

ECHR, *Jaloud v. The Netherlands*

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

[Source: *Jaloud v. the Netherlands*, European Court of Human Rights, Grand Chamber, Application no. 47708/08, Judgment, Strasbourg, 20 November 2014; references partially omitted. Available at <http://hudoc.echr.coe.int/eng?i=001-148367>]

[...]

THE FACTS

9. The applicant, Mr Sabah Jaloud, is an Iraqi national who was born in 1943 and lives in An-Nasiryah, Iraq. He is the father of the late Mr Azhar Sabah Jaloud, who died on 21 April 2004 at the age of twenty-nine.

A. The circumstances of the case

1. *The death of Mr Azhar Sabah Jaloud*

10. On 21 April 2004, at around 2.12 a.m., an unknown car approached a vehicle checkpoint (VCP) named “B-13” on the main supply route “Jackson” north of the town of Ar Rumaytah, in the province of Al-Muthanna, south-eastern Iraq. The car slowed down and turned. From inside the car shots were fired at the personnel guarding the VCP, all of them members of the Iraqi Civil Defence Corps (ICDC). The guards returned fire. No

one was hit; the car drove off and disappeared into the night.

11. Called by the checkpoint commander, ICDC Sergeant Hussam Saad, a patrol of six Netherlands soldiers led by Lieutenant A. arrived on the scene at around 2.30 a.m.

12. Some fifteen minutes later a Mercedes car approached the VCP at speed. It hit one of several barrels which had been set out in the middle of the road to form the checkpoint, but continued to advance. Shots were fired at the car: Lieutenant A. fired 28 rounds from a Diemaco assault rifle; shots may also have been fired by one or more ICDC personnel armed with Kalashnikov AK-47 rifles. At this point the driver stopped the car.

13. The applicant's son, Mr Azhar Sabah Jaloud, was in the front passenger seat of the car. He had been hit in several places, including the chest. Netherlands soldiers removed him from the car and attempted to administer first aid. Despite this, Mr Azhar Sabah Jaloud died. He was declared dead one hour after the incident.

[...]

C. The Netherlands military presence in Iraq

1. General background

53. From July 2003 until March 2005 Netherlands troops participated in the Stabilization Force in Iraq (SFIR) in battalion strength. They were stationed in the province of Al-Muthanna as part of Multinational Division South-East (MND-SE), which was under the command of an officer of the armed forces of the United Kingdom.

[...]

55. Netherlands military personnel were issued with an *aide-mémoire* drawn up by the Netherlands Chief of Defence Staff (*Chef Defensiestaf*). This was a reference document containing a summary of the Rules of Engagement. They were also issued with Instructions on the Use of Force (*Geweldsinstructie*), likewise drawn up by the Chief of Defence Staff.

56. As to the occupation of Iraq between 1 May 2003 and 28 June 2004, see generally *Al-Skeini and Others v. the United Kingdom* [See **Case: ECHR, Al-Skeini et al. v. UK**, paras 10-19] [...]

2. The letter to the Lower House of Parliament

57. On 6 June 2003 the Minister of Foreign Affairs (*Minister van Buitenlandse Zaken*) and the Minister of

Defence (*Minister van Defensie*) together sent a letter to the Lower House of Parliament (*Tweede Kamer der Staten-Generaal*) on the situation in the Middle East (Lower House of Parliament, Parliamentary Year 2002-03, no. 23,432, no. 116), setting out, in particular, the reasons for which the Government had decided to send Netherlands forces to take part in SFIR and providing background information. This letter reads, *inter alia*:

[...]

“Mandate/Legal basis

The basis for sending Netherlands troops to Iraq is to be found in United Nations Security Council Resolution 1483 [See **Case: Iraq, Occupation and Peacebuilding, Doc. A**]. [...]

The resolution makes it clear in its preamble that there is a distinction to be drawn between the United States and the United Kingdom, which are active in Iraq in the capacity (*hoedanigheid*) of occupying powers, and states which do not have that capacity. This finding by the Security Council in a resolution adopted under Chapter VII of the United Nations Charter must be understood as an authoritative opinion as to the status of the participating states, an opinion that is binding on the United Nations Member States.

[...]

