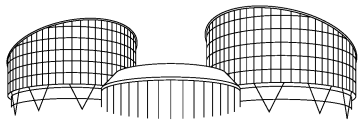

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF JALOUD v. THE NETHERLANDS

(Application no. 47708/08)

JUDGMENT

STRASBOURG

20 November 2014

This judgment is final but may be subject to editorial revision.

ABBREVIATIONS AND ACRONYMS

AOR	Area of operational responsibility
CD-ROM	Compact disc, read-only memory
CENTCOM	American Central Command
CFLCC	Coalition Forces Land Component Commander
CPA	Coalition Provisional Authority
DARIO	Draft Articles on the Responsibility of International Organisations (International Law Commission)
DR	European Commission of Human Rights, Decisions and Reports
ECHR	European Court of Human Rights, Reports of Judgments and Decisions (1999-present)
EUR	Euro (currency)
GC	Grand Chamber
GST	Government support teams
I.C.J.	International Court of Justice
ICDC	Iraqi Civil Defence Corps
LJN	*Landelijk Jurisprudentienummer* (National Jurisprudence Number, Netherlands)
LOC	Lines of communication
loc. cit.	*loco citato* (in the place cited)
MND (C-S)	Multinational Division, Central-South
MND (SE)	Multinational Division, South-East
MoU, MOU	Memorandum of Understanding
NATO	North Atlantic Treaty Organization
PJCC	Provisional Joint Coordination Center (emergency and local governmental services in Iraq)
POD	Port of disembarkation
Reports	European Court of Human Rights, Reports of Judgments and Decisions (1996-1998)
RoE, ROE	Rules of Engagement
SFIR	Stabilization Force in Iraq
UK	United Kingdom of Great Britain and Northern Ireland
UNPROFOR	United Nations Protection Force (Bosnia and Herzegovina 1992-1995)
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolution
US, USA	United States of America
VCP	Vehicle checkpoint

In the case of Jaloud v. the Netherlands,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Dean Spielmann, *President,*
Josep Casadevall,
Guido Raimondi,
Ineta Ziemele,
Mark Villiger,
Isabelle Berro-Lefèvre,
Elisabeth Steiner,
Alvina Gyulumyan,
Ján Šikuta,
Päivi Hirvelä,
Luis López Guerra,
András Sajó,
Zdravka Kalaydjieva,
Aleš Pejchal,
Johannes Silvis,
Valeriu Griţco,
Iulia Antoanella Motoc, *judges,*
and Michael O'Boyle, *Deputy Registrar,*

Having deliberated in private on 19 February 2014 and on 10 September 2014,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 47708/08) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Iraqi national, Mr Sabah Jaloud ("the applicant"), on 6 October 2008.

2. The applicant was represented by Ms L. Zegveld and Mr A.W. Eikelboom, lawyers practising in Amsterdam. The Netherlands Government ("the Government") were represented by their Agent, Mr R.A.A. Böcker of the Ministry of Foreign Affairs.

3. The applicant alleged, in particular, that Article 2 of the Convention had been violated in that the investigation into the death of his son, Mr Azhar Sabah Jaloud, had been inadequate.

4. On 6 December 2011 the application was communicated to the Government.

5. On 9 July 2013 a Chamber of the Third Section, composed of Josep Casadevall, President, Alvina Gyulumyan, Corneliu Bîrsan, Ján Šikuta, Luis López Guerra, Kristina Pardalos, Johannes Silvis, judges, and also of Santiago Quesada, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72 of the Rules of Court).

6. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24. Subsequently Elisabeth Steiner, substitute judge, replaced Judge Pardalos, who was unable to take part in the further consideration of the case.

7. The applicant and the Government each filed written observations. In addition, third-party comments were received from the Government of the United Kingdom, which had been given leave by the President to take part in the proceedings (Article 36 § 2 of the Convention and Rule 44 § 2). The intervening Government were represented by their Agent, Ms R. Tomlinson of the Foreign and Commonwealth Office.

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 19 February 2014 (Rule 59 § 3).

There appeared before the Court:

(a) *for the respondent Government*

Mr	R. BÖCKER, Ministry of Foreign Affairs,	*Agent*,
Dr	M. KUIJER, Ministry of Security and Justice,	*Adviser*,
Mr	B. VAN HOEK, Public Prosecution Service,	*Adviser*,
	Commander H. WARNAR, Ministry of Defence, Military staff	*Adviser*;

(b) *for the applicant*

Ms	L. ZEGVELD,	*Counsel*,
Mr	A.W. EIKELBOOM,	*Counsel*;

(c) *for the Third Party-State: the United Kingdom Government*

Ms	R. TOMLINSON, Foreign & Commonwealth Office,	*Agent*,
Mr	J. EADIE QC,	*Counsel*,
Mr	J. BENSON, Foreign & Commonwealth Office,	*Adviser*,
Ms	M. ADDIS, Foreign & Commonwealth Office,	*Observer*.

The Court heard addresses by Mr Böcker, Mr Eikelboom, Ms Zegveld and Mr Eadie, and also their replies to its questions.

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 (see paragraphs 21 and 49-52 below). 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.

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

15. 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.

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

2. The investigation

a. Beginning of the investigation

17. An official record 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 car's passenger had been wounded. He had been taken to hospital. The Royal Military Constabulary was asked to investigate.

18. A seven-person Royal Military Constabulary duty group (*piketgroep*), accompanied by an interpreter, had left at 3.50 a.m. and arrived on the scene at around 4.50.a.m. 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 Hussam Saad

19. The body was seized by Royal Military Constabulary Warrant Officer (*adjudant-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 by an Iraqi physician.

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

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

c. Statements taken down by Royal Military Constabulary officers

22. The following statements were submitted to the investigating and judicial authorities in the domestic proceedings.

i. Mr Dawoud Joad Kathim

23. 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, but no more, on the previous night, and did not consider himself to have been intoxicated. 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 had been no lighting. To his complete surprise, his car had been fired at 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 Hussam Saad

24. On 21 April 2004, at around 5.15 a.m., Royal Military Constabulary Sergeant First Class Weerdenburg took a statement from ICDC Sergeant Hussam Saad 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. Sergeant Hussam Saad had gone to look for spent cartridges with Lieutenant A., another Netherlands soldier and the interpreter. He had suddenly heard a bang and seen a car approaching from the direction of Ar Ruyaythah. The car had continued to move forward, despite being ordered 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

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

iv. Mr Walied Abd Al Hussain Madjied

26. 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. After arriving at VCP B1.3 and being told about the first shooting incident by ICDC Sergeant Hussam Saad, 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 was standing, a Netherlands soldier had fired at the car. After the car 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

27. 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 had been fired from across the road, where the lieutenant was positioned. He had shouted "Stop firing", but that had not been heard. When the firing stopped, the car had also stopped. The passenger had been 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 told by the doctor that there was no longer any point.

vi. Lieutenant A., first statement

28. 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 which was 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 had been intending 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 a noise. Looking behind him, he had seen two blazing car headlights approaching. Shots had then been fired from the direction of the car; on hearing them, he had dived for cover on the verge of the road. 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 it had just passed, he had started to shoot at its rear. He had fired 28 cartridges in aimed fire. He had been 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 had been no pulse. Shortly afterwards, the company commander had arrived; Lieutenant A. had briefed him.

vii. Private Finkelnberg

29. 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. At 2 a.m. on 21 April 2004 he had arrived with Lieutenant A. and Sergeant Teunissen, among others, at VCP B1.4, where the ICDC sergeant reported to Lieutenant A. that there had been a shooting incident 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 motorcar 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 on the left side of the road and heard shots from that direction. The 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 cut the passenger's clothes loose. While Sergeant Teunissen administered first aid, he had searched the car for weapons. He had found an icebox 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

30. 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 had seen a group of people to the left of the road opposite the hut. After Cavalry Sergeant Quist 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 point, he had seen a car approaching at high speed from Ar-Rumaythah; when the car reached the checkpoint, it had hit some of the barrels or rocks placed there. He had heard automatic gunfire from where the ICDC members were, which had then stopped. There had been further firing approximately 100 metres distant from him, but he could not tell who was firing up ahead. 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

31. On 23 April 2004, at around 3.35 p.m., Royal Military Constabulary Sergeant First Class Broekman and Warrant Officer Kortman took a second statement from Lieutenant A. The latter stated that the very last time he had seen the ICDC sergeant the latter 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 had asked for replacement ammunition.

d. Other investigation reports

i. Examination of the Mercedes car

32. 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 had black number plates with 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 calibre and, from the right, with a weapon firing ammunition larger than 6 mm calibre. The precise firing angles relative to the car could not, however, be determined.

ii. X-rays and photographs

33. On 9 May 2004 Royal Military Constabulary Warrant Officer Voorthuijzen and Sergeant Klinkenberg took receipt of a CD-ROM containing 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.

