the arms trade in the Netherlands is governed by the Decision on Strategic Goods (*Besluit Strategische Goederen*). Articles 11(1) and 18(1) of this Decision stipulate that it is illegal to export military goods from the Netherlands without a license. Moreover, articles 11(3) and 18(3) read that no such license may be granted if it conflicts with international obligations.¹¹⁵ These international obligations include the international and European legislation and human rights set out above as well as potentially other humanitarian law obligations.

Dutch export control has been Europeanised by the Union Customs Code (UCC).¹¹⁶ Article 44 of the UCC reads that all who have been directly and individually affected by the decision can appeal and object to a decision of customs authorities. The UCC has been transposed into Dutch law among others through the General Customs Act (*Algemene Dounewet*). Article 8:1 of the Dutch General Customs Acts specifies that article 8:1 GALA

¹¹¹ Article 2(a) and 2(b) Common Position (n110).

¹¹² See Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items [2009] OJ L134/1.

¹¹³ European Commission, Proposal for a Regulation of the European Parliament and of the Council setting up a Union regime for the control of exports, transfer, brokering, technical assistance and transit of dual-use items (28 October 2016) COM(2016) 616.

¹¹⁴ European Commission (n113) article 4(2).

¹¹⁵ Decision Strategic Goods (*Besluit Strategische Goederen*), article 21(1) stipulates that such a license can be granted by the minister of foreign affairs

¹¹⁶ Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code [2013] OJ L269/1.

(which determines that interested parties may appeal to a government decision at the administrative court) shall not be applicable in issues concerning customs.¹¹⁷ This means that the requirement to appeal to a customs related decision is stricter (individual and direct connection) than the one included in the Dutch GALA.

2.2. The arms trade file

The 'arms trade file' as PILP have dubbed the case study in the present research is comprised of a number of cases between 2015 and 2017 (with a little epilogue in 2002). The file is complex, both due to legal questions at stake as well as the sheer number of back-and-forths between the claimants, the governments and the courts. To aid in the reader's comprehension of the case line I have created a timeline which is added in Appendix I. The most important turning points of the case study are set out below in chronological order.

2002: Prologue

The prologue to our file starts in 2002 when a number of Dutch NGOs called for a general ban on the export of all military goods to Israel before a civil court.¹¹⁸ They called for a stop on the issuance of all licenses for export to Israel and a stop to the transfer of any military goods through the Netherlands to Israel.¹¹⁹ The civil judge considered that the defendant had not given any reasons why the claimants should not be considered an 'interested party' as follows article 3:305a of the Dutch civil code. Seeing as the civil judge is only allowed to consider the facts as presented by the parties, the claimants were therefore deemed preliminarily admissible. With regards to the merits of the case, the judge deemed there was no actual conflict on some demands by the claimants,¹²⁰ and with regards to other demands the judge held that the parties had access to the administrative judge and should, therefore, be taking such demands to the administrative judge.¹²¹

The case concluded with this judgement. According to a representative of one of the NGOs involved there was no more money to continue litigation at an administrative court.¹²² However, the parties were left with some resolve to try again when there was money available and a more specific case of an export license presented itself (the general nature of the ban to Israel was hard to materialise before the court) and this time take the case to the administrative court.¹²³

¹¹⁷ General Customs Act (*Algemene Douanewet*) article 8:1.

¹¹⁸ Court of the Hague (*Rb. 's-Gravenhage*) 29 May 2002 ECLI:NL:RBSGR:2002:AE3271, para 2.

¹¹⁹ Court of the Hague 2002 (n118) para 2.

¹²⁰ Court of the Hague 2002 (n118) para 4.6.

¹²¹ Court of the Hague 2002 (n118) para 4.4.

¹²² Interview Wendela de Vries.

¹²³ Interview Wendela de Vries.