Command structure

The entire operation in Iraq is under the command of US CENTCOM, in which a Coalition Forces Land Component Commander (CFLCC) directs the operation from Baghdad. For that purpose, Iraq is divided into four sectors. The sectors in northern Iraq and around Baghdad will be led by the United States. Poland is in charge of a sector and the United Kingdom is in charge of the south of Iraq. The Netherlands battalion will be under the operational control of the British division as an independent unit (*zelfstandige eenheid*). [...]

Incidentally (*Overigens*), the Netherlands will retain ‘full command’ [English in the original] over Netherlands military personnel at all times. The Chief of Defence Staff will guard the mandate and the military objective of the Netherlands troops. If necessary, he will give further directions in the name of the Minister of Defence.”

[...]

D. Instructions to Netherlands SFIR personnel

59. The respondent Government have submitted versions issued on 24 July 2003 of the *aide-mémoire* for SFIR commanders and the SFIR soldier’s card as issued to Netherlands personnel. As relevant to the case before the Court, they read as follows (translations by the Court, English-language expressions used in the Dutch original in italics throughout):

1. The aide-mémoire for SFIR commanders

[...]

MISSION

1. Your mission is to contribute to the creation of a safe and stable environment in Iraq to make possible the reconstruction of the country and the transition to representative self-government. The use of strictly necessary force is permitted as set out below.

GENERAL RULES

2. Use of force is permitted only if other means are insufficient. Note the following:

(a) in all circumstances, use no greater force than is strictly necessary to carry out your task;

(b) collateral damage (to persons or goods) must be prevented as much as possible.

SELF-DEFENCE

4. The use of strictly necessary force, including force that may cause death or serious bodily harm (*deadly force*) and involving the use of permitted weapons, is permitted:

(a) to defend yourself;

(b) to prevent the theft or destruction of property belonging to SFIR that are essential for the execution of the mission.

USE OF FORCE FOR OTHER REASONS

4. The use of strictly necessary force, including force that may cause death or serious bodily harm (*deadly force*) and involving the use of permitted weapons, apart from the right to self-defence, is permitted:

[...]

(e) against hostile acts and hostile intent;

[...]

WARNING PROCEDURE

6. If operational circumstances permit, a warning that fire will be opened must be given beforehand. Some examples of situations in which it is permitted to open fire without warning are:

- (a) if you yourself or others in your immediate vicinity are under armed attack; or
- (b) if giving a warning will increase the risk that you or any other person may be killed or seriously wounded.

[...]

HOSTILE ACT AND HOSTILE INTENT

9. A *hostile act* is an aggressive act amounting to an attack or a threatened attack using force that may result in death or serious injury directed against own troops, designated persons or designated property. The following are examples (not an exhaustive enumeration) of hostile acts:

- (a) a person firing at you, at own troops or designated persons or designated property;
- (b) a person placing explosives or incendiary devices or throwing them at you, at own troops, or at designated persons or designated property;
- (c) a person deliberately driving a car into you, or into own troops, or designated persons, or designated property.

...

REQUIREMENT TO USE ONLY STRICTLY NECESSARY FORCE

11. Whenever it is permitted to use force, you are obliged to limit the amount of force to what is strictly necessary. Take all possible precautions to prevent escalation and limit collateral damage as much as possible. It is forbidden to attack civilians as such, except in case of self-defence. It is forbidden to attack property which is strictly civilian or religious in character, unless this property is used for military purposes.

12. If you must open fire, you are obliged:

- (a) to fire only aimed shots;
- (b) to fire no more shots than is necessary; and

(c) to take all necessary precautions to prevent collateral damage (to persons and property); and

(d) to cease firing as soon as the situation so permits. You must then secure the area and take care of any wounded.

OTHER COMMAND GUIDELINES

...

18. Prevent, and report up the line of command, any suspected crimes against the humanitarian laws of war.”

2. *The SFIR soldier's card*

“[...]

USE OF FORCE

2. Use of force is permitted in the following cases:

(a) in self-defence;

(b) in defence of own troops and other persons designated by the MND (SE) Commander;

(c) to prevent the theft or destruction of property belonging to SFIR that are essential for the execution of the mission and other property designated by the MND (SE) Commander;

(d) to prevent unauthorised access to military installations belonging to SFIR and other places designated by the MND (SE) Commander (including designated property) (for example *Military Restricted Areas*);

(e) for the purpose of apprehending, searching and disarming enemy units if they endanger the safety of SFIR units or other persons designated by the MND (SE) Commander in the execution of the mission;

(f) as ordered by your on-scene commander.