34. 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)[1], both spent and live, and a quantity of spent cartridges stated to be

1. In fact, 7.62x39mm.

5.56x45mm (as fired by the Diemaco C7A1 rifle) in a pile close together. Others show a male body with wounds to an arm, the upper left quarter of the back and the right buttock. Further pictures show a dark-coloured Mercedes motorcar; details are included of holes in the bodywork and upholstery that could be bullet holes.

iii. Report by ICDC Lieutenant Colonel Awadu Kareem Hadi

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

> "The details of the accident which is happened at date (20/04/2004) and information coming from the first batallion (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

36. An official report by Royal Military Constabulary Warrant Officer Voorthuizen, dated 21 June 2004, states that on 2 June 2004 a document was received in Arabic, 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 had come 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 Voorthuijzen's report. It is not stated in whose custody the metal fragments had been left or where they were being stored.

e. Iraqi document

37. On 21 April 2004 Mr Dawoud Joad Kathim, the driver of the Mercedes car, lodged a complaint with the Iraqi police against the troops who had fired at his car. 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 rather than Netherlands. Mr Dawoud Joad Kathim also put on record that he had been told by the interpreter to say that all of the shots had been fired by the ICDC, whereas in fact he had not seen any shots fired by ICDC personnel.

f. Supplementary report, recording statements taken from the ICDC members

38. After the Chamber's relinquishment of jurisdiction to the Grand Chamber, the Government provided an official record of the following statements taken from the ICDC members. The following is a sworn translation subsequently submitted by the applicant:

"Name: **A Saad Mossah**

Weapon number: GL 5574

Ammunition: 4 X 30 cartridges

'During the second incident I was lying in a position with all-round security. I saw that a car was travelling at high speed towards the checkpoint from the direction of Ar Rumaytha. I saw that it rammed into two drums by the checkpoint and simply continued going. My commander [ICDC Sergeant Hussam Saad] walked forwards together with the interpreter and two Dutch soldiers and then I heard a large number of shots fired. I myself did not fire any shots. I cannot tell you any more than this.'

Name **Haider Shareef**

Weapon number UE 0481 1984

Ammunition 4 Cartridge clips and 120 cartridges in total

'1 cannot tell you anything about the first incident because I was asleep at the time in the watch hut.

During the second incident I was standing by the vehicle checkpoint and I saw a Mercedes Benz driving towards the checkpoint. I saw that the Mercedes Benz rammed into two oil drums and drove on in the direction of Hamsa. I heard the Dutch soldiers shouting stop, stop, and then I heard shots being fired. I saw nothing else because I was standing behind a hut on the opposite side to the watch hut.'

INTERPRETER

Name **Walied Abd Al Hussain Madjied**

Date of birth 25-10-1969 Kuwait / Hawalli

'We started at 0:00 hours and we drove on patrol. Up till 01:30 hours we were present here and then we drove on to the following checkpoint. When we arrived there the checkpoint commander said that shots had been fired at the previous checkpoint. I heard lieutenant V. [presumably Lieutenant A.] say that I should get into the car and we drove back to the checkpoint. When we arrived we asked for details. The checkpoint commander and sergeant Hossam of ICDC said that after we had left a truck had stopped there and its driver said that a vehicle, which was an Opel, was driving behind them. Then an Opel approached, which made a U-turn 100 metres before the checkpoint and switched off its lights. And then there were several shots fired at the checkpoint from this vehicle. Sergeant Hussam Saad then fired two of his magazines, each containing 30 cartridges, at the above-mentioned vehicle until they

were empty. Sergeant Hossam's men also fired shots. After I heard this report I went together with lieutenant V. to look for cartridge cases. We walked past the checkpoint and then I heard the sound of falling drums. I turned around and saw that a vehicle had driven into the drums and was driving towards us. I believe that the vehicle was not driving fast. I did see that the vehicle was swerving. I shouted in Arabic in a loud voice stop, stop, stop, but the vehicle continued going. The man appeared to be drunk and he closed his windows. After the vehicle had passed I heard shots being fired. A Dutch sergeant then told me to look for cover. This Dutch sergeant then shouted in a loud voice to stop firing. I also shouted this in the direction of the people from I.C.D.C. A Dutch soldier on the other side of the road continued firing. He did not stop firing, not even when the Dutch sergeant had called out to stop firing. When the vehicle stopped, on the instructions of the Dutch sergeant I tried to talk to the people in the vehicle. I told the driver to get out and to lie on the ground. He did this. When I started to talk to front-seat passenger, I heard the driver say that the front-seat passenger was injured. We then went straight to the vehicle and opened the front-seat passenger's door. I saw that the front-seat passenger's left arm was bloody. I then walked over to the driver of the vehicle and he said that they had been drinking and had not seen that there was a checkpoint. I could smell that the driver stank of alcohol. While the vehicle was stopped, shots were still being fired, but I do not know where these came from. When we went to pick up cartridge cases from the first incident everyone walked away from the checkpoint and there was no-one on the road and it was dark there. There were no lights showing up the checkpoint, which meant that it was not clear that there was a checkpoint there. I think it is strange that shots were fired at the vehicle because there was no firing at that moment. I think that they should have fired a warning shot, then the vehicle would have stopped. I can also tell you that, during the search for cartridge cases from the first shooting incident, I was walking on the same side together with the Dutch sergeant and the sergeant from I.C.D.C. The Dutch lieutenant was walking on the other side. I do not know how many other people were then walking behind me. I can also tell you that I do not know whether shots were fired at the checkpoint from the vehicle during the second shooting incident.'

On 21 April 2004, at around 05:15 hours was interviewed:

Name; Hussam Saad, the person in question is SGT [sergeant] and local CDT [*commandant*, commander] of ICDC.

Weapon number: 84MD5596 and is AK 47 and at the time of the interview not loaded.

He also had in his possession 2x full magazines (2x30 cartridges).

1 magazine was empty.

'At the start of my duty I had 120 cartridges in my possession. At around 02:10 hours I fired 60 cartridges. At that moment a car came from the direction of Al Hamza and stopped before the Traffic Control Point. The lights of this vehicle were then turned off and then the car turned back in the direction of Al Hamza. I hear shots and see muzzles pointing out of the car. I fire back with my AK 47. My position at the start of this shooting incident was in front of the watch hut. After the shooting we ran in the direction of the vehicle, together with three colleagues. These colleagues are called:

- Alla'a Adnan
- Mohammad Khazem

- Hameed Jaber.

These three colleagues also fired shots.

At around 02:15 hours this car suddenly drove away.

After this we immediately called up the base. Lieutenant A. arrives by us about 20 to 25 minutes later. The CDT, interpreter, lieutenant A. and someone else go to look for cartridge cases. During the search a car approached the Traffic Control Point on the Main Supply Route Jackson from the direction Ruymaythah and heading in the direction of Al Hamza.

The CDT was on the right-hand side of the road looking for cartridge cases, (looking in the direction of Al Hamza). Lieutenant A. was on the left-hand side of the road looking for cartridge cases, (looking in the direction of Al Hamza).

Suddenly I heard the sound as if a car had driven into the drums at the Traffic Control Point. I saw that the car continued driving in the direction of Al Hamza.

We tried to stop the car by shouting. Then we heard shots. I heard shots from the left-hand side of the road (looking in the direction of Al Hamza). As far as I am aware, no shots were fired from the Mercedes. A soldier from the Dutch army was standing on the right-hand side of the road.

I did not fire a single shot myself in the direction of the Mercedes.'

On 21 April 2004 at around 05:30 hours was interviewed;

Name: **Hameed Jaber**

Weapon number: 84MD0596

Ammunition:

1 cartridge clip containing 15 cartridges.

2 cartridge clips, each cartridge clip containing 30 cartridges.

1 cartridge clip containing 25 cartridges.

'At the time of the second incident I was lying behind the watch hut. I saw and I heard a car approaching from the direction of Ar Rumaytah. This vehicle drove at high speed through the checkpoint and rammed into two drums. Then I heard shooting. I do not know anything else. During the 1st incident I fired 15 cartridges.'

On 21 April 2004 at around 06:15 hours was interviewed:

Name: **Haider Mohsen**

Weapon number: GB 4140

Ammunition: 4 magazines, each magazine containing 30 cartridges.

'I was asleep during the 1st incident. I could not go outside on account of the shots being fired at the watch hut. When I came outside I saw a car driving away in the direction of Al Hamza.

During the 2nd incident I saw a Mercedes approaching. I was standing at the VCP. We had 360 degrees all-round security then. I heard the Mercedes driving into the oil drums and saw that it then drove away at high speed in the direction of Al Hamza.

I heard a Dutch person shouting "stop". However, the car did not stop.

I heard shots. I heard the car stop. I heard voices coming from the car radio. This was playing very loudly. I did not see anything else.'

On 21 April 2004 at around 06:00 hours was interviewed:

Name **Ali Hussein**

Weapon number S41297

Ammunition:

3 magazines, each magazine containing 30 cartridges.

1 magazine containing 26 cartridges.

'During the second incident I was lying within an all-round security. I saw a car driving at high speed through the VCP in the direction of Al Hamza. I heard a Dutch soldier shouting 'stop, stop'. I did not want to shoot since our own people were walking in front of the VCP.

Then I heard shots being fired. I fired 4 times during the first incident. I was standing outside the watch hut then.'

On 21 April 2004 at around 05 45 hours was interviewed.

Name: **Ahmed Ghaleb**

Weapon number S54469

Ammunition: 4x30 cartridges.

'During the first incident I was asleep in the watch hut. I did not fire any shots then. During the second incident I was lying within an all-round security just next to the watch hut. I heard a car ramming into two drums. The car continued driving fast, (it was clearly accelerating). Then I heard shots in front of the VCP. I know nothing else.'

Name **Alâa A Dnan**

Weapon number 84 MD 0890

Ammunition 3 magazines with 30 cartridges and 1 magazine with 22 cartridges

'I fired shots during the first incident. These were shots. [*sic*]

During the second incident I was situated in an all-round and was lying on the left-hand side of the road. I was looking in the direction of Hamza. I was [*sic*] that a car was driving from the direction of Ar Rumayta. It drove through the traffic control point and thereby rammed a couple of drums. I could not see what happened then, but I did hear shots being fired.'

Name **Ilia MOHAMMED KHAZEM**, corporal 2nd rank

Weapon number 84 MD 6151

Ammunition 4 magazines with 120 cartridges in total

'I did not fire a single shot last night because 1 did not receive any orders to do so. I was standing by the traffic control point facing the direction of Hamza. At a certain point I heard a car driving into an oil drum. The car continued driving in the direction of Hamza. I heard the Dutch people shouting stop at the driver of the car that had broken through. Then I heard shots. When I saw that the Mercedes had stopped I also

ran in that direction. I could not see who was standing on the left and right-hand sides of the road because it was dark.

