



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

Application no. 47708/08  
by Sabah JALOUD  
against the Netherlands  
lodged on 6 October 2008

**STATEMENT OF FACTS**

THE FACTS

1. 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.
2. The applicant is represented before the Court by Ms L. Zegveld, a lawyer practising in Amsterdam.

**A. The circumstances of the case**

3. The facts of the case, as submitted by the applicant, may be summarised as follows.

*1. The death of Mr Azhar Sabah Jaloud*

4. On 21 April 2004, at around 2.12 a.m., an unknown car passed 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.

5. Summoned by the checkpoint commander, ICDC Sergeant H.S., a patrol of six Netherlands soldiers led by Lieutenant A. arrived on the scene at around 2.30 a.m.

6. Some fifteen minutes later a Mercedes car approached the VCP at speed. It hit one of the barrels which had been set out in the middle of the road to form the checkpoint but continued on its way. 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 the Kalashnikov AK-47 rifle. At this point the driver stopped the car.

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

8. The body was subjected to X-ray examination. The pictures show objects identified as metallic inside the chest and elsewhere.

9. An autopsy was performed by an Iraqi physician who drew up a brief report in Arabic. Metal objects identifiable as bullet fragments were found in the body.

10. It was not determined from what weapon the bullets had been fired, nor by whom.

## 2. *The investigation*

### (a) **Beginning of the investigation**

11. An official report by Sergeant First Class (*wachtmeester 1e klasse*) Schellingerhout of the Royal Military Constabulary (*Koninklijke marechaussee*), As-Samawah detachment, shows that a telephone call was received at 3.25 a.m. from the batallion operations room reporting the shooting incident. A car had crashed into the VCP. Shots had been fired by Netherlands and Iraqi armed forces and the passenger of the car was wounded. He would be taken to hospital. The Royal Military Constabulary was asked to investigate.

12. A seven-person Royal Military Constabulary duty group (*piketgroep*) plus an interpreter had left at 3.50 a.m. and arrived on the scene at around 4.50. Royal Military Constabulary Sergeants First Class Broekman and Van Laar had begun securing evidence at 5 a.m. Also at 5 a.m. the Royal Military Constabulary staff in The Hague and the public prosecutor of the Regional Court (*rechtbank*) of Arnhem were informed of the incident.

### (b) **Seizure of the body, the car and the personal weapons of Lieutenant A. and ICDC Sergeant H.S.**

13. The body was seized by Royal Military Constabulary Warrant Officer (*adjutant-onderofficier*) Kortman at 7.30 a.m. and transported to the mobile hospital at Camp Smitty. At 11.45 a.m., after permission had been given in writing by a local court, the body was transported to the General Hospital in As-Samawah. The post mortem examination was carried out in the absence of any police witness, whether Netherlands or Iraqi, by an Iraqi physician.

14. The Mercedes car was seized at around 5.10 a.m. by Warrant Officer Kortman and later towed to Camp Smitty.

15. At around 7.50 a.m. Sergeant First Class Schellingerhout seized Sergeant H.S.'s Kalashnikov AK-47 rifle; at around 11.55 he also seized Lieutenant A.'s Diemaco C7A1 rifle. Both weapons were later labelled and kept at the disposal of the Arnhem public prosecutor.

**(c) Statements made to Royal Military Constabulary officers(**

*(i) Mr Dawoud Joad Kathim*

16. On 21 April 2004, at around 5.05 a.m., Royal Military Constabulary Warrant Officer Mercx took a statement from the driver of the Mercedes car, Mr Dawoud Joad Kathim with the aid of an interpreter. Mr Dawoud Joad Kathim admitted to having drunk two cans of beer the night before but no more and did not consider himself to have been the worse for drink. He stated that he had not noticed any checkpoint until it was too late to avoid hitting two barrels. It had been dark at the time and there was no lighting. To his complete surprise, his car had been fired on as he was driving through the checkpoint. His friend Mr Azhar Sabah Jaloud had been hit; Mr Dawoud Joad Kathim had heard him say that he was dying. He wished to submit a complaint because the checkpoint had not been clearly marked.

*(ii) ICDC Sergeant H.S.*

17. On 21 April 2004, at around 5.15 a.m., Royal Military Constabulary Sergeant First Class Weerdenburg took a statement from ICDC Sergeant H.S. The latter stated that he had reported shooting from a car at around 2.10 a.m.; Lieutenant A. had arrived at approximately 2.30 a.m. He had gone to look for spent cartridges together with Lieutenant A., another Netherlands soldier and the interpreter. He had suddenly heard a bang and seen a car approach from the direction of Ar Ruyaythah. The car had continued on its way despite being summoned to stop. He had then heard shooting from the left side of the road. He had not, however, fired any rounds himself.