2015: A letter to parliament

On the 10th of August 2015, the minister of Foreign Affairs grants a 34 million euro export license to a Dutch company to export radar and C3 systems to Egypt.¹²⁴ These systems would first be exported to France where they are to be incorporated in a number of ‘corvettes’ (small warships).¹²⁵ Since 21 August 2013, EU Member States had been refusing the export of military goods to Egypt if there is a chance it might be used for internal repression.¹²⁶ However, since 2014, several Member States had distinguished between deliveries to different branches of the Egyptian army, allowing export to the navy but not to other branches. With this decision to grant a license, the Dutch government effectively does the same. On September 1st 2015 the Dutch parliament is informed by way of a letter of this decision. The letter details an analysis of the human rights situation in Egypt as carried out by the ministry of foreign affairs. This analysis is carried out according to a number of criteria laid down in the EU Common Position on arms export. The third of these criteria is ‘human rights’. According to the human rights situation in Egypt, the minister says the following:

“Serious human rights violations are occurring in Egypt. However, there are no indications that the items to be exported are in any way connected to these human rights violations or the internal repression. Moreover, the Egyptian navy is not involved in human rights violations in Egypt.”¹²⁷

This is the only mention of human rights standards being applied in the licensing procedure in the letter of 2015. A separate *WOB-procedure* (Freedom of information inquiry for government documents) in 2016 led to the release of the original document which granted the license on the 10th of August 2015. In this document, the ministry discusses the role of the Egyptian navy as well as the material delivered in more detail. According to the minister, there is proof that the Egyptian navy is active in the Gulf of Aden which borders Yemen. The naval blockade of Yemen in 2016 is known to have destabilised the region to a large extent, risking a humanitarian crisis.¹²⁸ However, the minister argues that it is unlikely that the radar and C3 systems delivered by the Dutch producer will contribute to any type of *grondoffensief* (conflict on land) in Yemen.¹²⁹ From the original document, it also becomes

¹²⁴ C3 stands for command, control and communication system.

¹²⁵ Original document issuing license for arms export to Egypt via France (*verstrekking vergunning wapenexport Egypte via Frankrijk*) (10 August 2015), consulted in private file PILP.

¹²⁶ EU Foreign Affairs Council conclusions on Egypt (21 August 2013), URL: https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/138599.pdf.

¹²⁷ Tweede Kamer der Staten-Generaal ‘Brief van de Ministers voor Buitenlandse Handel en Ontwikkelingssamenwerking en van Buitenlandse Zaken (1 September 2015) 22 054 nr 263, p. 2 (quote translated by author).

¹²⁸ NJCM, PAX & Stop Wapenhandel, Letter of Appeal and Request for Preliminary Measure (*Hoger Beroepschrift tevens Verzoek tot het treffen van een voorlopige voorziening*) to Court of Amsterdam (3 October 2016), p. 12.

¹²⁹ NJCM, PAX & Stop Wapenhandel (n128) p. 13.

evident that the minister considers the material delivered as being used for patrol purposes.¹³⁰ NJCM, PAX for peace and Stop Wapenhandel ('the organisations') argue, however, that there is proof the systems might also be used for 'surface target's and 'coastal land-attack'. The minister argues that the Egyptian navy only incidentally shoots at boats of migrants and refugees on the Mediterranean sea. The organisations argue that the incidental nature of a human rights violation does not make it less of a human rights violation.¹³¹

On 12 October 2015, PILP, PAX for peace and Stop Wapenhandel decide to object to this decision. In fact, the three organisations had been monitoring the licenses extended by the Dutch government to a Dutch company for the export of weapons for a while, looking for the right case to expose the larger human rights issue at stake.¹³² This case was considered 'the right case' because it was more specific than the case in 2002.¹³³

The main arguments for the objection are that the human rights test included in the decision was incomplete and imprecise. According to the organisations, the minister fails to adequately address the role of the Egyptian navy with regards to the refugees on the Mediterranean Sea and in the conflict with Yemen. Therefore, the decision to grant the license is in violation of Article 7 ATT and the EU Common Position, as well as the right to life as protected through article 6 ICCPR and article 2 ECHR.

2016: Directly and individually affected

Throughout the beginning of 2016, the parties are in intensive contact about the refusal of the government to share the original decision to grant the license (which was eventually acquired through the aforementioned *WOB-procedure*). On June 1st 2016, the Dutch government denies the objection of the organisations to the license, declaring the parties inadmissible on the ground that the organisations were not statutorily affected. The organisations appeal to this decision and on August 25th the parties meet in administrative court. The judge of the court in Noord-Holland declares that the admissibility requirement of the Dutch General Customs Act is applicable, which holds that parties must be affected directly and individually in order to appeal to a decision.¹³⁴ Since the judge does not consider PILP, Pax for peace or Stop Wapenhandel to be individually or directly affected by the decision, the appeal is declared inadmissible.¹³⁵

On October 3rd 2016, the organisations send a notice of appeal with regards to the judgement of August 25th to the Court in Amsterdam. In this notice, the organisation argue that they should be considered admissible before the administrative court because a denial of access would mean they could only seek redress at a civil court. This would mean that

¹³⁰ NJCM, PAX & Stop Wapenhandel (n128) p. 15.