Murtada Khazaat

Yasser Abd Alaal

Ahmed Shaker

Ali Hussein

The above-mentioned people came at 04:10 AM hours.'

Name **SAHIB JASSIM**

Weapon number 84 MV 7435

Ammunition 4 magazines with 120 cartridges in total

'During the first incident I was standing by the Traffic Control Point. I saw a truck driving from the direction of Hamza towards the traffic control point. The driver said that he was being followed by a car and he pointed to this car. The driver of the truck said that the car was an Opel. At a certain point there were many shots fired from the car. My colleagues reacted to this and all fired back at the car. We then moved into a 360 degree formation after which the car continued further.

During the second incident I was lying on the ground in an all-round by the traffic control point. I saw a car coming from the direction of Ar Rumayta. The car was travelling at high speed and thereby rammed into an oil drum. The car then drove straight through the traffic point and I heard that shots were fired. I cannot tell you anything else that would further explain the situation."

3. Domestic proceedings

39. On 8 January 2007 the applicant's counsel, Ms Zegveld, wrote via the registry of the Military Chamber to the public prosecution service attached to the Regional Court of Arnhem on behalf of the next-of-kin 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).

40. 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.

41. 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.

42. 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.

43. 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.

44. On 28 January 2008 the Chief Public Prosecutor (*hoofdofficier van justitie*) to the Regional Court of Arnhem wrote to the Chief Advocate General (*hoofdadvocaat-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 were 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 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 objective 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."

45. The public prosecutor further argued that no violation of Article 2 of the Convention under its procedural head could be found, since the Convention did not bind Netherlands troops in Iraq: the Netherlands troops had not exercised effective authority in Iraq.

46. 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 he might be in the world. However, UNSC Resolution 1483 indicated that co-operating States did not have the status of occupying powers, and the armed conflict had ended by the time of Mr Azhar Sabah Jaloud's death. 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.

47. 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 of copies and, where necessary, translations of the Rules of Engagement and the pertinent instructions based thereon; the Iraqi autopsy report; the statement by 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 queried the finding that shots had been fired by Iraqi personnel and argued that Lieutenant A.'s actions had gone beyond legitimate self-defense.

48. The Court of Appeal gave its decision on 7 April 2008. It declined to order further investigative measures, taking the view that the lapse of time since the incident had made any further such measures pointless. It refused to order the prosecution of Lieutenant A. Its reasoning read, *inter alia*, as follows:

"The legitimation for the functional use of force in the area in issue is laid down in the Rules of Engagement (RoE) and the SFIR Instructions on the use of force, revised version of 24 July 2003, which are derived from that document. Counsel has asked the Court of Appeal in camera to make the RoE available. These, however, are not included in the file, [and] neither the Court of Appeal nor the Advocate General have them. The test in the present case will be carried out under the SFIR Instructions on the use of force. It is indicated in this instruction that the use of force is permitted,

inter alia, in self-defence and in defence of own troops and other persons designated by the MND (SE) Commander. On the subject of aimed fire, it is mentioned in this instruction that aimed fire may be given if [an SFIR member himself], own troops or persons under his protection are threatened with violence that may cause serious bodily harm or death and there are no other ways to prevent this. Examples given include cases in which a person fires or aims his weapon at the person concerned, own troops or persons under his protection and in which a person deliberately drives a car into the person concerned, own troops or persons under his protection.

It appears from the file that [Lieutenant A.], who was investigating traces relating to a shooting incident that had taken place shortly before, in which shots had been fired from a car, was confronted on the spot with a car that ignored the VCP and came in his direction at high speed. At that moment shots were fired. [Lieutenant A.] assumed that the shots were being fired from the car. This assumption is entirely understandable, in view of the fact that [Lieutenant A.] was not required to expect that shots would be fired from own or friendly units – the Netherlands servicemen present, or the members of the ICDC present – in his direction. It makes no difference that counsel has argued that others present on the spot made a different assessment of the situation. After all, [Lieutenant A.] was in a different position and did not observe the situation in the same way as the other group on the opposite side of the road, which moreover was using an image intensifier. Nor does the fact that [Lieutenant A.] fired at the moment when the car had passed make any difference, given that shortly before the post had been fired at by a vehicle distancing itself therefrom and [Lieutenant A.] had, as he has indicated, to consider the fact that there were friendly troops on the other side of the road whom he did not wish to draw into his line of fire. Counsel has further suggested that [Lieutenant A.] could have fired a warning shot. Pursuant to the Instructions on the use of force a warning shot shall be fired only if the operational conditions admit of it and there is no need to do so for example if the person concerned or others in the direct vicinity are under armed attack.

In view of the above the Court of Appeal considers that [Lieutenant A.] could reasonably [have] believe[d] that he and his own troops were under fire and that, on this assumption, he acted within the limits of the applicable Instructions on the use of force.

The Court of Appeal therefore finds that the Public Prosecutor rightly declined to bring a prosecution."

B. Weapons used in the incident

1. Diemaco C7A1

49. 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. Its rate of fire in automatic mode is 700-940 rounds per minute.

50. 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

51. 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 and its clones are today issued to the military of many countries, including local forces in Iraq.

52. 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 NATO bullet.

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.

54. 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.

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* [GC], no. 55721/07, §§ 9-19, 7 July 2011.

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*:

"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

"**Mandate/Legal basis**

The basis for sending Netherlands troops to Iraq is to be found in United Nations Security Council Resolution 1483. The Government is of the opinion that the provisions of this resolution provide such a basis. The resolution is explicitly based on Chapter VII of the United Nations Charter, and in its first paragraph appeals to Member States and organisations 'to assist the people of Iraq in their efforts to reform their institutions and rebuild their country, and to contribute to conditions of stability and security in Iraq in accordance with this resolution'. More generally, the penultimate operational paragraph of Resolution 1483 calls upon Member States and international and regional organisations 'to contribute to the implementation of this resolution'. The report of the Security Council meeting at which this resolution was adopted makes it clear that there was broad consensus as regards the starting point that this resolution provides a basis for Member States to send troops to Iraq, within the framework drawn by the resolution.

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.

Paragraph 5 of the resolution makes a clear appeal ('calls upon') to all the countries concerned (including the countries that are not present as occupying powers) 'to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907'. The Netherlands will heed this call."

and

"**Influence**

The Stabilization Force will consist of a coalition of participating countries led by the United States and the United Kingdom. It is important that 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

58. There was a Royal Military Constabulary unit attached to the Netherlands forces in Iraq. It is stated by the applicant that they shared the living quarters of the regular troops.

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

"This instruction sheet contains a simplified rendering, drawn up for commissioned and non-commissioned officers, of the Rules of Engagement (ROE) for MND (SE) and the Netherlands restrictions applied to them. In case of doubt, consult the English-language text of the ROE and the pertaining Netherlands declarations. Where this sheet differs from the ROE and the Netherlands declarations, the ROE and the Netherlands declarations shall take precedence.

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:

(a) to defend own troops and other persons designated by the MND (SE) Commander (*designated persons*);

(b) to prevent the theft or destruction of goods designated by the MND (SE) Commander (*designated property*);

(c) 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*);

(d) 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;

(e) against hostile acts and hostile intent;

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

...

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.

7. You give warning by calling out:

in English:

'STABILIZATION FORCE! STOP OR I WILL FIRE!'

followed by, in the local language,

'OEGAF DFEE-SJ! AU-OE ILLA ARMIE BILL NAAR!'[2] (Stop, army! Or I will fire!)

8. If the warning is not heeded, you may fire a warning shot as ordered by the on-scene commander or on the basis of existing standing orders.

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

2. Transliteration using Dutch orthography

(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

"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.

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.

GENERAL RULES

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

(a) try to avoid escalation;

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

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

4. Persons who attack you or others, or who make or force unauthorised entry into SFIR military installations or other places designated by the MND (SE) Commander, may be apprehended and searched for the purpose of disarming them until it is established that they no longer dispose of weapons with which you or others can be killed or wounded. You may seize dangerous objects and if necessary disable them – for immediate use – if these objects endanger persons, property or the execution of the mission.

5. As soon as the execution of the mission so allows, apprehended persons must be handed over to the competent Iraqi or occupying (UK) authorities.

6. Treat everyone humanely.

7. Collect the wounded and take care of them, regardless of the faction to which they belong.

8. Do not collect 'war trophies'.

9. Prevent violations of the humanitarian laws of war and report any violations and suspected violations to your commander.

10. Report all use of force to your commander.

WARNINGS AND WARNING SHOTS

11. If the situation permits, you are obliged to give warning before firing aimed shots. You warn that you will fire if [the persons addressed] do not halt, or do not cease the endangering act.

You give warning by calling out:

in English:

'STABILIZATION FORCE! STOP OR I WILL FIRE!'

followed by, in the local language,

'OEGAF DFEE-SJ! AU-OE ILLA ARMIE BILL NAAR!' (Stop, army! Or I will fire!)

12. If the warning is not heeded, you may fire a warning shot as ordered by the on-scene commander or on the basis of orders given to you.

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 thrown 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."

E. The Royal Military Constabulary

60. 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.

61. 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*)).

62. 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*).

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

F. The Military Chamber of the Arnhem Court of Appeal

64. At the relevant time, Article 9 of the Code of Military Criminal Procedure (*Wet militaire strafrechtspraak*) provided that the benches of the Military Chamber of the Arnhem Court of Appeal should consist of two judges of the Court of Appeal, one of whom should preside, and one military member. The military member should 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 was also qualified for judicial office; he was promoted to the titular rank of commodore (*commandeur*, Royal Navy), brigadier (*brigadegeneraal*, Royal Army) or air commodore (*commodore*, Royal Air Force) if he did not already hold that substantive rank. He could not be a member of the Royal Military Constabulary. The military member was appointed for a term of

four years, renewable once for a further such term; compulsory retirement was at the age of sixty (Article 6 § 4 of the Code of Military Criminal Procedure).