*(iii) Other ICDC personnel*

18. Sergeant First Class Weerdenburg next questioned the other Iraqi soldiers, but they provided no pertinent information.

*(iv) Mr Walied Abd Al Hussain Madjied*

19. On 21 April 2004, at around 7 a.m., Royal Military Constabulary Sergeant Klinkenberg took a statement from Mr Walied Abd Al Hussain Madjied, an interpreter working with the ICDC. The interpreter had been accompanying Lieutenant A.'s patrol between two checkpoints. Upon arrival at VCP B1.3 and being told about the first shooting incident by Sergeant Hossam, he had joined Lieutenant A. and others in the search for spent cartridges. He had suddenly heard the sound of barrels falling over, turned around and seen a car approaching. He had shouted "stop, stop, stop" but the car had driven on. Across the road from where he stood a Netherlands soldier had fired at the car. After the car had stopped, he had assisted its occupants by providing interpretation. The passenger's left arm had been covered in blood and the driver had smelled of alcohol.

*(v) Sergeant Teunissen*

20. On 21 April 2004, at around 9.30 a.m., Royal Military Constabulary Sergeant First Class Van Laar and Sergeant Klinkenberg took a statement from Infantry Sergeant (*sergeant*) Teunissen. Arriving at VCP B1.3 at 2 a.m., he had been given information by the ICDC sergeant. Together with his lieutenant, the ICDC sergeant and the interpreter he had gone up the road to look for spent cartridges. At a distance of approximately 100 metres from the VCP hut, he had turned around, startled by a sound. He had seen a car drive into the VCP at speed; when the car had passed the VCP, he had heard shooting from the VCP. The four of them had dived for cover. When the car had reached their level, shots were fired from across the road where the lieutenant was. He had shouted “Stop firing”, but that had not been heard. When the firing stopped, the car had stopped also. The passenger was bleeding from the lower body and the left shoulder. Sergeant Teunissen and Private Finkelnberg had removed him from the car, laid him on the ground and bandaged his wounds. He and Lieutenant A. had attempted to resuscitate the passenger until the doctor had told him that there was no longer any point.

*(vi) Lieutenant A., first statement*

21. On 21 April 2004, at around 11.15 a.m., Royal Military Constabulary Sergeants First Class Broekman and Van Laar heard Lieutenant A. under caution. Lieutenant A. stated that he was responsible for monitoring two vehicle checkpoints, one of them VCP B1.3 on the Jackson road north of Ar-Rumaythah. After the first shooting incident had been reported, he had arrived at VCP B1.3 at around 2.30 a.m.; he was going to reconnoitre the area on foot, together with Sergeant Teunissen and the ICDC sergeant. At around 2.45 a.m. he had been startled by something. Looking back, he had seen two blazing car headlights approaching. Shots were then fired from that direction, at which he had dived for cover in the road shoulder. He had been convinced that shots were being fired from inside the car. When the car had reached his level, he had cocked his weapon; when the car had just passed, he had started to shoot at its rear. He had fired 28 cartridges in aimed fire. He was responding to the danger arising from his having been fired at first. He had fired the entire contents of a magazine, 28 rounds; this had taken approximately seven seconds. The passenger being wounded, he and Sergeant Teunissen had attempted to resuscitate him until help arrived. By that time there was no pulse. Shortly afterwards, the company commander had arrived; Lieutenant A. had briefed him.

*(vii) Private Finkelnberg*

22. On 23 April 2004, at around 1.50 p.m., Royal Military Constabulary Warrant Officer Kortman and Sergeant First Class Broekman took a statement from Private Finkelnberg. On 21 April 2004 he had arrived at VCP B1.4 with Lieutenant A. and Sergeant Teunissen, among others, at 2 a.m., where the ICDC sergeant reported to Lieutenant A. that there had been shooting at VCP B1.3. The patrol had therefore gone to that checkpoint, arriving at 2.30 a.m. Lieutenant A., Sergeant Teunissen, the ICDC sergeant and the interpreter had gone up the road towards Hamza to