¹³¹ NJCM, PAX & Stop Wapenhandel (n128 p. 15.

¹³² Interview Wendela de Vries; Interview Frank Slijper.

¹³³ Interview Frank Slijper.

¹³⁴ Court of Noord Holland (*Rb. Noord-Holland*) 25 August 2016 ECLI:NL:RBNHO:2016:7024, para 9.

¹³⁵ Court of Noord-Holland 2016 (n134) para 13.

different interested parties (meaning, for instance, the arms supplier and an NGO) would have to use different court to litigate on the same license.¹³⁶

2017: From pillar to post

The appeal is heard on January 24th 2017 by the Amsterdam Court. However, the time limit to appeal to the original decision to grant the license had expired on 30 September 2016.¹³⁷ The license had since been extended until 31 October 2017. The judge decides that since it has become impossible to call back any of the exported items even if the original license were to be destroyed, the appealing parties do not have an interest in litigating (*procesbelang*) any longer.¹³⁸ The parties are, therefore, deemed inadmissible. The judge considers the decision to extend the license a separate decision which should be appealed by the parties in a separate procedure.¹³⁹

On 15 February 2017, the organisations appeal to the decision to extend the license to export to Egypt. On October 17th the appeal to the prolonged license is heard by the Amsterdam Court. The court, like earlier courts, decides that the claimants cannot be considered individually or directly affected by the decision to prolong the license.¹⁴⁰ Moreover, the judge decides that the access to justice of the parties is maintained since they have recourse to a civil judge under article 3:305a of the Dutch Civil Code.¹⁴¹

¹³⁶ NJCM, PAX & Stop Wapenhandel, Letter of Appeal and Request for Preliminary Measure (*Hoger Beroepschrift tevens Verzoek tot het treffen van een voorlopige voorziening*) to Court of Amsterdam (3 October 2016), p. 7.

¹³⁷ Court of Amsterdam (*Gerechtshof Amsterdam*) 24 January 2017 ECLI:NL:GHAMS:2017:165, para 5.1.

¹³⁸ Court of Amsterdam January 2017 (n137) para 5.4.

¹³⁹ Court of Amsterdam January 2017 (n135) para 5.2.

¹⁴⁰ Court of Amsterdam (*Gerechtshof Amsterdam*) 17 October 2017 ECLI:NL:GHAMS:2017:4582, para 5.11.

¹⁴¹ Court of Amsterdam October 2017 (n140) para 5.9.

Chapter 3: Analysis

The object of this final chapter is to analyse the case study set out in the last chapter using the evaluation model presented in chapter 1. The evaluation is structured by stage, starting with the preparation stage.

3.1. Preparation

The process before litigation includes the identification of goals and risks as well as the selection of a case and a forum.

Were clear goals identified and were risks realistically assessed?

For the NJCM the purposes of the litigation process were mostly legal procedural, for example, to find out what route (i.e. which court) to take when litigating against such licenses.¹⁴² A second goal was to find out if the human rights test for licenses was carried out properly.¹⁴³ In a blog for the Humboldt University, PILP argues that the case was intended to start a legal discussion on human rights with the government as well as to gain broader attention to the idea that human rights standards exist when it comes to the export of arms. Moreover, the PILP writes about wanted to help the Dutch government in “fine-tuning their human rights tests before granting a license.”¹⁴⁴ In preparation of the case, PILP was supported by a pro bono lawyer from a corporate law firm. The lawyer and the firm did not want to be publicly involved because of possible conflict of interest.