65. 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 (sections 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.

G. Relevant domestic law and procedure

66. The provisions of domestic law which are relevant to the case are the following:

1. The Constitution of the Kingdom of the Netherlands

Article 97

"1. There shall be armed forces for the defence and protection of the interests of the Kingdom, and in order to maintain and promote the international legal order.

2. The Government shall have supreme authority over the armed forces."

*2. The Criminal Code (*Wetboek van Strafrecht*)*

Article 41

"1. Anyone who commits an act which is necessary in order to defend his own or someone else's physical integrity (*lijf*), sexual integrity (*eerbaarheid*) or property against immediate unlawful assault shall not be liable for punishment in respect of that act.

2. A transgression of the limits of necessary defence shall not be punishable if it has been caused by a strong emotion occasioned, with immediacy, by an assault."

Article 42

"Anyone who commits an act prescribed by law shall not be liable for punishment in respect thereof."

Article 43

"1. Anyone who commits an act for the purpose of carrying out an official order given by the authority invested with the relevant competence shall not be liable for punishment in respect thereof.

2. An official order given without the necessary competence does not confer impunity unless it was considered by the subordinate in good faith as having been given [by an authority acting within their competence] and obedience thereto lay within the ambit of his subordination."

*3. 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."

Article 38

"1. Anyone who commits an act permitted under the laws of war within the limits of his competence, or who could not be punished without violating a treaty in force between the Netherlands and the power with which the Netherlands is at war or any regulation adopted pursuant to such a treaty, shall not be liable for punishment.

2. A serviceman who uses force in the lawful execution of his task and consistent with the rules laid down for that task shall not be liable for punishment."

Article 71

"In this Code the expression 'war' shall be understood to include an armed conflict that cannot be considered a war properly so-called and in which the Kingdom is involved, whether for individual or collective self-defence or for the restoration of international peace and security."

Article 135

"The expression 'service instruction' (*dienstvoorschrift*) shall mean a written decision of general purport given in the form of, or pursuant to, an order in council for the Kingdom or for one of the countries of the Kingdom[3] (*bij of krachtens algemene maatregel van rijksbestuur of van bestuur dan wel een bij of krachtens landsverordening onderscheidenlijk landsbesluit gegeven schriftelijk besluit van algemene strekking*) that concerns a military service interest of whatever nature (*enig militair dienstbelang*) and comprises an order or a prohibition directed to military personnel."

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

Section 1

"...

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

3. The Kingdom of the Netherlands is comprised of autonomous "countries"; at the relevant time, these were the Realm in Europe (the Netherlands proper) and the island of Aruba and the Netherlands Antilles (both in the Caribbean).

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."

*5. 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. ..."

H. Relevant domestic case-law

1. The Eric O. *case*

67. 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.

68. 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.

69. 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.

2. The Mustafić *and* Nuhanović *cases*

70. In 1992 Bosnia and Herzegovina declared independence from the Socialist Federal Republic of Yugoslavia. A war ensued that was to continue until December 1995. By its Resolution 743 (1992) of 21 February 1992, the Security Council of the United Nations set up a United Nations Protection Force (UNPROFOR). Troop-contributing nations included the Netherlands, which provided a battalion of airmobile infantry. This battalion, known as Dutchbat, was deployed as a peacekeeping force under United Nations command in and around the town of Srebrenica in eastern Bosnia, which was then held by the Bosniac-dominated Government of the Republic of Bosnia and Herzegovina.

71. On 10 July 1995 Bosnian Serb forces attacked the Srebrenica "safe area" in overwhelming force. They overran the area and took control despite the presence of Dutchbat, which in the end was left in control only of a compound in the village of Potočari. In the days that followed, Bosniac men who had fallen into the hands of the Bosnian Serb forces were separated from the women and children and killed. It is now generally accepted as fact that upwards of 7,000, perhaps as many as 8,000 Bosniac men and boys died at the hands of the Bosnian Serb forces and of Serb paramilitary forces in what has come to be known as the "Srebrenica massacre".

72. Civil cases have been brought in the Netherlands courts against the Netherlands State by surviving relatives of three men killed in the Srebrenica massacre in July 1995.

73. The plaintiffs in the first case (*Mustafić v. the State of the Netherlands*) are surviving kin of an electrician who was a *de facto* employee of Dutchbat but did not enjoy any status conferred to persons employed by the United Nations directly. They alleged that the Netherlands State committed a breach of contract in that the Dutchbat deputy commander had refused to let him stay with his family in the compound at Potočari, as a result of which he was made to leave the compound that same day, whereas the Dutchbat leadership ought to have protected him by keeping him inside and evacuating him with Dutchbat itself. In the alternative, they alleged a tort. The plaintiff in the second case (*Nuhanović v. the State of the Netherlands*) was himself a *de facto* employee of Dutchbat, for which he worked as an interpreter but also without the status of United Nations employee; he is the son of one man killed in the massacre and the brother of another. He alleged a tort in that the Dutchbat deputy commander had turned the two men out of the compound.

74. On 6 September 2013 the Supreme Court gave judgment in both cases (LJN BZ9225, *Nuhanović*, and LJN BZ9228, *Mustafić*). As relevant to the case before the Court, these judgments, which in their essential parts are identical, read as follows (excerpt from the *Nuhanović* judgment, translation by the Supreme Court itself):

"3.10.1. Part 1 of the cassation appeal submits that in findings of law 5.7 and 5.8 of the interim judgment the Court of Appeal has failed to recognize that a UN troop contingent that has been established in accordance with Chapter VII of the UN Charter and has been placed under the command and control of the United Nations – in this case UNPROFOR, of which Dutchbat formed part – is an organ of the United Nations. This means that attribution of the conduct of such a troop contingent should be made by reference to article 6 DARIO [i.e. the International Law Commission's Draft Articles on the Responsibility of International Organizations (Sixty-third session of the International Law Commission, UN Doc A/66/10, to appear in Yearbook of the International Law Commission, 2011, vol. II, Part Two)] and not by reference to article 7 DARIO. According to this part of the appeal, application of article 6 DARIO means that Dutchbat's conduct should, in principle, always be attributed to the United Nations.

3.10.2. It is apparent from the Commentary of article 7 DARIO ... that this attribution rule applies, *inter alia*, to the situation in which a State places troops at the disposal of the United Nations in the context of a UN peace mission, and command and control is transferred to the United Nations, but the disciplinary powers and criminal jurisdiction (the 'organic command') remain vested in the seconding State. It is implicit in the findings of the Court of Appeal that this situation occurs in the present case. After all, in finding of law 5.10 of the interim judgment the Court of Appeal has held – and this has not been disputed in the cassation appeal – that it is not at issue that the Netherlands, as the troop-contributing State, retained control over the personnel affairs of the military personnel concerned, who had remained in the service of the Netherlands, and retained the power to punish these military personnel under disciplinary and criminal law. The submission in part 1 of the cassation appeal that the Court of Appeal has failed to apply the attribution rule of article 6 DARIO and has instead wrongly applied the attribution rule of article 7 DARIO therefore fails.

3.11.1. Part 2 of the cassation appeal consists of a series of submissions directed against findings of law 5.8 – 5.20 of the interim judgment, in which the Court of Appeal has defined the criterion of effective control in applying the attribution rule of article 7 DARIO to the present case.

3.11.2. In so far as these grounds of appeal are based on the submission that international law excludes the possibility that conduct can be attributed both to an international organization and to a State and that the Court of Appeal therefore wrongly proceeded on the assumption that there was a possibility that both the United Nations and the State had effective control over Dutchbat's disputed conduct, they are based on an incorrect interpretation of the law. As held above at 3.9.4., international law, in particular article 7 DARIO in conjunction with article 48 (1) DARIO, does not exclude the possibility of dual attribution of given conduct.

It follows that the Court of Appeal was able to leave open whether the United Nations had effective control over Dutchbat's conduct in the early evening of 13 July 1995. Even if this was the case, it does not necessarily mean that the United Nations had exclusive responsibility.

3.11.3. In so far as it is submitted in these grounds of the cassation appeal that the Court of Appeal has applied an incorrect criterion in assessing whether the State had effective control over Dutchbat at the moment of the disputed conduct, they too are based on an incorrect interpretation of the law. For the purpose of deciding whether the State had effective control it is not necessary for the State to have countermanded the command structure of the United Nations by giving instructions to Dutchbat or to have exercised operational command independently. It is apparent from the

> Commentary on article 7 DARIO ... that the attribution of conduct to the seconding State or the international organization is based on the factual control over the specific conduct, in which all factual circumstances and the special context of the case must be taken into account. In the disputed findings of law the Court of Appeal has examined, in the light of all circumstances and the special context of the case, whether the State had factual control over Dutchbat's disputed conduct. The Court of Appeal has not therefore interpreted or applied the law incorrectly."

It followed that the Court of Appeal's judgment finding the Netherlands State responsible for the deaths of the three men could stand.

I. Other domestic documents

1. Evaluation report on the application of military criminal procedure in operations abroad

75. This report, dated 31 August 2006, was drawn up by a committee consisting of a senior civil servant, a former chief advocate general to the Arnhem Court of Appeal and a judge. It was commissioned by the Minister of Defence at the request of the Lower House of Parliament in the wake of the commotion caused by the Eric O. case (see §§ 67-69 above).