[...]

AIMED FIRE

13. You may open aimed fire if you yourself, own troops or persons under your protection are threatened with violence that may cause serious bodily harm or death and there are no other ways to prevent this.

Here are some examples:

- you may fire at a person who is firing or aiming his weapon at you, at own troops or persons under your protection;
- you may fire at a person who is placing explosives or incendiary devices or throwing them or preparing to throw them at you, at own troops or persons under your protection;
- you may fire at a person who is deliberately driving a car into you, own troops or persons under your protection.

MINIMUM FORCE

14. If you have to open fire, you must:

- fire only aimed shots;
- fire no more shots than is necessary; and
- cease firing as soon as the situation allows.

15. It is forbidden to use deliberate force against civilians, unless this is necessary for self-defence.

16. it is forbidden to attack property with a strictly civilian or religious character, unless:

(a) this property is used for military purposes; and

(b) your commander orders you to.

17. It is forbidden to simulate an attack or other aggressive actions.

18. It is forbidden to use tear gas.”

[...]

H. Relevant domestic case-law

[...]

I. Other domestic documents

[...]

3. *The final evaluation report*

87. A final evaluation report was published after the completed withdrawal of the last Netherlands contingent. It states that the Netherlands Government added a number of “caveats” (limitations) to the tasks of the Netherlands troops. These “caveats” were that the Netherlands would not assume any administrative duties and would not deploy “executive law enforcement development activities”. They were inspired by the desire not to be considered a *de facto* occupying power.

88. As to the choice of methods, it is stated that initially the intention was not to lay any great stress on the military presence, and to avoid as much as possible the use of patrols and checkpoints. In practice, however, it turned out that security could best be provided by means of frequent patrols, both by day and by night, and by setting up vehicle checkpoints on routes potentially used by criminals or terrorists.

[...]

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

[...]

B. Jurisdiction

[...]

2. *The Court's assessment*

[...]

b. Applicable principles

139. The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. The Court reiterates that in *Al-Skeini*, cited above, §§ 130-139, it summarised the principles on the exercise of jurisdiction within the meaning of Article 1 of the Convention outside the territory of the Contracting States as follows:

“130. ... As provided by [Article 1 of the Convention] the engagement undertaken by a Contracting State is confined to ‘securing’ (*reconnaître* in the French text) the listed rights and freedoms to persons within its own ‘jurisdiction’. ‘Jurisdiction’ under Article 1 is a threshold criterion. The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable

to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention.

(α) The territorial principle

131. A State's jurisdictional competence under Article 1 is primarily territorial. Conversely, acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 only in exceptional cases.

132. To date, the Court in its case-law has recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries. In each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the State was exercising jurisdiction extra-territorially must be determined with reference to the particular facts.

(β) State agent authority and control

133. The Court has recognised in its case-law that, as an exception to the principle of territoriality, a Contracting State's jurisdiction under Article 1 may extend to acts of its authorities which produce effects outside its own territory...

[...]

136. In addition, the Court's case-law demonstrates that, in certain circumstances, the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction. [...] What is decisive in such cases is the exercise of physical power and control over the person in question. ...

(γ) Effective control over an area

138. Another exception to the principle that jurisdiction under Article 1 is limited to a State's own territory occurs when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory. [...] Where the fact of such domination over the territory is established, it is not necessary to determine whether the Contracting State exercises detailed control over the policies and actions of the subordinate local administration. The fact that the local administration survives as a result of the Contracting State's military and other support entails that State's responsibility for its policies and actions. The controlling State has the responsibility under Article 1 to secure, within the area under its control, the entire range of substantive rights set out in the Convention and those additional Protocols which it has ratified. It will be liable for any violations of those rights.

139. It is a question of fact whether a Contracting State exercises effective control over an area outside its

own territory. In determining whether effective control exists, the Court will primarily have reference to the strength of the State's military presence in the area. Other indicators may also be relevant, such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region [...]”

c. Application of the above principles to the facts of the case

140. The respondent Party relied heavily on the argument that the Netherlands could not be blamed for the events complained of since authority lay elsewhere: either with the United States and the United Kingdom together, designated as “occupying powers” by United Nations Security Council Resolution 1483, or with the United Kingdom alone as “lead nation” in south-eastern Iraq, holding command over the Netherlands contingent of SFIR.