PAX for peace was initially hesitant to litigate because of negative experiences in 2002. Initially, it was thought that strategic litigation might be more suitable to Stop Wapenhandel as it is a smaller and more specific NGO. However, the Egyptian license case was considered more specific so strategic litigation had better chances. Pax’s direct aim was to get the license for export retracted. Ultimately the deciding factor to go through with litigation was that PAX had tried other strategies for many years, for example influencing the Dutch parliament but felt that was not working satisfactorily and it was worth trying a different way. One of the risks involved with litigation for PAX was that litigation might affect their relationship with the Dutch government as PAX receives subsidies from the Ministry of Foreign Affairs.¹⁴⁵

Stop Wapenhandel was interested in litigation in order to gain further information about the procedures that were being used by the government to evaluate the human rights risks of potential export deals. Moreover, Stop Wapenhandel initiated contact with PILP in order

¹⁴² Interview Jelle Klaas.

¹⁴³ Interview Jelle Klaas.

¹⁴⁴ Jelle Klaas and Merel Hendrickx, ‘The PILP (Public Interest Litigation Project) case against arms trade’ (11 August 2016) Humboldt Law Clinic Grund und Menschenrechtsblog, URL:

<http://grundundmenschenrechtsblog.de/the-pilp-public-interest-litigation-project-case-against-arms-trade/>

¹⁴⁵ Interview Frank Slijper.

to expand their knowledge about the possibilities of strategic human rights litigation against arms trade in the Netherlands. Subsequently, PILP and Stop Wapenhandel asked 10 students, supported by academics to do research into different aspects of strategic litigation and arms trade.¹⁴⁶ These research findings were presented at a meeting with a number of other NGOs as well, including PAX. In terms of the goals Stop Wapenhandel had for the Egyptian license case, they were not very optimistic about the potential of litigation to actually get the license revoked but considered strategic litigation as a good publicity tool. One other goal for Stop Wapenhandel was to see what other human rights legislation could be involved outside of the EU Common Position and the ATT.¹⁴⁷

From interviews with the involved parties, it has become clear that each party had different goals in mind when starting the process. However, all parties considered it a relatively low-risk effort. Moreover, all parties seemed to be aware that arguing their case before a judge would be difficult and that their chances of getting the license overturned by a judge would be slim.

How was the case selected?

For the NJCM/PILP, this particular case was deemed appropriate because it raises both procedural as well as substantive human rights questions.¹⁴⁸ PILP was also interested in pursuing this case in order to gain expertise on the topic within the organisation. The parties were checking every month for a controversial license to come by,¹⁴⁹ first thinking about litigating against export to Saudi Arabia, however, this license came along and “ticked all the boxes.”¹⁵⁰

Stop Wapenhandel emphasised that this case was worth objecting to because the blockade in Yemen had bog humanitarian consequences and the license itself was for a large amount of export as well.¹⁵¹ Moreover, the license had been noticed quite early on in the process of being granted.¹⁵²

In terms of the Dutch legal export, all parties considered it more appropriate to appeal to an individual decision rather than appealing a general decision (as was the case in 2002). The main reason for this decision was the fact that in 2002, it was easy for the court to dismiss a general appeal without going into the specifics.

Selection of forum

The decision to go to an administrative judge was firstly informed by the 2002 judgement which instructed the parties to pursue litigation at an administrative judge in a similar case.

¹⁴⁶ <https://pilpnjcm.nl/dossiers/wapenhandel-export-en-mensenrechten/>

¹⁴⁷ Interview Wendela de Vries.

¹⁴⁸ Interview Jelle Klaas.

¹⁴⁹ Interview Frank Slijper.

¹⁵⁰ Interview Jelle Klaas.

¹⁵¹ Interview Wendela de Vries.

¹⁵² Interview Wendela de Vries.

Moreover, before the court, the parties argued that the administrative judge should be preferred since the procedure is more accessible and takes better into account the power differences between the claimants and the government.¹⁵³

From the interviews, it became evident that the selection of forum, because of the Dutch legal context on this issue, was a central part of the entire litigation process. The selection of forum influenced the goals set for the process as well as the expectations with regards to impact.

3.2. Implementation

It is not easy to distinguish the implementation phase from the preparation phase of the process. Timing, for instance, could also be considered part of the preparation process and involving the media also requires a degree of preparation. However, both timing and media involved are also factors that can change the course of a litigation process during its implementation.

Was timing considered?

In the interviews, the timing was not talked about extensively by the parties. The timing was relevant in the selection of the case. This particular license was appropriate for litigation partially because the issuance had been noticed by the organisations quite early and the weapons had not yet been shipped.