look for spent cartridges. A dark-coloured motor car had approached at high speed and driven past him through the checkpoint, hitting some barrels in the road. Through his image intensifier he had seen Lieutenant A. to the left of the road going for cover; he had then seen muzzle flashes from several weapons from the left side of the road and heard shots from that direction. Firing was in single shots. At a certain moment he had seen the car stop. While the shots were being fired, he had heard Sergeant Teunissen shout “Stop firing”. He had gone up to the vehicle and had cut the passenger’s clothes loose. While Sergeant Teunissen administered first aid, he had searched the car for weapons. He had found an ice box containing an almost empty bottle of alcoholic drink. He had then joined Sergeant Teunissen and Lieutenant A. in their attempts to resuscitate the passenger until the latter was declared dead. He was critical of Lieutenant A. for firing while his own troops were on the opposite side of the road and for firing so many rounds, and also of the ICDC for firing in the general direction of their own personnel.

*(viii) Cavalry Sergeant Quist*

23. On 23 April 2004, at around 1.50 p.m., Royal Military Constabulary Sergeant Major (*opperwachtmeester*) Wolfs and Sergeant First Class Van Laar took a statement from Cavalry Sergeant (*wachtmeester*) Quist. On 21 April 2004 at around 2 a.m. he had been at VCP B1.4 with Lieutenant A. and the other members of his patrol unit, which had been led by Sergeant Teunissen. There had been shooting at VCP B1.3 and they had gone there. Upon arrival, he had noticed no ICDC personnel manning the checkpoint, but he had seen a group of people to the left of the road opposite the hut. After he had parked his vehicle, Lieutenant A., Sergeant Teunissen, the interpreter Walied and the ICDC sergeant had walked off north to look for spent cartridges. At a certain moment, he had seen a car approaching at high speed from Ar-Rumaythah; when it reached the checkpoint, it hit some of the barrels or rocks placed there. He heard automatic fire from where the ICDC members were, which then stopped. There was further firing approximately 100 metres distant from him, but he could not tell who had fired in the front. He did think that there had been firing from a plurality of weapons. He had seen the vehicle stop 50 metres away. He had made a situation report. He had seen Lieutenant A. and Sergeant Teunissen trying to resuscitate the victim.

*(ix) Lieutenant A., second statement*

24. On 23 April 2004, at around 3.35 p.m., Royal Military Constabulary Sergeant First Class and Warrant Officer Kortman took a second statement from Lieutenant A.. The latter stated that the very last moment he had seen the ICDC sergeant had been at the checkpoint, fiddling (*klungelen*) with his AK-47 rifle. Lieutenant A. had told the sergeant not to point the rifle at him. On the subject of the firing incident, he stated that as far as he remembered he had probably lain on a flat part of the road; he had not fired from a standing position. He had performed mouth-to-mouth resuscitation on the wounded passenger of the car and remembered him tasting of alcohol. The ICDC deputy company commander had given him a list of names of the

ICDC personnel who had fired their weapons and the corresponding numbers of cartridges, and asked for replacement ammunition.

**(d) Other investigation reports**

*(i) Examination of the Mercedes car*

25. On 22 April 2004 Royal Military Constabulary Warrant Officer Voorthuijzen and Sergeant Heijden examined the car seized by Warrant Officer Kortman the day before. It was a black Mercedes Benz 320 E AMG. It bore black number plates bearing markings in Arabic script; these visibly covered white number plates bearing black letters in Latin script and numerals. The car had damage consistent with hitting foreign objects at speed. The rear window was shattered. Holes were found in the rear of the car, in the body on the right and left sides, and in the seats. Metal tips were found in various places; one, identified as a bullet fragment, had clearly passed through the passenger seat. The conclusion was that the car had been fired on from both the left and the right; from the left, with a weapon firing ammunition smaller than 6 mm and from the right with a weapon firing ammunition larger than 6 mm. The precise firing angles relative to the car could not, however, be determined.

*(ii) X-rays and photographs*

26. On 9 May 2004 Royal Military Constabulary Warrant Officer Voorthuijzen and Sergeant Klinkenberg took receipt of a CD-ROM bearing X-rays of Azhar Sabah Jaloud's body. These showed fragments of metal in the left chest cavity, the left hip and the left lower arm. The X-rays had been made by Warrant Officer Dalinga, X-ray technician at Camp Smitty, As-Samawah, Al-Muthanna province.