141. For the purposes of establishing jurisdiction under the Convention, the Court takes account of the particular factual context and relevant rules of international law.

142. Turning first to the international-law background, the Court points out that the status of “occupying power” within the meaning of Article 42 of the Hague Regulations, or lack of it, is not *per se* determinative. Although it found that concept relevant in *Al-Skeini* (See **Case: ECHR, Al-Skeini et al. v. UK**, para. § 143) and in *Al-Jedda v. the United Kingdom* (See **Case: ECHR, Al-Jedda v. UK**, para. § 77), the Court did not need to have recourse to it in finding that the responsibility of Turkey was engaged in respect of events in northern Cyprus, or that of Russia in respect of the situation in Moldovan territory east of the Dniester.

143. Furthermore, the fact of executing a decision or an order given by an authority of a foreign State is not in itself sufficient to relieve a Contracting State of the obligations which it has taken upon itself under the Convention. The respondent Party is therefore not divested of its “jurisdiction”, within the meaning of Article 1 of the Convention, solely by dint of having accepted the operational control of the commander of MND (SE), a United Kingdom officer. The Court notes that the Netherlands retained “full command” over its military personnel, as the Ministers of Foreign Affairs and of Defence pointed out in their letter to Parliament (see paragraph 57 above).

[...]

147. It appears from the Memorandum of Understanding for MND (C-S), as well as the excerpt of the Memorandum of Understanding for MND-SE to which the Government have afforded the Court access [...] that while the forces of nations other than the “lead nations” took their day-to-day orders from foreign commanders, the formulation of essential policy – including, within the limits agreed in the form of Rules of Engagement appended to the Memoranda of Understanding, the drawing up of distinct rules on the use of force – remained the reserved domain of individual sending States.

[...]

149. Although Netherlands troops were stationed in an area in south-eastern Iraq where SFIR forces were under the command of an officer from the United Kingdom, the Netherlands assumed responsibility for providing security in that area, to the exclusion of other participating States, and retained full command over its contingent there.

[...]

151. That being so, the Court cannot find that the Netherlands troops were placed “at the disposal” of any foreign power, whether it be Iraq or the United Kingdom or any other power, or that they were “under the exclusive direction or control” of any other State (compare, *mutatis mutandis*, Article 6 of the International Law Commission’s Articles on State Responsibility).

152. The Court now turns to the circumstances surrounding the death of Mr Azhar Sabah Jaloud. It notes that Mr Azhar Sabah Jaloud met his death when a vehicle in which he was a passenger was fired upon while passing through a checkpoint manned by personnel under the command and direct supervision of a Netherlands Royal Army officer. [...] The Court is satisfied that the respondent Party exercised its “jurisdiction” within the limits of its SFIR mission and for the purpose of asserting authority and control over persons passing through the checkpoint. That being the case, the Court finds that the death of Mr Azhar Sabah Jaloud occurred within the “jurisdiction” of the Netherlands, as that expression is to be construed within the meaning of Article 1 of the Convention.

153. The Court has established jurisdiction in respect of the Netherlands. It is not called upon to establish whether the United Kingdom, another State Party to the Convention, might have exercised concurrent jurisdiction.

d. Attribution

154. The Court reiterates that the test for establishing the existence of “jurisdiction” under Article 1 of the Convention has never been equated with the test for establishing a State’s responsibility for an internationally wrongful act under general international law. Furthermore, in *Al-Skeini* the Court emphasised that “whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be ‘divided and tailored’ (compare *Banković*, cited above, § 75).”

155. The facts giving rise to the applicant’s complaints derive from alleged acts and omissions of Netherlands military personnel and investigative and judicial authorities. As such they are capable of giving rise to the

responsibility of the Netherlands under the Convention.

[...]

C. Alleged breach of the investigative duty under Article 2

157. The applicant alleged that the respondent State had failed to meet its obligations properly to investigate the death of his son with a view to bringing the person responsible to justice. He relied on Article 2 of the Convention, which provides as follows:

“1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

[...]