One important way in which time influenced the litigation process, however, was the duration of the process. The organisations all felt as though the process took very long. This was the result of many unsatisfactory judgements as well as some difficulties in gathering all the right information from the government. The length of the process can in this sense impact the interest of the NGOs involved in further litigation (although neither NGO claimed that the length of the process directly impacted their resolve to attempt litigation again should an opportunity present itself). The length of the process can also influence the likelihood that the cases will attract media attention. Long processes of legal communication on procedural issues are less likely to make headlines.

How was the media involved?

According to the PILP, the original idea was to have a research journalist involved from the very start. However, the newspapers approached showed no interest. The media attention, therefore, depended on press releases.¹⁵⁴ The formulation of an appropriate press release for such a legally complex topic proved quite difficult. PILP argued that it was hard to formulate a press statement that was both imaginative as well as accurate and legally

¹⁵³ NJCM, PAX & Stop Wapenhandel (n128) p. 6.

¹⁵⁴ Press release: <https://pilpnjcm.nl/persbericht-organisaties-vechten-wapenexportvergunning-egypte-bij-rechter-aan/>

valid.¹⁵⁵ There was some media attention in the form of a newspaper article¹⁵⁶ and radio interview¹⁵⁷ but not as much the parties had hoped for. Stop Wapenhandel also regrets that there was not a more active media strategy, but explained that there was only a small team involved in the process. PAX for peace did not consider the media engagement a failure as such, although more media attention would have been beneficial.

Did the victims feel represented and empowered?

This particular case did not have any direct victims. This was due to the fact that the weapons were in the process of being exported during the court proceedings. By the time the weapons would have been used the terms for objection to the extension of the license would like have run out and the parties would not have been able to object to the license before a court.

Although there was no representation of direct victims, the PILP did represent the interests of the two human rights organisations PAX and Stop Wapenhandel. It is important that, despite the legal procedural nature of the court cases, these parties felt represented and felt that their substantive arguments and goals were sufficiently put forward. In the interviews, the organisations both said that during the proceedings the PILP took the lead, however, during the preparation phase each party was equally involved. Both PAX and Stop Wapenhandel felt that they had exhausted all their possibilities for this case in court and were thus represented well by PILP.

3.3. Reflection

In the interviews, the parties were asked what they considered to be the main successes of the litigation processes and what they would have done differently or what they regret. Below, I categorise their answers into three types of impact: material impact, instrumental impact and non-material impact, while for each of these categories considering what negative impact might have occurred.

Did the case have a material impact?

No direct material impact can be detected from the case as the judge declared the parties inadmissible.

Possible negative impacts of SHRL identified in the literature mostly relate to the high material costs and lengthiness of strategic litigation in relation to other strategies. This begs

¹⁵⁵ Interview Jelle Klaas.

¹⁵⁶ On 15 August 2016, Dutch national newspaper *Trouw* published an article. Jan Kruidhof, 'NGO's willen wapenexport blokkeren via rechter' (NGOs want to block arms trade in court) (15 August 2016) *Trouw*, URL: https://www.trouw.nl/nieuws/ngo-s-willen-wapenexport-blokkeren-via-rechter~baa28493/?utm_medium=rss&utm_content=trouwnieuws

¹⁵⁷ Interview for Dutch national and international radio station BNR, Koos Tervoren 'NGO's klagen Nederland aan vanwege wapendeal' (NGOs sue the Netherlands because of weaponsdeal) (15 August 2016) *BNR*, URL: <https://www.bnr.nl/nieuws/juridisch/10309408/ngo-s-klagen-nederland-aan-vanwege-wapendeal>

the question of whether other strategies would have been as, or more, effective as litigation. However, such questions are purely speculative and would be very hard if not impossible, to conduct research into. Moreover, answering such a question affirmatively would still not prove that a certain litigation process had a definitive negative material impact.

Did the case have an instrumental impact?

In terms of instrumental impact, the procedural knowledge gathered through the cases can be considered most impactful. Although being sent from pillar to post between 2002 and 2017, there seems to be more knowledge now as to what judge such a case should be taken to, namely, the civil judge. However, this is not an unproblematic conclusion. According to PILP the biggest problem with this result is the possibility of parallel procedures occurring between both judges.¹⁵⁸ Moreover, in terms of precedent, this case also means that it might be harder to start administrative procedures in other fields.¹⁵⁹ Therefore, the fact that more knowledge now exists on the procedure is a positive impact, but the content of this knowledge can also be considered negatively impactful.