27. The file contains photocopies of the above-mentioned X-rays and of photographs. They are accompanied by descriptions contained in an official report by Warrant Officer Kortman. The photographs include pictures of a road and a checkpoint area, some taken by daylight, some apparently taken at night. Several of the photographs show cartridges lying on the ground, including some described as 7x39mm (as fired by the Kalashnikov AK-47 rifle) both spent and live and a quantity of spent cartridges stated to be 5.56x45mm (as fired by the Diemaco C7A1 rifle) in a pile close together. Others show a male body wounded in an arm, in the upper left quarter of his back and in the right buttock. Further pictures show a dark-coloured Mercedes motor car; details are included of holes in the bodywork and upholstery that could be bullet holes.

*(iii) Report by ICDC Lieutenant Colonel Awadu Kareem Hadi*

28. On 22 April 2004 ICDC Lieutenant Colonel Awadu Kareem Hadi, the commanding officer of 603 ICDC Battalion, sent a report from his battalion headquarters to the headquarters of the Iraqi police. It reads as follows (handwritten translation submitted by the applicant):

“The details of the accident which is happened at date (20/04/2004) and information coming from the first battalion (Ar-Rumaytha) and the details are:

At the hour (21.05 [sic] after the midnight) from the date (20/04/2004) [sic] a car type (Mercedes) coming by high speed directed from (Al Hamza) to (Al Nassiriya) and when the car is reached to the location of the checkpoint does not stop and making a crash with the obstacles present in checkpoint and he was carelessness and the soldiers shouting on him and calling to stop and he is continued and does not stop and after that Dutch soldiers see that there is no way and shoot on him and then injured person ([Azhar Sabah Jaloud]) then he is died and he was sitting near the driver.

With our greetings

[signed] Lieutenant Colonel Awadu Kareem Hadi

A copy to / PJCC”

*(iv) The metal fragments*

29. An official report by Royal Military Constabulary Warrant Officer Voorthuizen, dated 21 June 2004, states that on 2 June 2004 a document in Arabic was received, which, translated orally by an interpreter, was identified as a report by the Baghdad police. The report stated that three metal fragments had been examined in Baghdad at the request of the Al-Muthanna police with a view to identifying the ammunition from which they came and the weapon from which they had been fired; however, the provenance of the metal fragments could not be determined as they were too few in number. A copy of a document in Arabic was attached to Warrant Officer Voorthuizen’s report.

**(e) Iraqi document**

30. On 21 April 2004 Mr Dawoud Joad Kathim, the driver of the Mercedes car, lodged a complaint against the troops who had fired at his car with the Iraqi police. It appears from the statement as taken down in writing that Mr Dawoud Joad Kathim was under the misapprehension that the foreign troops involved had been Polish not Netherlands. Mr Dawoud Joad Kathim also put on record that he had been told by the interpreter to say that all shots had been fired by the ICDC, whereas in fact he had not seen any shots fired by ICDC personnel.

*3. Domestic proceedings*

31. On 8 January 2007 the applicant’s representative, Ms Zegveld, wrote to the registry of the Military Chamber of the public prosecution service attached to the Regional Court of Arnhem on behalf of the next-of-in of Mr Azhar Sabah Jaloud. She asked to be informed of the outcome of the investigation into the latter’s death and any decisions made as to the prosecution of any suspects, with a view to bringing proceedings under Article 12 of the Code of Criminal Procedure (*Wetboek van Strafvordering*) (see below).

32. The public prosecutor replied on 11 January 2007, stating that the investigation had been closed in June 2004; that Mr Azhar Sabah Jaloud had presumably (*vermoedelijk*) been hit by an Iraqi bullet; that the Netherlands serviceman who had also fired at the vehicle was entitled to claim

self-defence; and that for that reason no Netherlands service personnel had been designated as suspects.

33. On 1 February 2007 Ms Zegveld wrote to the public prosecutor asking, among other things, for the Rules of Engagement and any reports of investigations by the Iraqi authorities to be added to the file.

34. The public prosecutor replied on 14 February, declining to accede to Ms Zegveld's requests. Referring to the Court's Chamber judgment in the case of *Ramsahai and Others v. the Netherlands*, no. 52391/99, 10 November 2005, he stated that since the procedure under Article 12 of the Code of Criminal Procedure did not involve the determination of a "criminal charge", Article 6 of the Convention did not apply and so arrangements for access to the case file in such cases were different from those applicable in ordinary criminal proceedings.