2. The Court’s assessment

[...]

b. Relevant principles

186. As the Court held in its above-cited *Al-Skeini and Others* judgment:

“163. The general legal prohibition of arbitrary killing by agents of the State would be ineffective in practice if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision, read in conjunction with the State’s general duty under Article 1 of the Convention to “secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention”, requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alia*, agents of the State. The essential purpose of such an investigation is to secure the effective implementation of the

domestic laws safeguarding the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. However, the investigation should also be broad enough to permit the investigating authorities to take into consideration not only the actions of the State agents who directly used lethal force but also all the surrounding circumstances, including such matters as the planning and control of the operations in question, where this is necessary in order to determine whether the State complied with its obligation under Article 2 to protect life.

164. The Court has held that the procedural obligation under Article 2 continues to apply in difficult security conditions, including in a context of armed conflict. It is clear that where the death to be investigated under Article 2 occurs in circumstances of generalised violence, armed conflict or insurgency, obstacles may be placed in the way of investigators and, as the United Nations Special Rapporteur has also observed, concrete constraints may compel the use of less effective measures of investigation or may cause an investigation to be delayed. Nonetheless, the obligation under Article 2 to safeguard life entails that, even in difficult security conditions, all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life.

165. [T]he authorities must act of their own motion once the matter has come to their attention. [...] [T]he procedural obligation of the State under Article 2 cannot be satisfied merely by awarding damages.

166. As stated above, the investigation must be effective in the sense that it is capable of leading to a determination of whether the force used was or was not justified in the circumstances and to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must take the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye-witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard.

167. For an investigation into alleged unlawful killing by State agents to be effective, it is necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events. [...] A requirement of promptness and reasonable expedition is implicit in this context. While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results [...] [T]he victim's next-of-kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests."

c. Independence of the investigation

[...]

d. Effectiveness of the investigation

i. The statements by the ICDC personnel

197. In his application the applicant complained of the Royal Military Constabulary's failure to take statements from the ICDC personnel who had been guarding the checkpoint at the time of the shooting incident. The report as submitted to the Military Chamber of the Arnhem Court of Appeal stated only that they had provided "no pertinent information" (see paragraph 25 above).

[...]

199. As the Court has held on many occasions, the use of the term "absolutely necessary" in Article 2 § 2 indicates that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is "necessary in a democratic society" under paragraph 2 of Articles 8 to 11 of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2 (a), (b) and (c) of Article 2. It follows that no domestic investigation can meet the standards of Article 2 of the Convention if it does not determine whether the use of lethal force by agents of the State went no further than the circumstances demanded.

200. Although the investigation must be effective in the sense that it is capable of leading to the identification and, if necessary, punishment of those responsible, the Court would also point out that an investigation sufficient to inform a judicial finding as to whether the force used was or was not justified in the circumstances is crucial to the exercise, by any State agent prosecuted in ensuing criminal proceedings, of the rights of the defence.

201. The Military Chamber of the Arnhem Court of Appeal was called upon to consider whether Lieutenant A. had acted in accordance with the instructions given to him by the competent authority. [...] Lieutenant A.'s instructions on the use of force, as set out on the soldier's card (see paragraph 57 above) under the heading "minimum force", included the following (*loc. Cit.*, paragraph 14):

"If you have to open fire, you must:

- fire only aimed shots;
- fire no more shots than is necessary; and
- cease firing as soon as the situation allows."

202. The Military Chamber of the Court of Appeal confined itself to establishing as fact that Lieutenant A. had mistakenly reacted to friendly fire from across the road and to holding that Lieutenant A. was for that reason entitled to putative self-defence. [...] It did not, however, address aspects relevant to the question of whether Lieutenant A. had acted within the confines of his instructions as regards the proportionality of the force used. In particular, it made no findings as to whether more shots had been fired than was necessary and whether firing had ceased as soon as the situation allowed.

203. The Court takes the view that a proper assessment in the sense outlined above would have required the Military Chamber of the Arnhem Court of Appeal to have access to the official record of the questioning of the ICDC members by Royal Military Constabulary officers (see paragraph 38 above). As it is, the absence of that document from the Court of Appeal's file seriously impaired the effectiveness of its examination of the case.

[...]

iii. The delay in questioning Lieutenant A.

206. The applicant drew the Court's attention to the delay in questioning Lieutenant A. after the incident, during which he was not kept separate from other witnesses to the incident. [...]