Another type of instrumental impact is the disclosure of information. Through the *WOB-procedure*, the parties were able to receive the original document granting the license that the government first had refused to extend as part of the litigation documents. This brought to light information on the decision-making process of the foreign affairs ministry and the extent to which human rights standards are considered. Moreover, the case has also brought to light other legal questions. Stop Wapenhandel expressed their interest in the fact that judges retrieved stricter admissibility from EU law and wonder whether your rights as a civil party can be limited by EU rules.¹⁶⁰

Lastly, since the last case in 2017, the rules regarding the export of weapons to Egypt have become stricter. The minister of foreign affairs decided in late 2018 that, because of the situation in Yemen, companies that want to export to Egypt (or Saudi-Arabia or the UAE) must prove that the weapons will not be used in the conflict in Yemen.¹⁶¹ Stop Wapenhandel doubts that this development was a direct result of the cases, most likely there were many factors involved in this decision, but there is a possibility that it was an influencing factor.

Did the case have a non-material impact?

Since the last case has only been heard close to two years ago it is hard to gauge whether there has been any non-material impact. In terms of the impact on the litigating parties themselves, the non-material impact has been quite positive. Both PAX and Stop

¹⁵⁸ Interview Jelle Klaas.

¹⁵⁹ Interview Jelle Klaas.

¹⁶⁰ Interview Wendela de Vries.

¹⁶¹ NOS, 'Rem op Nederlandse wapenhandel naar doelen in Jemen' (Stop on Dutch arms trade to targets in Jemen) (29 November 2018) URL: <https://nos.nl/artikel/2261410-rem-op-nederlandse-wapenhandel-naar-doelen-in-jemen.html>

Wapenhandel seem interested in continuing strategic litigation effort, though Stop Wapenhandel would next time like to see a more thought out media strategy. PILP also noted that the cooperation between the parties during the litigation process had been an accomplishment as such. All organisations involved were able to learn a lot about strategic litigation and exchange ideas and beliefs with each other.

In addition, it would have been interesting to see whether policy officers had changed their behaviour in reviewing license application for export knowing that they might be taken to court for it. However, I was unable to get an interview at the Foreign Ministry, and even if, I doubt I would have been able to gather such information.

In terms of negative non-material impact, PAX for peace was the only organisation that had some concerns prior to process about the potential of the litigation influencing the relationship of the organisation with the Dutch government. Although I was unable to check this with the Dutch government, PAX maintains that the relationship seems to continue unharmed after the litigation process and the parties involved all confirmed that the communication with the government was good-natured.

3.4. What factors have determined success?

In designing the model, I explain that there are two questions that need to be answered. First, what have been the main impacts of the process and have they been positive or negative? Second, what steps have been taken during the preparation and implementation phases to maximise the impact of the SHRL process (i.e. what factors determined the eventual impact)?

a) Impacts

The biggest impact of the case is the instrumental knowledge on the choice of the forum which can be derived from the court judgement in October 2017. However, this knowledge is not unproblematic and also feels tedious since it is the exact opposite outcome from the case regarding Israel in 2002. In order to fully appreciate this impact as being negative or positive, we will have to wait and see to what extent it aids or harms further litigation efforts against arms export licenses. In fact, after 2017 the organisation continued to look for cases that might be appropriate for SHRL. At the moment the parties are investigating two possible cases and published an article about the export of Dutch warships to Libya in 2018.¹⁶²

The case has also been impactful (and more undeniably positive so) in disclosing previously unknown information with regards to the decision-making process of the Dutch government on license requests through the WOB-procedure. The way in which the government applies human rights standards in extending licences is valuable information for the organisations involved, not only in the process of the case but in their further work

¹⁶² Merijn Rengers and Carola Houtekamer, 'Gaddafi verdween, maar Damen bleef geliefd in Libië' (Gaddafi disappeared but Damen remained popular in Libya) *NRC Handelsblad* (26 oktober 2018), URL: <https://www.nrc.nl/nieuws/2018/10/26/gaddafi-verdween-damen-bleef-geliefd-a2752912>

as well. Moreover, the parties gathered a substantial amount of research prior to the legal proceedings which has helped shed light on issues of arms trade in the Netherlands which might not have been researched before.