35. On 2 October 2007 the applicant, represented by his counsel Ms Zegveld and Mr Pestman, lodged a request under Article 12 of the Code of Criminal Procedure with the Arnhem Court of Appeal for the prosecution of Lieutenant A. He argued that there was nothing to support the suggestion that Mr Azhar Sabah Jaloud had been killed by an Iraqi bullet; that the number of shots fired by Lieutenant A. reflected disproportionate violence; that Lieutenant A. had failed to fire a warning shot and had failed to heed Sergeant Teunissen's order to cease firing; that, in accordance with Article 50 of the First Additional Protocol to the Geneva Conventions, Mr Azhar Sabah Jaloud ought to have been considered a civilian in the absence of any indications to the contrary and ought therefore not to have been subjected to aimed rifle fire; and that the use of lethal force by Lieutenant A. had been unnecessary in any event. He also relied on the statement made to the Iraqi police by the driver of the car to the effect that the latter had been told to keep quiet about the involvement of Netherlands military personnel.

36. On 28 January 2008 the Chief Public Prosecutor (*hoofdofficier van justitie*) to the Regional Court of Arnhem wrote to the Chief Advocate General (*hoofdadvoocaat-generaal*) to the Court of Appeal of Arnhem recommending that the applicant's request be dismissed. He appended a detailed statement by the public prosecutor who had taken the decision (in July 2004) not to prosecute Lieutenant A. According to the public prosecutor, while it had to be accepted that Lieutenant A. had fired at the car, it could not be proved that Lieutenant A. had caused the death of Mr Azhar Sabah Jaloud; moreover, even if such be the case, Lieutenant A. could reasonably have believed that he was under attack and needed to defend himself. The public prosecutor's statement also contained the following passage:

"On the basis of United Nations Security Council Resolution 1483 the special responsibilities of the United States and the United Kingdom as occupying powers were recognised. Unlike the British forces, however, the Netherlands were not to be considered an occupying power in Iraq: SFIR counts as a peacekeeping operation (*vredesoperatie*) for the Netherlands. The Government's point of view was that the role of the Netherlands armed forces should remain limited to supporting the British in their appointed territory in southern Iraq (Lower House of Parliament, 2002-23, no. 23432, no. 16). The legitimisation for the use of functional force by SFIR is not to be found in *ius in bello*, but in the Security Council mandate, the Rules of Engagement (ROE) based thereon, and the Netherlands instruction card for the use of

force which is derived from those. The ROE empower to the use of force against any person who falls within the scope of the relevant rule. Accordingly, in certain cases such persons may be civilians. This also applies – as the instruction for the use of force reflects – to the inherent right of self-defence. The instructions and the purpose of the commanding officer, seen in connection with the perceived threat, are decisive as to whether a soldier will make use of his powers to use force, and if so, how.”

37. Nor could a violation of Article 2 of the Convention under its procedural head be found, since the Convention did not bind Netherlands troops in Iraq: the Netherlands troops had not exercised effective authority in Iraq.

38. On 1 February 2008 the Advocate General to the Court of Appeal of Arnhem submitted a written opinion expressing the provisional opinion that the decision not to prosecute had been sound. A Netherlands serviceman remained subject to Netherlands criminal jurisdiction wherever in the world he might be. However, it was reflected in UNSC 1483 that co-operating States did not have the status of occupying powers, and the armed conflict had ended by the time of the death of Mr Azhar Sabah Jaloud. Moreover, even assuming the existence of an armed conflict in Iraq at the time, given the circumstances in which the incident had taken place, which were unrelated to the conflict as such, it would not be feasible to prosecute Lieutenant A. under war crimes legislation. Under ordinary criminal law, Lieutenant A. would be entitled to claim self-defence. However, even without a conviction the Netherlands State might be in a position in which monetary compensation *ex gratia* was appropriate.

39. The Court of Appeal held a hearing on 18 March 2008. The applicant’s representative, Ms Zegveld, asked for certain investigative measures, including the addition to the file copies and where necessary translations of the Rules of Engagement and the pertinent instructions based thereon, the Iraqi autopsy report, and the statement of Mr Dawoud Joad Kathim to the Iraqi police; and the questioning of the Iraqi interpreter Mr Madjied in connection with Mr Dawoud Joad Kathim’s allegation that the interpreter had told him to keep silent about the involvement of Netherlands troops. She also questioned the finding that shots had been fired by Iraqi personnel and argued that Lieutenant A.’s actions had gone beyond legitimate self-defense.

40. The Court of Appeal gave its decision on 7 April 2008. On the facts, it concluded that Lieutenant A. had reacted to friendly fire from across the road, mistaking it for fire from inside the car. In the circumstances, he had therefore acted within the confines of his instructions; the decision not to prosecute him could therefore stand.