76. Among the subjects discussed in this report is jurisdiction within the meaning of Article 1 of the Convention. On this point, the report states (p. 30):

> "The formal extraterritorial effect of the Convention would appear limited to certain specific cases. This does not alter the fact that the standards flowing from the Convention are of general importance to Netherlands military operations abroad. In particular, important basic standards arise from the Convention which can apply to criminal investigations into the use of force that has caused death or wounding. ..."

There follows an analysis of domestic case-law on the substantive and procedural aspects of Article 2 in the light of the Court's case-law.

77. The report makes mention of changes already introduced in prosecution policy and the way in which Rules of Engagement and other instructions are relayed to field commanders following the Eric O. case. It suggests further adjustments.

78. Criticism of the lack of preparation of Royal Military Constabulary personnel for police work in foreign theatres of operation is confirmed, but by 2006 "much has been invested in improving the quality of military policing" and more is to be done in the months to come.

79. Similarly, the report states that the Public Prosecution Service, which is composed of civilian lawyers, has on occasion been found lacking in "situational awareness". This has led to over-hasty decisions to prosecute military personnel, the Eric O. case being cited as a case in point. However, here also, improvements are observed.

80. The shooting incident which led to the present application is mentioned among the real-life cases studied by the committee, but is not discussed in detail.

2. The report of the Van den Berg Committee

81. In response to allegations that Iraqi citizens had been maltreated or even tortured by Netherlands military personnel, the Minister of Defence ordered an inquiry by an official committee. This committee included a former member of parliament (its chairman, Dr J.T. van den Berg, from whom the committee takes its name), a serving member of parliament, a retired lieutenant general and a retired rear admiral.

82. A report of the committee's findings was published in June 2007. It is stated that an earlier version of the report was read and commented on by two legal experts, one of these being Ms Zegveld, now the applicant's representative.

83. The report mentions frictions within the Royal Military Constabulary unit, which is stated *inter alia* to have been inadequately trained for police-type criminal investigations, and tensions between the Royal Military Constabulary unit and the Royal Marines battalions, which were the first Netherlands contingents to be sent to Iraq (preceding the Royal Army battalion stationed there at the time of the death of Mr Azhar Sabah Jaloud).

84. The report also states that the Netherlands was not an "occupying power" and for that reason had made certain caveats; among other things, Netherlands troops were not empowered to keep any persons interned or to prosecute crimes. Anyone arrested by Netherlands troops had to be handed over to either the United Kingdom military or to the Iraqi authorities, depending on the nature of the suspicion. "Conversations" with persons so arrested were permitted within the context of force protection.

85. The report addresses the question whether persons outside the Kingdom of the Netherlands in an area where Netherlands troops are operating in an armed conflict can be said to be within Netherlands jurisdiction. It answers this question in the affirmative.

86. The Minister of Defence presented this report to the Lower House of Parliament on 18 June 2007, with a covering letter commenting on some of its findings but endorsing the conclusions.

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.

89. Elsewhere the report states that there were a number of incidents in which Netherlands troops were fired at, a number of which had taken place at vehicle checkpoints. In the cases where Iraqis were wounded or killed, no acts contravening the Rules of Engagement had been established. It is mentioned that one Iraqi wounded by Netherlands fire spent several weeks in the Netherlands for treatment.

J. Relevant international law

1. The Hague Regulations

90. The definition of an Occupying Power, and its duties as relevant to the case before the Court, can be found primarily in Articles 42 to 56 of the Regulations concerning the Laws and Customs of War on Land (The Hague, 18 October 1907: hereafter, "the Hague Regulations").

91. Articles 42 and 43 of the Hague Regulations provide as follows:

Article 42

"Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."

Article 43

"The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

2. The Fourth Geneva Convention

92. Articles 27 to 34 and 47 to 78 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949: hereafter, "the Fourth Geneva Convention") set out the obligations of an Occupying Power in detail. Articles 6 and 29 of the Fourth Geneva Convention provide as follows:

Article 6

"The present Convention shall apply from the outset of any conflict or occupation mentioned in Article 2.

In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations.

In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, and 143."

Article 29

"The Party to the conflict in whose hands protected persons may be is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility which may be incurred."

3. United Nations Security Council Resolutions

93. The Security Council of the United Nations ("the Security Council") adopted Resolution 1483 (2003) at its 4761st meeting on 22 May 2003. As relevant to the case before the Court, it reads as follows:

"*The Security Council*,

Recalling all its previous relevant resolutions,

Reaffirming the sovereignty and territorial integrity of Iraq,

...

Noting the letter of 8 May 2003 from the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland to the President of the Security Council (S/2003/538) and recognizing the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers under unified command (the 'Authority'),

Noting further that other States that are not occupying powers are working now or in the future may work under the Authority,

Welcoming further the willingness of Member States to contribute to stability and security in Iraq by contributing personnel, equipment, and other resources under the Authority,

...

Acting under Chapter VII of the Charter of the United Nations,

1. *Appeals* to Member States and concerned organizations to assist the people of Iraq in their efforts to reform their institutions and rebuild their country, and to contribute to conditions of stability and security in Iraq in accordance with this resolution;

2. *Calls upon* all Member States in a position to do so to respond immediately to the humanitarian appeals of the United Nations and other international organizations for Iraq and to help meet the humanitarian and other needs of the Iraqi people by

providing food, medical supplies, and resources necessary for reconstruction and rehabilitation of Iraq's economic infrastructure;

...

4. *Calls upon* the Authority, consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future;

5. *Calls upon* all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907;

...

8. *Requests* the Secretary-General to appoint a Special Representative for Iraq whose independent responsibilities shall involve reporting regularly to the Council on his activities under this resolution, coordinating activities of the United Nations in post-conflict processes in Iraq, coordinating among United Nations and international agencies engaged in humanitarian assistance and reconstruction activities in Iraq, and, in coordination with the Authority, assisting the people of Iraq through:

(a) coordinating humanitarian and reconstruction assistance by United Nations agencies and between United Nations agencies and non-governmental organizations;

(b) promoting the safe, orderly, and voluntary return of refugees and displaced persons;

(c) working intensively with the Authority, the people of Iraq, and others concerned to advance efforts to restore and establish national and local institutions for representative governance, including by working together to facilitate a process leading to an internationally recognized, representative government of Iraq;

(d) facilitating the reconstruction of key infrastructure, in cooperation with other international organizations;

(e) promoting economic reconstruction and the conditions for sustainable development, including through coordination with national and regional organizations, as appropriate, civil society, donors, and the international financial institutions;

(f) encouraging international efforts to contribute to basic civilian administration functions;

(g) promoting the protection of human rights;

(h) encouraging international efforts to rebuild the capacity of the Iraqi civilian police force; and

(i) encouraging international efforts to promote legal and judicial reform;

9. *Supports* the formation, by the people of Iraq with the help of the Authority and working with the Special Representative, of an Iraqi interim administration as a transitional administration run by Iraqis, until an internationally recognized, representative government is established by the people of Iraq and assumes the responsibilities of the Authority;

...

26. *Calls upon* Member States and international and regional organizations to contribute to the implementation of this resolution;

27. *Decides* to remain seized of this matter."

94. The Security Council adopted Resolution 1511 (2003) at its 4844th meeting on 16 October 2003. As relevant to the case before the Court, it reads as follows:

"*The Security Council*,

Reaffirming its previous resolutions on Iraq, including resolution 1483 (2003) of 22 May 2003 and 1500 (2003) of 14 August 2003, and on threats to peace and security caused by terrorist acts, including resolution 1373 (2001) of 28 September 2001, and other relevant resolutions,

Underscoring that the sovereignty of Iraq resides in the State of Iraq, *reaffirming* the right of the Iraqi people freely to determine their own political future and control their own natural resources, *reiterating* its resolve that the day when Iraqis govern themselves must come quickly, and *recognizing* the importance of international support, particularly that of countries in the region, Iraq's neighbours, and regional organizations, in taking forward this process expeditiously,

Recognizing that international support for restoration of conditions of stability and security is essential to the well-being of the people of Iraq as well as to the ability of all concerned to carry out their work on behalf of the people of Iraq, and *welcoming* Member State contributions in this regard under resolution 1483 (2003),

...

Acting under Chapter VII of the Charter of the United Nations,

...

13. *Determines* that the provision of security and stability is essential to the successful completion of the political process as outlined in paragraph 7 above and to the ability of the United Nations to contribute effectively to that process and the implementation of resolution 1483 (2003), and *authorizes* a multinational force under unified command to take all necessary measures to contribute to the maintenance of security and stability in Iraq, including for the purpose of ensuring necessary conditions for the implementation of the timetable and programme as well as to contribute to the security of the United Nations Assistance Mission for Iraq, the Governing Council of Iraq and other institutions of the Iraqi interim administration, and key humanitarian and economic infrastructure;

14. *Urges* Member States to contribute assistance under this United Nations mandate, including military forces, to the multinational force referred to in paragraph 13 above;

...

16. *Emphasizes* the importance of establishing effective Iraqi police and security forces in maintaining law, order, and security and combating terrorism consistent with paragraph 4 of resolution 1483 (2003), and calls upon Member States and international and regional organizations to contribute to the training and equipping of Iraqi police and security forces;

...

25. *Requests* that the United States, on behalf of the multinational force as outlined in paragraph 13 above, report to the Security Council on the efforts and progress of this force as appropriate and not less than every six months;

26. *Decides* to remain seized of the matter."

4. Case-law of the International Court of Justice

a. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory

95. In *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004*, p. 136, the International Court of Justice held as follows:

"109. The Court would observe that, while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, States parties to the Covenant should be bound to comply with its provisions.