b) Factors

All parties involved have taken great care in approaching this SHRL process. Although the goals of the parties involved diverged somewhat, all parties set realistic goals and expectations that referred to earlier experiences at court. However, it should be noted that because of the procedural nature of the cases (which fits within the line of expectation of such cases in the Netherlands) many of the more substance-related goals of the parties involved (i.e. getting the license retracted or starting a dialogue with the government) were not met. Still, I believe it would be too easy (and undermine the effort of constructing a wide-angle evaluation model) to conclude from this that the project was a failure, it should not be concealed that these goals were not (yet) met. Moreover, the fact that these goals were not yet met does not mean that this line of cases cannot be a step in the right direction towards achieving those goals.

The parties were careful in selecting the right case and the right forum. In terms of choosing a forum, the parties did not have much of a choice since they had been referred to the administrative judge in 2002. However, it was the selection of this forum that eventually led to more clarity on the question of which route to choose. Since the arguments in court never reached the specifics of the case at hand, it is hard to say anything about the selection of the case.

During the time the case was in court, the parties were adaptive to the long and slow process and the initial unwillingness of the Dutch ministry to cooperate. The decision to file a WOB request for the original license led to the publication of information that could prove useful for future legislative endeavours and which increases the transparency of the ministry's method of extending licences.

However, the parties failed to come up with an effective media strategy together. Given the importance of such strategies in the Netherlands, where the case itself is less likely to generate impact, the parties should have placed more of an emphasis on the media. This was recognised by the organisations and they explained that it was difficult to get the media to respond to the case because of the topic of the case and the legal complexity of the main deliberations of the judge. Moreover, the radar systems being exported do not necessarily speak to the imagination of the wider public.¹⁶³ Still, given the importance of the development of a media strategy to maximise the impact of SHRL, the parties should have made a bigger effort to involve the media and to tell a story that could engage a larger public. If the organisations had been able to engage the public they might have been able to increase

¹⁶³ Interview Frank Slijper.

political pressure and have a more direct impact on the eventual decision of the minister to stop the export of weapons to Egypt.

I do not think there is much the organisations could have done differently in order to achieve the goal of getting the license retracted since the decision to declare the case inadmissible is explicable by Dutch law and Dutch legal culture. Things that the parties did do that led to positive impacts were the selection of the right forum and their inventiveness during court procedures. However, the failure of the parties to engage the media and the larger public stopped the case from going beyond its procedural aspects and starting a debate on the merits of the case (whether in the court, in the media or in politics).

3.5. The usefulness of the proposed model

A secondary purpose of this paper is to see to what extent a model of evaluation for SHRL processes can be developed and applied to the present case. After applying the model in the paragraphs above, a few things stand out.

In developing the model, I believed it was important to limit the influence of my knowledge of the case on the development of the model. I wanted the model to be self-standing and useful not only to the evaluation of this particular case but possibly also to other cases. In the end, I think this was too ambitious. Developing a model that analyses each phase of the litigation process is hard. There are inevitably going to be things that are different in the phases of each different case, which cannot be foreseen and therefore may fall outside of the scope of the evaluation model. In this case, it was the WOB-procedure that was started alongside the court proceedings. While this was eventually discussed when determining the types of impacts, this particular type of action should maybe have been discussed as part of the implementation phase.

In terms of application, the purpose of the model was to allow the parties to learn and possibly provide some lessons for the future. I think the model I developed was able to give a good overview of the different choices that were made during the SHRL process and the motivations of the parties involved. In terms of evaluation, I think the split between the impacts and the factors that determined the impact worked well and gave a more in-depth analysis of the case than a straight forward goal-based analysis might have been able to produce. Moreover, the application of the model was able to give the concrete advise that for future litigation efforts the parties should put more effort into the media strategy.

However, one aspect of the application proved quite difficult. The determination of the different impacts is a fundamental part of the proposed model but is not an easy task, especially the non-material and instrumental impacts. Sometimes, identifying impacts may require a separate research project on its own. In this paper I relied on the reflections of the parties involved to determine the impacts but these testimonies can also be incomplete and subjective.