## **B. Weapons used in the incident**

### *1. Diemaco C7A1*

41. The Diemaco C7A1 infantry rifle is the standard weapon issued to the Netherlands military. Of Canadian manufacture, it is a development of the better-known American-designed Armalite AR-15/Colt M16 rifle. It is

capable of automatic and semiautomatic fire. The magazine issued to the Netherlands armed forces as standard holds up to thirty rounds.

42. Like the AR-15/M16, the Diemaco rifle fires the 5.56x45 mm (or 5.56 NATO) cartridge. The bullet yaws and frequently fragments when it hits a body at high velocity, causing severe damage to tissue.

### 2. *Kalashnikov AK-47*

43. The Kalashnikov AK-47 rifle was originally designed and manufactured in the Soviet Union but clones have been produced in many countries. Formerly the main weapon of Warsaw Pact infantry, it is today issued to the military of many countries including local forces in Iraq.

44. Like the AK-47 itself, its ammunition, the 7.62x39 mm cartridge, is produced in large quantities by many manufacturers. The standard bullet has considerable penetrating power; however, when it hits a body without passing right through, it too can yaw and fragment, producing much the same effects as the 5.56 mm bullet.

## C. The Netherlands military presence in Iraq

### 1. *General background*

45. From July 2003 until March 2005 Netherlands troops participated in the Stabilisation 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.

46. The participation of Netherlands forces in MND-SE was governed by a Memorandum of Understanding between the United Kingdom and the Kingdom of the Netherlands, to which Rules of Engagement were appended. Both documents were classified confidential and remain so.

47. 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.

48. As to the occupation of Iraq between 1 May 2003 and 28 June 2004, see generally *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, §§ 9-19, 7 July 2011.

### 2. *The letter to the Lower House of Parliament*

49. On 6 June 2003 the Minister of Foreign Affairs (*Minister van Buitenlandse Zaken*) and the Minister of Defence (*Minister van Defensie*) 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 contains the following:

“As requested by the British, the Netherlands units will be deployed in the south of Iraq, in the province of al-Muthanna (...). This province comes within the responsibility of a British division. The operational line of command thus runs via British divisional headquarters and then via American headquarters in Baghdad to American Central Command (CENTCOM) which co-ordinates military direction.”

and

**“Influence**

The stabilisation force will consist of a coalition of participating countries led by the United States and the United Kingdom. It is important the other troop-contributing countries should be sufficiently involved in the determination of the security force’s general political-military policy and the exchange of information. To that end, the United Kingdom will set up a ‘Committee of Contributors’ for the British sector, which will enable close consultation between Government representatives, analogous to the procedure which the British have set up for ISAF [i.e. the International Security Assistance Force, deployed in Afghanistan] and which is now also followed by the Netherlands and Germany for ISAF. Troop-contributing countries will also be involved in military direction through national representatives in the operational headquarters.”

and

**“Instructions for the use of force (Rules of Engagement)**

‘Rules of Engagement’ (ROE) are instructions to military units which set out the circumstances, conditions, degree and modality of the permitted use of force. Their content is not made public. The ROE are drawn up on the basis of military-operational and legal considerations. These include considerations relating to humanitarian law and the laws of war, as well as political/diplomatic considerations. This is done with reference to a NATO document in which guidelines are set out for ROE.

As is the practice in other peace operations, it is provided that the Netherlands shall take over the ROE of the ‘lead nation’, in this case the United Kingdom. The Netherlands can make changes to the instructions for the use of force based on domestic directives and considerations. Although the ROE have not yet been finalised, the Government intends them to be robust, which means among other things that there should be wide powers for ‘force protection’ and the creation of a safe and stable environment. On this basis, the Government assumes that the ROE will offer sufficient possibility for carrying out the tasks even in the face of hostilities or riots.

**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*). Within the framework of NATO support for Poland it has been decided to station some Netherlands personnel in Polish headquarters. Besides, the Polish sector adjoins the American sector and the presence of Netherlands personnel facilitates better overall co-ordination.

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.”

### 3. *Royal Military Constabulary presence in Iraq*

50. There was a Royal Military Constabulary unit attached to the Netherlands forces in Iraq. It is stated by the applicant that they were under the command and full control of the Netherlands battalion commander and shared the living quarters of the regular troops.