207. Lieutenant A. was only questioned after Royal Military Constabulary personnel had been on the scene for over six hours (see paragraph 28 above). Although, as the Government correctly point out, there is no suggestion of foul play on his part (or that of any Netherlands soldier), such a lapse of time would have allowed him sufficient opportunity to collude with others to distort the truth had he been minded to do so. No precautions seem to have been taken to prevent this from happening.

208. As in *Ramsahai*, cited above, the Court finds the mere fact that appropriate steps were not taken to reduce the risk of such collusion to amount to a shortcoming in the adequacy of the investigation.

iv. The list of ICDC personnel who had fired their weapons

209. The applicant submitted that Lieutenant A. apparently obtained from the ICDC deputy commander a list of the names of ICDC personnel who had fired their weapons, and the corresponding number of rounds fired.

210. The fact that Lieutenant A. was able to obtain this list does not in itself raise any issue. Until the company commander arrived he was the highest-ranking Coalition officer on the spot and moreover responsible not only for the Netherlands patrol but also for the ICDC personnel present. It follows that it was Lieutenant A.'s duty to take measures aimed at facilitating the investigation.

211. However, this list, once it was available, ought to have been added to the file. The information which it contained might have proved useful, especially in comparison with the statements taken from the ICDC members themselves. The Court finds that the investigation was inadequate on this point.

v. The autopsy

[...]

213. The Court notes that the autopsy seems to have been carried out in the absence of any qualified Netherlands official. Nothing is known of the qualifications of the Iraqi pathologist who performed it.

214. Moreover, the pathologist's report had serious shortcomings; extremely brief, it was lacking in detail and there were not even any pictures included.

215. More generally, it does not appear that any alternative arrangement was considered for the autopsy. For example, it does not appear unlikely that either or both of the Occupying Powers, or perhaps another Coalition power, had facilities and qualified personnel available.

216. The Court finds therefore that the investigation was deficient on this point also.

vi. The bullet fragments

217. The applicant criticised the absence of a detailed report on any examination of the bullet fragments. [...]

219. Whether or not the bullet fragments were capable of yielding useful information, the Court finds it unacceptable that they were not stored and examined in proper conditions, in the Netherlands if need be.

220. For this reason too the investigation was inadequate.

[...]

f. Conclusion

226. The Court is prepared to make reasonable allowances for the relatively difficult conditions under which the Netherlands military and investigators had to work. In particular, it must be recognised that they were engaged in a foreign country which had yet to be rebuilt in the aftermath of hostilities, whose language and culture were alien to them, and whose population – witness the first shooting incident on 21 April 2004 (see paragraph 10 above) – clearly included armed hostile elements.

227. Even so, the Court must conclude that the investigation into the circumstances surrounding Mr Azhar Sabah Jaloud's death failed, for the following reasons, to meet the standards required by Article 2 of the Convention: firstly, documents containing important information were not made available to the judicial authorities and the applicant (the official record of statements taken from the ICDC personnel and the list, compiled by Lieutenant A., recording which ICDC members had fired their weapons and the number of rounds fired by each); secondly, in that no precautions were taken to prevent Lieutenant A. from colluding, before he was questioned, with other witnesses to the events; thirdly, in that no attempt was made to carry out the autopsy under conditions befitting an investigation into the possible criminal responsibility of an agent of the State, and in that the resulting report was inadequate; and fourthly, in that important material evidence – the bullet fragments taken from the body – was mislaid in unknown circumstances. It cannot be found that these failings were inevitable, even in the particularly difficult conditions prevailing in Iraq at the relevant time.

228. The above failings lead the Court to find that there has been a failure to meet the procedural obligations flowing from Article 2 of the Convention.

[...]

FOR THESE REASONS, THE COURT UNANIMOUSLY

[...]

3. *Holds* that Mr Azhar Sabah Jaloud fell within the jurisdiction of the respondent State and *dismisses* the Government's preliminary objection;

4. *Holds* that there has been a breach of the procedural obligation under Article 2 of the Convention;

[...]

JOINT CONCURRING OPINION OF JUDGES CASADEVALL, BERRO-LEFEVRE, ŠIKUTA, HIRVELÄ, LÓPEZ GUERRA, SAJÓ AND SILVIS

[...]