Conclusion

In the first chapter, I developed, in accordance with existing literature on SHRL evaluation, some insights from evaluation studies, and a brief analysis of the Dutch legal framework, a model for the evaluation of SHRL efforts by Dutch civil society actors against the Dutch government. Evaluating a process of SHRL has proven a complicated yet interesting endeavour, a challenge in any case. Since I have only applied the model to one case study, it remains to be seen whether it (as a true model should) can be applied to different situations as well. However, the research question of the paper was not on the construction of a model but on the case study at hand, and so, the ability of the model to accurately evaluate other case studies is secondary to its ability to evaluate the case study in this paper.

The second chapter has laid down the chronology of the line of cases against the Dutch government between 2015 and 2017 regarding the issuance of a license for the export of arms to Egypt. From this chronology two things became apparent: i) the process was complicated on a legal level and it took a number of back-and-forths between the parties and the judge to receive a final judgement, and ii) the cases are part of a larger effort (which started in 2002) to find a way to litigate against these licenses.

In the third chapter, the case was evaluated in accordance with the evaluation model proposed in chapter one. In terms of usefulness, I believe that the model was quite helpful in dissecting the different parts of the litigation process and evaluating them accordingly. However, identifying the different levels of impact and developing a truly complete model proved quite difficult. Still, the evaluation model was able to provide an answer to the research question by examining what impacts the cases have had and what steps were taken to maximise the impact.

In terms of impact, the cases have most clearly had an impact by generating new information, firstly about the ways in which organisations can litigate against arms trade licenses and secondly about the way in which the government uses human rights standards when considering a license application. The most important factors in generating this impact were the preparation of the organisations, the formulation of realistic expectations and their adaptivity during the legal proceedings.

On the other hand, the parties failed to come up with an effective media strategy which could have allowed for more consideration of the merits of the case (if not in court than maybe in the public debate). As a result, the parties were unable to use the cases as a way to gain public attention for their cause. In the future, the parties are advised to pay more attention to the construction of a media strategy as, in the Dutch legal context, they are more likely to gain attention to the merits of the case in the media than in the courts.

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- Court of Noord Holland (*Rb. Noord-Holland*) 25 August 2016 ECLI:NL:RBNHO:2016:7024.
- Court of Amsterdam (*Gerechtshof Amsterdam*) 24 January 2017 ECLI:NL:GHAMS:2017:165.
- Court of Amsterdam (*Gerechtshof Amsterdam*) 17 October 2017 ECLI:NL:GHAMS:2017:4582.

Appendix I: timeline

Date	Type of document	Content/Conclusion
29 May 2002	<u>Judgement</u> Court decision RB The Hague ECLI:NL:RBSGR:2002:AE3271	Number of NGOs v. the Dutch government for granting licensing authorising the export of military goods to Israel. Claim deemed inadmissible. The claimants are free to continue prosecution at an administrative court.
1 September 2015	Letter to the parliament on decision to grant license for export.	Announcement of a license for export of radar and C3 systems to be integrated in French corvettes (small warships) to Egypt (via France). Brief acknowledgement of human rights violations, but none found with regards to the Egyptian navy.
12 October 2015	Objection to the decision to grant the license by the organisations.	
16 December 2015	Request for the withdrawal of the export license by the organisations.	
1 June 2016	Government declares the objection and request for withdrawal inadmissible.	
6 July 2016	Organisations appeal to inadmissibility decision.	NJCM, PAX and Stop Wapenhandel appeal. They ask the judge for a temporary measure: freeze the export.
25 August 2016	<u>Judgement</u> Court decision RB Noord-Holland ECLI:NL:RBNHO:2016:7024	Appeal is declared inadmissible.
3 October 2016	Organisations appeal court judgement at Amsterdam court and request preliminary measure.	Appeal sets out the ground for admissibility as well as merits of the case according to the claimants.
1 December 2016	Court Hearing appeal	Time limit on original decision to grant a license has expired. Second decision on the

		remaining weapons was made on 21 September 2016.
23 December 2016	Organisations appeal to second decision.	
30 January 2017	<u>Judgement</u> Court Hearing Amsterdam ECLI:NL:GHAMS:2017:165	Judge decides that the NGOs involved have no direct interest in the withdrawal of the license since the terms of license have expired.
15 February 2017	Organisations appeal against the court judgement on the second decision.	
17 October 2017	<u>Judgement</u> Court hearing Amsterdam ECLI:NL:GHAMS:2017:4582	Claimants declared inadmissible. Judge decides that parties can still pursue litigation with a civil judge.