#### **D. The Royal Military Constabulary**

51. The Royal Military Constabulary is a branch of the armed forces, on a level with the Royal Navy (*Koninklijke Marine*), the Royal Army (*Koninklijke Landmacht*) and the Royal Air Force (*Koninklijke Luchtmacht*). Its members have military status and hold military rank. It has its own line of command; its commanding officer holds the rank of lieutenant general (*luitenant-generaal*) and is directly answerable to the Minister of Defence.

52. The duties of the Royal Military Constabulary, as relevant to the present case, include “carrying out police duties for Netherlands and other armed forces, as well as international military headquarters, and persons belonging to those armed forces and headquarters” (section 6(1)(b) of the 1993 Police Act (*Politiewet 1993*)).

53. Members of the Royal Military Constabulary undergo both military and police training. Non-commissioned officers holding the rank of sergeant (*wachtmeester*) or higher may be appointed as civil servants invested with investigative powers (*opsporingsambtenaren*), and certain categories of commissioned officers may be appointed as assistant public prosecutors (*hulpofficieren van justitie*).

54. In their capacity of military police or military police investigators, Royal Military Constabulary officers are subordinate to the public prosecutor to the Regional Court of Arnhem.

#### **E. The Military Chamber of the Arnhem Court of Appeal**

55. Article 9 of the Code of Military Criminal Procedure (*Wet militaire strafrechtspraak*) provides that chambers of the Military Chamber of the Arnhem Court of Appeal shall consist of two judges of the Court of Appeal, one of whom shall preside, and one military member. The military member shall be a serving officer holding the rank of captain (*kapitein ter zee*, Royal Navy), colonel (*kolonel*, Royal Army), group captain (*kolonel*, Royal Air Force) or higher, who is also qualified for judicial office; he is promoted to the titular rank of commodore (*commandeur*, Royal Navy), brigadier (*brigadegeneraal*, Royal Army) or air commodore (*commodore*, Royal Air Force) if he does not already hold that substantive rank. He may not be a member of the Royal Military Constabulary. The military member is appointed for a term of four years, renewable once for a further such term; compulsory retirement is at the age of sixty (Article 6 § 4 of the Code of Military Criminal Procedure).

56. Section 68(2) of the Judiciary (Organisation) Act (*Wet op de rechterlijke organisatie*) provides that the military members of the Military Chamber of the Arnhem Court of Appeal participate as judges on an equal

footing with their civilian colleagues and are subject to the same duties of confidentiality (section 7 and 13 of that Act) and functional independence and impartiality (section 12); and also that they shall be subject to the same scrutiny of their official behaviour as civilian judges (sections 13a–13g). The latter involves review of specific behaviour by the Supreme Court (*Hoge Raad*), initiated, at the request of an interested party or *proprio motu*, by the Procurator General (*procureur-generaal*) to the Supreme Court.

## F. Relevant domestic criminal law and procedure

57. Statutory provisions relative to the case are the following:

### 1. *The Military Criminal Code* (Wetboek van Militair Strafrecht)

#### Article 4

“Netherlands criminal law shall apply to military personnel who commit any punishable act outside the Netherlands.”

### 2. *The Military Criminal Procedure Act* (Wet Militaire Strafrechtspraak)

#### Section 1

“...

3. The Code of Criminal Procedure shall apply unless this Act deviates from it.”

#### Section 8

“...

2. Within the Court of Appeal of Arnhem a multi-judge chamber, to be called the Military Chamber, shall have exclusive competence to consider appeals against appealable judgments of the Military Chambers of the Regional Court mentioned in section 3 [i.e. the Arnhem Regional Court]. This Chamber shall also consider complaints under Article 12 of the Code of Criminal Procedure.”

### 3. *The Code of Criminal Procedure* (Wetboek van Strafvordering)

#### Article 12

“1. If the perpetrator of a punishable act is not prosecuted, or if the prosecution is not pursued to a conclusion, then anyone with a direct interest (*rechtstreeks belanghebbende*) may lodge a written complaint with the Court of Appeal within whose area of jurisdiction the decision has been taken not to prosecute or not to pursue the prosecution to a conclusion.

...”

### Article 148

“1. The public prosecutor shall be charged with the investigation of criminal acts which are triable by the regional court to which he is appointed, as well as the investigation, within the area of that regional court’s jurisdiction, of criminal acts triable by other regional courts or district courts.