The constant practice of the Human Rights Committee is consistent with this. Thus, the Committee has found the Covenant applicable where the State exercises its jurisdiction on foreign territory. It has ruled on the legality of acts by Uruguay in cases of arrests carried out by Uruguayan agents in Brazil or Argentina (case No. 52/79, *López Burgos v. Uruguay*; case No. 56/79, *Lilian Celiberti de Casariego v. Uruguay*). It decided to the same effect in the case of the confiscation of a passport by a Uruguayan consulate in Germany (case No. 106181, *Montero v. Uruguay*).

The *travaux préparatoires* of the Covenant confirm the Committee's interpretation of Article 2 of that instrument. These show that, in adopting the wording chosen, the drafters of the Covenant did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory. They only intended to prevent persons residing abroad from asserting, vis-à-vis their State of origin, rights that do not fall within the competence of that State, but of that of the State of residence (see the discussion of the preliminary draft in the Commission on Human Rights, E/CN.4/SR.194, para. 46; and United Nations, Official record, of the General Assembly, Tenth Session, Annexes, Al2929, Part II, Chap. V, para. 4 (1955)).

110. The Court takes note in this connection of the position taken by Israel, in relation to the applicability of the Covenant, in its communications to the Human Rights Committee, and of the view of the Committee.

In 1998, Israel stated that, when preparing its report to the Committee, it had had to face the question 'whether individuals resident in the occupied territories were indeed subject to Israel's jurisdiction' for purposes of the application of the Covenant (CCPR/C/SR.1675, para. 21). Israel took the position that 'the Covenant and similar instruments did not apply directly to the current situation in the occupied territories' (ibid., para. 27).

The Committee, in its concluding observations after examination of the report, expressed concern at Israel's attitude and pointed 'to the long-standing presence of Israel in [the occupied] territories, Israel's ambiguous attitude towards their future status, as well as the exercise of effective jurisdiction by Israeli security forces therein' (CCPR/C/79/Add.93, para. 10). In 2003 in face of Israel's consistent position,

to the effect that 'the Covenant does not apply beyond its own territory, notably in the West Bank and Gaza ...', the Committee reached the following conclusion:

> 'in the current circumstances, the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by the State party's authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of State responsibility of Israel under the principles of public international law' (CCPR/C0/78/1SR, para. 11).

111. In conclusion, the Court considers that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory."

b. Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)

96. In *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005*, p. 168, the International Court of Justice held as follows:

"172. The Court observes that, under customary international law, as reflected in Article 42 of the Hague Regulations of 1907, territory is considered to be occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised (see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports* 2004, p. 167, para. 78, and p. 172, para. 89).

173. In order to reach a conclusion as to whether a State, the military forces of which are present on the territory of another State as a result of an intervention, is an 'occupying Power' in the meaning of the term as understood in the *jus in bello*, the Court must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question. In the present case the Court will need to satisfy itself that the Ugandan armed forces in the DRC were not only stationed in particular locations but also that they had substituted their own authority for that of the Congolese Government. In that event, any justification given by Uganda for its occupation would be of no relevance; nor would it be relevant whether or not Uganda had established a structured military administration of the territory occupied."

and

"179. The Court, having concluded that Uganda was an occupying Power in Ituri at the relevant time, finds that Uganda's responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account.

180. The Court notes that Uganda at all times has responsibility for all actions and omissions of its own military forces in the territory of the DRC in breach of its obligations under the rules of international human rights law and international humanitarian law which are relevant and applicable in the specific situation."

and

"213. The Court turns now to the question as to whether acts and omissions of the UPDF and its officers and soldiers are attributable to Uganda. The conduct of the UPDF as a whole is clearly attributable to Uganda, being the conduct of a State organ. According to a well-established rule of international law, which is of customary character, 'the conduct of any organ of a State must be regarded as an act of that State' (*Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports* 1999 (I), p. 87, para. 62). The conduct of individual soldiers and officers of the UPDF is to be considered as the conduct of a State organ. In the Court's view, by virtue of the military status and function of Ugandan soldiers in the DRC, their conduct is attributable to Uganda. The contention that the persons concerned did not act in the capacity of persons exercising governmental authority in the particular circumstances, is therefore without merit.

214. It is furthermore irrelevant for the attribution of their conduct to Uganda whether the UPDF personnel acted contrary to the instructions given or exceeded their authority. According to a well-established rule of a customary nature, as reflected in Article 3 of the Fourth Hague Convention respecting the Laws and Customs of War on Land of 1907 as well as in Article 91 of Protocol I additional to the Geneva Conventions of 1949, a party to an armed conflict shall be responsible for all acts by persons forming part of its armed forces."

c. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)

97. In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, the International Court of Justice held as follows:

"399. This provision [i.e. Article 8 of the International Law Commission's Articles on State responsibility] must be understood in the light of the Court's jurisprudence on the subject, particularly that of the 1986 Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* referred to above (paragraph 391). In that Judgment the Court, as noted above, after having rejected the argument that the contras were to be equated with organs of the United States because they were 'completely dependent' on it, added that the responsibility of the Respondent could still arise if it were proved that it had itself 'directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State' (*I.C.J. Reports 1986*, p. 64, para. 115); this led to the following significant conclusion:

> 'For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.' (Ibid., p. 65.)

400. The test thus formulated differs in two respects from the test — described above — to determine whether a person or entity may be equated with a State organ even if not having that status under internal law. First, in this context it is not necessary to show that the persons who performed the acts alleged to have violated international law were in general in a relationship of 'complete dependence' on the respondent State; it has to be proved that they acted in accordance with that State's instructions or under its 'effective control'. It must however be shown that this

'effective control' was exercised, or that the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations."

and

"406. It must next be noted that the 'overall control' test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. That is true of acts carried out by its official organs, and also by persons or entities which are not formally recognized as official organs under internal law but which must nevertheless be equated with State organs because they are in a relationship of complete dependence on the State. Apart from these cases, a State's responsibility can be incurred for acts committed by persons or groups of persons — neither State organs nor to be equated with such organs — only if, assuming those acts to be internationally wrongful, they are attributable to it under the rule of customary international law reflected in Article 8 cited above [i.e. Article 8 of the International Law Commission's Articles on State responsibility]. This is so where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed. In this regard the 'overall control' test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility."

5. The International Law Commission's Articles on State Responsibility

98. Articles on State Responsibility with commentaries were adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly of the United Nations as a part of the International Law Commission's report covering the work of that session (A/56/10). The report appeared in the Yearbook of the International Law Commission, 2001, vol. II, Part Two. As relevant to the present case, the Articles and their commentaries (adopted together with the Articles themselves) read as follows (footnote references omitted):

Article 2
Elements of an internationally wrongful act of a State

"There is an internationally wrongful act of a State when conduct consisting of an action or omission:

(a) is attributable to the State under international law; and

(b) constitutes a breach of an international obligation of the State."

The commentary on this Article includes the following:

"(5) For particular conduct to be characterized as an internationally wrongful act, it must first be attributable to the State. The State is a real organized entity, a legal person with full authority to act under international law. But to recognize this is not to

deny the elementary fact that the State cannot act of itself. An 'act of the State' must involve some action or omission by a human being or group: 'States can act only by and through their agents and representatives.' The question is which persons should be considered as acting on behalf of the State, i.e. what constitutes an 'act of the State' for the purposes of State responsibility.

(6) In speaking of attribution to the State what is meant is the State as a subject of international law. Under many legal systems, the State organs consist of different legal persons (ministries or other legal entities), which are regarded as having distinct rights and obligations for which they alone can be sued and are responsible. For the purposes of the international law of State responsibility the position is different. The State is treated as a unity, consistent with its recognition as a single legal person in international law. In this as in other respects the attribution of conduct to the State is necessarily a normative operation. What is crucial is that a given event is sufficiently connected to conduct (whether an act or omission) which is attributable to the State under one or other of the rules set out in chapter II.

(7) The second condition for the existence of an internationally wrongful act of the State is that the conduct attributable to the State should constitute a breach of an international obligation of that State ...

(12) In subparagraph (a), the term 'attribution' is used to denote the operation of attaching a given action or omission to a State. In international practice and judicial decisions, the term 'imputation' is also used. But the term 'attribution' avoids any suggestion that the legal process of connecting conduct to the State is a fiction, or that the conduct in question is 'really' that of someone else.

(13) In subparagraph (b), reference is made to the breach of an international obligation rather than a rule or a norm of international law. What matters for these purposes is not simply the existence of a rule but its application in the specific case to the responsible State. The term 'obligation' is commonly used in international judicial decisions and practice and in the literature to cover all the possibilities. The reference to an 'obligation' is limited to an obligation under international law, a matter further clarified in article 3."

Article 6
Conduct of organs placed at the disposal of a State by another State

"The conduct of an organ placed at the disposal of a State by another State shall be considered an act of the former State under international law if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed."

The commentary on this Article includes the following:

"(2) The words 'placed at the disposal of' in article 6 express the essential condition that must be met in order for the conduct of the organ to be regarded under international law as an act of the receiving and not of the sending State. The notion of an organ 'placed at the disposal of' the receiving State is a specialized one, implying that the organ is acting with the consent, under the authority of and for the purposes of the receiving State. Not only must the organ be appointed to perform functions appertaining to the State at whose disposal it is placed, but in performing the functions entrusted to it by the beneficiary State, the organ must also act in conjunction with the machinery of that State and under its exclusive direction and control, rather than on instructions from the sending State. Thus article 6 is not concerned with ordinary situations of inter-State cooperation or collaboration, pursuant to treaty or otherwise.