5. [...] [W]e respectfully regret that the Grand Chamber also found it appropriate to scrutinise the investigations in Iraq in such a painstaking way that eyebrows may be raised about the role and competence of our Court. We restrict ourselves to two examples in the judgment.

6. The Court criticises the autopsy. Of course, from the perspective of "state of the art" forensic examinations as these would be carried out in the context of domestic proceedings, the autopsy performed in Iraq was inadequate, and that is easily admitted; however, in finding on that basis that this part of the investigation in

Iraq was in violation of the Netherlands' procedural obligations under Article 2, the majority of the Court is taking a rather big step. Whether the Royal Military Constabulary could have claimed full legal control over the body and the circumstances of the autopsy is highly questionable. The Court has not indicated any legal basis for it. Should the Netherlands Royal Constabulary perhaps have used force to secure its attendance at the autopsy? In fact, the Royal Military Constabulary held the body of Mr Azhar Sabah Jaloud for some hours, and something had to be done rapidly. The facilities for an autopsy not being available at the Netherlands camp, the body had to be transferred into Iraqi care. The body was then moved to an Iraqi civilian hospital, where an autopsy was carried out, in the absence of Royal Military Constabulary officials. The Government submit that it was the Iraqi authorities' decision to exclude Netherlands personnel from the autopsy. There was no legal reason why they could not do so. In addition, according to the Government, the situation was becoming very tense: wider escalation might have followed if a confrontation had been sought; the Netherlands personnel who were present in the hospital reported their fear of being taken hostage and left the premises for that reason. Is this not an example of concrete constraints which may compel the use of less effective measures of investigation?

7. Another point of concern is where the Court reproaches the Netherlands for the fact that the Royal Military Constabulary did not separate witnesses prior to questioning "the prime suspect" in the shooting, that is, six hours after their arrival at the VCP. This raises questions. Is it really within the competence of our Court to set the standards for investigations at this detailed level in unstable situations such as these which prevailed in Iraq? That would be a very hazardous exercise. It seems obvious that concerns for security at a vehicle checkpoint continued to exist while the investigations were going on. The witnesses to the incident were also responsible for that security. Separating all the witnesses on the spot could have interfered with that duty. Equally, to separate persons in a command position from their military personnel abruptly and in such an unstable environment seems rather dangerous. There were obviously more dimensions to be taken into account than just the investigation, and it is not easy to imagine all of them.

8. To conclude, we consider that the Court has rightfully underlined that in a context such as the incident under scrutiny there may be obstacles to performing what may seem the most effective manner of investigation. However, this point of departure does not sit easily with all aspects of the subsequent painstaking analysis undertaken by the Court. Besides, the lieutenant, having reported the incident himself, took full responsibility for the shooting from the outset, and there was no appearance of any attempt on his part to manipulate the evidence.

Discussion

I. Classification of the situation and applicable law

1.
 - a. (*Paras 53-56*) How would you classify the situation at the time of the incident? Was the territory in which it took place occupied? If so, by whom? Was the Netherlands a party to the conflict? (GC I-IV, Art. 2)
 - b. (*Paras 57, 87, 141-142*) Is Security Council Resolution 1483 binding in its recognition of certain States as

occupying Powers and others as not being occupying powers? In the view of the Court? In your view? Does such a determination influence the human rights obligations of the Netherlands? (GC I-IV, Art. 2)

c. (Para. 142-143) Does the Court consider the Netherlands as an occupying Power? Could it be considered as one according to the functional concept of occupation?

d. Considering the situation on the ground, what in your opinion was the law applicable to the use of force by Dutch soldiers? By the ICDC personnel? Do the rules on conduct of hostilities apply to uses of force during occupation or shall they be regulated by human rights law applicable to law enforcement operations? In the present case?

2. Is international human rights law applicable in armed conflicts? In occupied territories? If yes, how do you determine whether that law or IHL prevails in cases where they differ/contradict each other?