2. To that end, he shall give orders to the other persons charged with [such] investigation. ...”

### G. Relevant domestic case-law

58. On 27 December 2007, Sergeant Major (*sergeant-majoor*) Eric O. of the Royal Marines (*Korps Mariniers*), while leading a unit charged with salvaging the contents of a container lying alongside the “Jackson” route, fired a warning shot into the ground to deter a group of looters. The bullet ricocheted off the surface, mortally wounding a looter.

59. Sergeant Major O. was prosecuted for disobeying official instructions in that he had allegedly used force going beyond what was permitted by the *aide-mémoire* and the Instructions on the Use of Force, or in the alternative, negligent killing.

60. Following an appeal by the prosecution against an acquittal at first instance, the Military Chamber of the Court of Appeal of Arnhem acquitted Sergeant Major O. In its judgment of 4 May 2005, *Landelijk Jurisprudentie Nummer* (National Jurisprudence Number, “LJN”) AT4988, it held that the Rules of Engagement constituted official instructions despite their secrecy. It went on to find that Sergeant Major O. had acted within the constraints of the Rules of Engagement and had not been negligent.

## COMPLAINTS

61. The applicant alleges violations of Article 2 in its procedural aspect.

62. He complains that the investigation was insufficiently independent, on the following grounds:

a) The Royal Military Constabulary unit in Iraq was under the sole command of the Netherlands battalion commander; there was no presence of the public prosecution service. Since the members of the unit shared the living quarters of the regular troops, the distance between them and the individuals they might be called upon to investigate was insufficient.

b) The Arnhem public prosecutor’s decision not to prosecute Lieutenant A. had been based entirely on the reports of the Royal Military Constabulary, on which the public prosecutor had placed excessive reliance.

c) The Military Chamber of the Arnhem Court of Appeal, which included in its composition a serving Army officer not belonging to the judiciary, also placed full reliance on the results of the very limited investigations by the Royal Military Constabulary.

63. The applicant also complains that the investigation was insufficiently effective, on the following grounds:

a) No statements had been taken from ICDC personnel who had witnessed the incident, a Royal Military Constabulary investigator having decided that the information which they gave was of no pertinence.

b) The questioning of the key witness, Mr Dawoud Joad Kathim, the driver of the Mercedes car, was extremely cursory. His evidence was important because he was the only civilian witness available, and thus the only witness without any hierarchical or otherwise functional link to Lieutenant A. Moreover, his statement as recorded by the Royal Military Constabulary investigators was inconsistent with the statement which he made later the same day to an Iraqi official.

c) Lieutenant A. was only first questioned seven hours after the incident and not separated from the other witnesses during that time. He would therefore have had ample opportunity to discuss the incident with the other witnesses beforehand and adapt his statement accordingly.

d) The day after the incident, Lieutenant A. stated that he had been able to obtain 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. The fact that he, as the prime suspect, had been able to obtain this information from a key witness also affected the effectiveness of the investigation.

e) What was more, the list obtained by Lieutenant A. was not added to the file despite its potential importance to the case.

f) The Royal Military Constabulary had held the body of Mr Azhar Sabah Jaloud for some hours, yet no autopsy was performed at that time. The body was transferred to an Iraqi civilian hospital, where an autopsy was carried out in the absence of Royal Military Constabulary officials. The autopsy report, such as it was, was added to the file but not translated.

g) Other forensic evidence was treated in a similarly careless fashion. In particular, no detailed translation was made of the report concerning the bullet fragments taken from the body.

64. Finally, the applicant complains that the next-of-kin of Mr Azhar Sabah Jaloud were insufficiently involved in the investigation and informed of its progress. In particular, no attempt was ever made to contact Mr Azhar Sabah Jaloud's family; nor did anyone bother to inform them of the decision not to prosecute Lieutenant A.

### **QUESTIONS TO THE PARTIES**

1. Did the events complained of occur within the "jurisdiction" of the Kingdom of the Netherlands (see, in particular, *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, 7 July 2011)?

2. Having regard to the procedural protection of the right to life (see paragraph 104 of *Salman v. Turkey* [GC], no. 21986/93, ECHR 2000-VII), was the investigation in the present case by the authorities of the respondent Party in breach of Article 2 of the Convention?

3. What powers and responsibilities relevant to the use of force by the Netherlands SFIR contingent and subsequent measures of investigation was attributed or devolved to Netherlands commanders or other authorities of the Kingdom of the Netherlands by, or under, the Memorandum of Understanding between the United Kingdom and the Kingdom of the Netherlands, the Rules of Engagement and/or other *ad hoc* arrangements?