(3) Examples of situations that could come within this limited notion of a State organ 'placed at the disposal' of another State might include a section of the health service or some other unit placed under the orders of another country to assist in overcoming an epidemic or natural disaster, or judges appointed in particular cases to act as judicial organs of another State. On the other hand, mere aid or assistance offered by organs of one State to another on the territory of the latter is not covered by article 6. For example, armed forces may be sent to assist another State in the exercise of the right of collective self-defence or for other purposes. Where the forces in question remain under the authority of the sending State, they exercise elements of the governmental authority of that State and not of the receiving State. Situations can also arise where the organ of one State acts on the joint instructions of its own and another State, or there may be a single entity which is a joint organ of several States. In these cases, the conduct in question is attributable to both States under other articles of this chapter.

(4) Thus, what is crucial for the purposes of article 6 is the establishment of a functional link between the organ in question and the structure or authority of the receiving State. The notion of an organ 'placed at the disposal' of another State excludes the case of State organs, sent to another State for the purposes of the former State or even for shared purposes, which retain their own autonomy and status: for example, cultural missions, diplomatic or consular missions, foreign relief or aid organizations. Also excluded from the ambit of article 6 are situations in which functions of the 'beneficiary' State are performed without its consent, as when a State placed in a position of dependence, territorial occupation or the like is compelled to allow the acts of its own organs to be set aside and replaced to a greater or lesser extent by those of the other State.

(5) There are two further criteria that must be met for article 6 to apply. First, the organ in question must possess the status of an organ of the sending State; and secondly its conduct must involve the exercise of elements of the governmental authority of the receiving State. The first of these conditions excludes from the ambit of article 6 the conduct of private entities or individuals which have never had the status of an organ of the sending State. For example, experts or advisers placed at the disposal of a State under technical assistance programmes do not usually have the status of organs of the sending State. The second condition is that the organ placed at the disposal of a State by another State must be 'acting in the exercise of elements of the governmental authority' of the receiving State. There will only be an act attributable to the receiving State where the conduct of the loaned organ involves the exercise of the governmental authority of that State. By comparison with the number of cases of cooperative action by States in fields such as mutual defence, aid and development, article 6 covers only a specific and limited notion of 'transferred responsibility'. Yet, in State practice the situation is not unknown."

Article 8
Conduct directed or controlled by a State

"The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."

The commentary on this Article includes the following:

"(2) The attribution to the State of conduct in fact authorized by it is widely accepted in international jurisprudence. In such cases it does not matter that the person

or persons involved are private individuals nor whether their conduct involves 'governmental activity'. Most commonly, cases of this kind will arise where State organs supplement their own action by recruiting or instigating private persons or groups who act as 'auxiliaries' while remaining outside the official structure of the State. These include, for example, individuals or groups of private individuals who, though not specifically commissioned by the State and not forming part of its police or armed forces, are employed as auxiliaries or are sent as 'volunteers' to neighbouring countries, or who are instructed to carry out particular missions abroad."

and

"(5) The Appeals Chamber of the International Tribunal for the Former Yugoslavia has also addressed these issues. In the Tadić case, the Chamber stressed that:

The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The degree of control may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control.

The Appeals Chamber held that the requisite degree of control by the Yugoslavian 'authorities over these armed forces required by international law for considering the armed conflict to be international was overall control going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations'. In the course of their reasoning, the majority considered it necessary to disapprove the ICJ approach in the Military and Paramilitary Activities in and against Nicaragua case. But the legal issues and the factual situation in the Tadić case were different from those facing the Court in that case. The tribunal's mandate is directed to issues of individual criminal responsibility, not State responsibility, and the question in that case concerned not responsibility but the applicable rules of international humanitarian law. In any event it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it."

K. Documents relevant to the occupation of Iraq

1. Coalition Provisional Authority Order no. 28

99. Coalition Provisional Authority Order no. 28, entitled "Establishment Of The Iraqi Civil Defense Corps", was promulgated by the Administrator of the Coalition Provisional Authority, Ambassador L. Paul Bremer, on 9 March 2003. As relevant to the case before the Court, it provides as follows:

"*Pursuant* to my authority as head of the Coalition Provisional Authority (CPA), under the laws and usages of war, and consistent with relevant United Nations Security Council resolutions, including Resolution 1483(2003),

Noting that Resolution 1483 appeals to Member States to assist the people of Iraq in their efforts to reform their institutions, rebuild their country, and to contribute to conditions of stability and security in Iraq,

Understanding the need to address promptly threats to public security and stability resulting from wrongful acts or disasters,

Recognizing that continued attacks and acts of sabotage by Ba`athist remnants and terrorists intent on undermining security in Iraq necessitate the temporary establishment of an Iraqi constabulary force to operate with Coalition Forces to counter the threat and maintain security in Iraq,

I hereby promulgate the following:

Section 1
Establishment of the Iraqi Civil Defense Corps

1) The Iraqi Civil Defense Corps is established as a temporary institution, subject to a decision by an internationally recognized, representative government, established by the people of Iraq, to continue or disband the Corps.

2) The Iraqi Civil Defense Corps is a security and emergency service agency for Iraq. The Iraqi Civil Defense Corps is composed of Iraqis who will complement operations conducted by Coalition military forces in Iraq to counter organized groups and individuals employing violence against the people of Iraq and their national infrastructure.

3) In support of Coalition operations to provide security and stability to the people of Iraq, the Iraqi Civil Defense Corps is authorized to perform constabulary duties, including the following tasks: patrolling urban and rural areas; conducting operations to search for and seize illegal weapons and other contraband; providing fixed site, check point, area, route and convoy security; providing crowd and riot control; disaster response services; search and rescue services; providing support to humanitarian missions and disaster recover (sic) operations including transportation services; conducting joint patrols with Coalition Forces; and, participating in other activities designed to build positive relationships between the Iraqi people and Coalition authorities including serving as community liaisons.

4) The Iraqi Civil Defense Corps is distinct from the Iraqi police force and the New Iraqi Army. The Iraqi Civil Defense Corps will complement the police force, but will be designed to perform operations that exceed the capacity of the police.

a) While on duty and under the supervision of Coalition Forces, members of the Iraqi Civil Defense Corps will not be subject to the direction or control of the Iraqi Police. Except as provided herein, the Iraqi Civil Defense Corps will not have, or exercise, domestic law enforcement functions.

b) The Iraqi Civil Defense Corps is not a component of the New Iraqi Army established by CPA Order 22, Creation of a New Iraqi Army (CPA/ORD/9 August 2003/22) and is not subject to the orders of the New Iraqi Army chain of command.

...

Section 4
Functioning of the Iraqi Civil Defense Corps

1) The Iraqi Civil Defense Corps shall operate under the authority of the Administrator of the CPA and shall be subject to the supervision of Coalition Forces. The Administrator of the CPA may delegate to the senior military commander of Coalition Forces in Iraq responsibility and authority for the recruiting, training, organization, and control of the Iraqi Civil Defense Corps. This responsibility and authority may be redelegated pursuant to Section 7 below.

2) Operational or tactical command of units of the Iraqi Civil Defense Corps operating with Coalition Forces shall be vested in an officer of Coalition Forces

designated by the senior military commander of Coalition Forces in Iraq pursuant to Section 7 below. ...

...

Section 7 Delegation of Authority

The Administrator of the Coalition Provisional Authority may delegate responsibilities under this Order, as determined by the Administrator, to the senior military commander of Coalition Forces in Iraq. The senior military commander of Coalition Forces in Iraq may further delegate responsibilities under this Order to those under his command."

2. The MND (SE) (Multinational Division, South East) Memorandum of Understanding

100. The respondent Government have submitted the following excerpt from the Memorandum of Understanding governing the arrangement between the Netherlands and the United Kingdom:

"14.1 Members of MND (SE) may possess and carry arms and ammunition in Iraq according to their respective national operations rules and procedures for the purposes of carrying out the MND (SE) mission and when authorized to do so by Comd MND (SE).

14.2 ROE for the MND (SE) are at Annex F. The fundamental driver for the level of permissiveness in the ROE profile is Force Protection rather than the MND (SE) mission. Participants may indicate their intention to apply different levels of permissiveness to their own forces by means of national direction or clarifications to their National Contingent Commanders provided that:

a. All differences are communicated to Comd MND (SE) Legal Adviser prior to implementation of such ROE in Iraq.

b. No difference is more permissive than that authorized by MND (SE) ROE.

14.3 Due to its classification, Annex E [presumably Annex F is meant] is issued separately on restricted circulation. Signature of this MOU, however, signifies accession to the ROE contained within Annex F."

101. According to the Government, the Memorandum of Understanding also provided that the Netherlands would exercise exclusive disciplinary and criminal jurisdiction over its personnel.

102. The Agent of the respondent Government, speaking at the hearing, stated that the Memorandum of Understanding was a classified document and that the Minister of Defence had declined to declassify it in order that it be submitted to the Court.

3. The MND (C-S) (Multinational Division, Central-South) Memorandum of Understanding

103. Latvian troops participated in SFIR as part of the multinational division stationed in Central-South Iraq under Polish command. The Government of the Republic of Latvia published the applicable

Memorandum of Understanding in the *Latvian Herald* (Latvijas Vēstnesis) the official publication of legal acts and official announcements, on 11 January 2005 (no. 5 (3163)). In its relevant parts, it reads as follows:

"**SECTION FOUR — MANDATE**

4.1. In accordance with the UNSCR 1483, the mandate of the SFIR MND (C-S) will be to assist the Authority in maintaining stability and security in Iraq by contributing personnel, equipment and other resources to work under its unified command in accordance with arrangements set out in section five below. Main tasks of the MND (C-S) are set out in the Mission Statement annexed to this MOU ...

4.2. Members of MND (C-S) will carry out their duties in a strict, fair and equitable manner and will refrain from any action incompatible with the independent nature of their duties. This does not interfere with the right of SFIR to act in self-defence, extended self-defence as well as force protection and mission enforcement.