II. Law enforcement and conduct of hostilities paradigms

3.

a. (Paras 10-12) Which paradigm - law enforcement or conduct of hostilities - applies to the present incident? To the one that had occurred just before it?

b. What determines whether a situation is governed by one or the other? Is it the nexus to the armed conflict? Can there be a nexus where there are no active hostilities?

c. (Para. 59) What are the main differences between the two paradigms? In regard to targeting? Choice of weapons (such as tear gas)? Proportionality assessment? Precautionary measures (such as warning)? Do soldiers have to take the same precautionary measures as commanders? To what extent can a soldier rely on a superior's command? (P I, Art. 51, 52 and 57)

d. (Para. 59) Please identify among the instructions the Dutch soldiers received those which reflect a conduct of hostilities paradigm and those which reflect a law enforcement paradigm!

e. (Para. 59) Is self-defence a relevant consideration for soldiers engaged in hostilities? May they invoke self-defence as a defence to justify a violation of IHL? Can you imagine an act committed by a soldier in hostilities justified by self-defence which would otherwise violate IHL?

III. Classification of persons and attribution

4.

a. Under IHL, how would you classify the Netherlands forces? ICDC personnel? (Para. 99) People passing through the checkpoint? (GC III, Art. 4; GC IV, Art. 4; P I, Art. 43, 50 and 61-67)

b. (Paras 53-57, 143, 147, 151) What does the fact that the Netherlands forces were under foreign operational control add to the assessment? Is the fact that the Netherlands retained 'full command' over its forces sufficient to attribute all conduct of the latter to the Netherlands? For the purposes of jurisdiction under the ECHR?

IV. Jurisdiction

5. (Paras 139-153)

a. Does international human rights law apply extraterritorially? Does it depend on control over territory? Is control over a person sufficient to bring him or her under the jurisdiction of the State?

b. Does the Court find that the Netherlands had jurisdiction over the applicant's son? Does it do so because the Netherlands was solely responsible for providing security in the area in question? Because the Netherlands had control over the checkpoint? Simply because a Dutch soldier was able to fire at the car? Does the Court apply the 'territorial' or the 'personal' approach?

- c. Compare the present case to *Al-Skeini et al. v. UK*. What are the differences between the two? How did the approach of the Court regarding extraterritorial application of human rights evolve?
- d. Does the Court analyze whether the UK exercised concurrent jurisdiction in the present situation? Under IHL, can there be two Occupying Powers? Is State responsibility for violations of IHL divisible? That for violations of International Human Rights Law? Individual criminal responsibility?
- e. (Paras 154-155) Is the notion of jurisdiction the same as that of attribution to a State for the purposes of State responsibility? In the Court's view? In your opinion? Is the Court consistent in its view? (Para. 151)

V. Investigation of the killing

- 6.
 - a. Does IHL contain any general obligation to investigate deaths caused by the use of lethal force by state authorities? Does it contain an obligation to investigate the deaths of soldiers killed on the battlefield? Of civilians killed in the conduct of hostilities? Incidentally killed during an attack directed at a legitimate target? Of civilians killed during a law enforcement operation in an occupied territory? Of persons who die in detention or internment? Does IHL contain an obligation to conduct investigations into alleged violations of IHL? Into alleged grave breaches of IHL? (GC I, Arts 49 and 50; GC II, Arts 50 and 51; GC III, Arts 121, 129 and 130; GC IV, Arts 131, 146 and 147; P I, Art. 87)
 - b. Are the obligations to investigate the same under IHL and under Art. 2 of the ECHR? What are the aims of the investigations under IHL and under the ECHR? Does IHL give any information on the requirements the investigation has to meet? May the ECHR be used to specify these missing requirements under IHL? On when an enquiry must be conducted? On how it must be conducted? (GC I, Arts 49 and 50; GC II, Arts 50 and 51; GC III, Arts 121, 129 and 130; GC IV, Arts 131, 146 and 147; P I, Art. 87; ECHR, Art. 2)
 - c. For those cases where IHL does not require an investigation, when could it be argued that this absence of obligation prevails over the International Human Rights Law obligation to investigate? Why? In which cases would the obligation under International Human Rights Law prevail? Why?
 - d. (Paras 186-220) What specific requirements does the Court mention in relation to the duty to investigate? Do you think all of them are realistic in an unstable situation like the one in question? Does the Court require full compliance with the positive obligations or does it make some allowances due to the situation on the ground? (Paras 226-228) Do you think that the Court sufficiently takes into account the overall situation? (Joint concurring opinion of Judges Casadevall and others)
 - e. Would the duty to investigate be the same if the shots had been fired by the ICDC personnel?