SECTION FIVE — COMMAND AND CONTROL OF MND (C-S)

5.1. The post of Commander MND (C-S) will be held by the Republic of Poland. The Republic of Poland will co-ordinate the introduction of the MND (C-S) structure and will be responsible for ensuring that the Participants remain informed of progress in implementing that structure.

5.2. Members of National Contingents will remain under Full Command of their participant through their National Contingent Commander/Senior National Representative. Operational Control of all National Contingents contributed to MND (C-S) will be assigned to a superior Commander.

5.3. Participants are responsible for planning and execution of movements of their forces and sustainment from home stations to PODs [ports of disembarkation] along the strategic LOCs [lines of communication]. This responsibility can be delegated to other agencies who act on behalf of the Participants. Reception, Staging and Onward Movements (RSOM) operations including Port Clearance will be conducted in line with existing Standard Operating Procedures unless otherwise decided. Tactical Control of all aspects of the Strategic and Tactical LOCs will be assigned to the respective Movements Control Organisations at the theatre level (CJTF-7).

5.4. Comd MND (C-S) has Co-ordinating Authority over National Support Element logistic assets in order to meet operational requirements or to ensure deconfliction of use of limited infrastructure or assets. In such circumstances the provisions of Section eleven may be applied. Those logistic assets that form all or part of a Participant's contribution to MND (C-S) will be controlled in accordance with para 5.2 above.

5.5. Transfer of Authority (TO A) of Forces to Comd MND (C-S) in accordance with the Command Status above, will take place at declared Full Operational Capability (FOC) by the National Contingent Commanders (NCCs). Participants will confirm the Command Status of their Forces by signal to Comd MND (C-S) on TOA.

5.6. National Contingent Commanders/Senior National Representatives are responsible for the maintenance of order and discipline within the National Contingent under his or her command.

5.7. Comd MND (C-S) may request the withdrawal of any personnel contributed to MND (C-S). National Contingent Commanders/Senior National Representatives will review any such request and will seek to comply where permissible in accordance with their own National regulations.

5.8. Comd MND (C-S) is responsible for coordination with CPA in the MND (C-S) AOR. Brigade Commanders after consultation with concerned Participants will nominate representatives to be the military point of contact with CPA inside their Brigade AOR, keeping informed MND (C-S) Commander. These representatives will also sit on a Joint Co-ordination Board.

5.9. English will be the official working and command language in the MND (C-S) down to the battalion level, except for the Battle Group 1.

SECTION FOURTEEN — RULES OF ENGAGEMENT (ROE)/CARRIAGE OF ARMS AND AMMUNITION

14.1. Members of MND (C-S) may possess and carry arms and ammunition in Iraq for the purposes of carrying out the MND (C-S) mission when authorised to do so by Comd MND (C-S).

14.2. ROE for the MND (C-S) will be a part of MND (C-S) operational order. The fundamental driver for the level of permissiveness in the ROE Profile is Force Protection rather than the MND (C-S) mission. Participants may indicate their intention to apply different levels of permissiveness to their own forces by means of national direction or clarifications to their National Contingent Commanders/Senior National Representatives provided that:

a. Initial differences are to be communicated to Comd MND (C-S) before TO A. Other differences can be communicated if there is a need.

b. No difference is more permissive than that authorised MND (C-S) ROE.

SECTION SIXTEEN — CLAIMS

16.1. Except as covered elsewhere in this MOU, each Participant waives any claim it may have against any other Participant for injury (including injury resulting in death) suffered by its National Contingent personnel and damage or loss of property owned by it, its National Contingent personnel caused by acts of omissions of any other Participant or its National Contingent personnel in the performance of official duties in connection with this MOU.

16.2. Where the relevant Participants mutually determine in respect of any claim that damage, loss, injury or death was caused by reckless acts, reckless omissions, wilful misconduct or gross negligence of only one of the Participants, its service personnel, servants or agents the costs of any liability will be borne by that Participant alone.

16.3. Where more than one Participant is responsible for the injury, death, loss or damage or it is not possible to attribute responsibility for the injury, death, loss or damage specifically to one Participant, the handling and settling of the claim will be approved by the relevant Participants. The costs of handling and settling the claims will be equally shared between the Participants concerned.

16.4. Third party claims including those for property loss or damage and for personal injury, illness or death or in respect of any other matter arising from or attributed to MND (C-S) personnel or any persons employed by it, whether normally resident in Iraq or not and that do not arise in connection with military combat operations, shall be submitted and dealt with by the Participant whose National Contingent personnel, property, activities or other assets are alleged to have caused the claimed damage, in a manner consistent with the national laws of the Participant state.

16.5. Third party claims will be received initially by HQ MND (C-S) and will be forwarded to the Participant deemed to be responsible. Where more than one Participant is responsible for the injury, death, loss or damage or it is not possible to attribute responsibility for the injury, death, loss or damage specifically to one Participant; the cost of handling and settling the third party claims will be distributed equally between the Participants concerned.

ANNEX A
TO THE MND (C-S) MOU

THE STABILIZATION FORCE MND (C-S) MISSION STATEMENT

Introduction

1. The Mission will involve the Participants in assisting with the conduct of key tasks. Furthermore, these tasks will increasingly involve working with the Coalition Provisional Authority (CPA) and the local people of Iraq with respect to restoration and establishment of local institutions.

MND C-S Area of Operational Responsibility (AOR)

2. The Area of Operational Responsibility (AOR) for the Stabilization Force in Iraq (SFIR) in MND (C-S) comprises five provinces: Babil, Karbala, Wasit, Al Qadistyah, An Najaf A provisional map of the MND (C-S) AOR is at Appendix 1 to this Annex.

Key Tasks

3. The SFIR MND (C-S) will undertake a range of tasks in the AOR in support of its Mission and these will be determined in response to the changing situation. Key tasks, will include:

a. External Security/Border Security. SFIR MND (C-S) led. Protection of key points, including monitoring the land border and assisting in the establishment and training of an Iraqi Border Security Force.

b. Internal Security. SFIR MND (C-S) led. The maintenance of a safe and secure environment, including intelligence-led operations to dislocate the threat from subversive and armed groups.

c. Force Protection. SFIR MND (C-S) led. This will include all aspects of current operations to ensure the security of SFIR and, for a limited period, CPA personnel throughout the AOR

d. Fixed Site Security. SFIR MND (C-S) led. This will include responsibility for maintaining security at the critical and sensitive sites within the AOR

e. Governance and Support for Infrastructure. CPA led. SFIR MND (C-S) will, for a limited period of time, support CPA (C-S) efforts to establish local governance based on the rule of law that affords equal rights and justice to all Iraqi citizens in the AOR without regard to ethnicity, religion, or gender. SFIR MND (C-S) will support this by working at the local and regional level to establish mechanisms for governance and civil administration until the CPA has the capability of working with the local Iraqi people to establish full governance. SFIR MND (C-S) will continue to support this within the AOR with Government Support Teams (GST) until the CPA Local Government Teams (LGT) are operational within the AOR Com SFIR MND (C-S) will continue to provide liaison to the GST after the CPA assumes control and will work closely with CPA (C-S) to ensure military operations are synchronised with

Coalition activities. Further support may be provided for a limited period to assist in the establishment and maintenance of Iraqi infrastructure.

f. Law Enforcement Development. CPA led. SFIR MND (C-S) will provide support for a limited period. SFIR MND (C-S) will continue to assist with the development of the Civilian Police Force, including the conduct of joint patrols, the establishment of a Police Evaluation Team, the development of a Complaints Procedure, and support to the local Iraqi courts and judiciary in maintaining law & order. After successful transition to the CPA and the local Iraqis, SFIR MND (C-S) will maintain a liaison role in order to coordinate law enforcement operations, training and oversight with the military.

g. War Criminals. CPA led. SFIR MND (C-S) may need to provide support to facilitate the detention of suspected war criminal in the AOR.

h. Restoration of Essential Services. CPA led. SFIR MND (C-S) will provide support for a limited period until civilian contracted and Iraqi personnel can assume responsibility. SFIR MND (C-S) will be responsible with the support of CPA for facilitating the provision of essential services within the AOR.

i. Building the Iraqi Military. CPA led. SFIR MND (C-S) will provide nominal military support but the manning, training and equipping of an Iraqi Military Structure are a CPA function.

4. Under the Fourth Geneva Convention (the Civilian convention) the only authority to act as the 'detaining power' in the AOR is the Comd SFIR MND (C-S) on behalf of the Authority.

5. The Commander of SFIR MND (C-S) will liaise with such political, social and religious leaders as necessary in the AOR to ensure that religious, ethnic and cultural sensitivities in Iraq are appropriately respected by the members of the SFIR MND (C-S).

Identification

6. SFIR MND (C-S) military and paramilitary personnel will wear uniforms and carry arms as authorised by their orders. The Iraqi Civilian Police Force, when on duty, will be visibly identified by uniform or other distinctive markings and may carry arms as authorised by CPA Regulations and Orders and once the Iraqi (Administration) is established.

Threat Assessment

7. Coalition Forces assess that the internal threat to stability in Iraq is from armed factions jostling for political power and influence, remnants of the Baath Party and its splinter organisations, criminals and terrorists. Externally, the threat is limited and neighbouring countries are supportive. The situation is dynamic and may change. The SFIR MND (C-S) force posture may need to be adjusted as the situation develops and Participants will need to be flexible.

8. The Participants must understand the need to provide the Commander of SFIR MND (C-S) with any information relevant to the security of the mission, its personnel, equipment and locations.

Membership of SFIR in MND (C-S)

9. It is understood that once the MND (C-S) is established, its membership may change

Final Authority to Interpret

10. The Commander of MND (C-S) is the final authority regarding operational interpretation of this Mission statement.

Summary

11. This Mission Statement sets out the obligations and responsibilities of the Participants and outlines main tasks of the SFIR MND (C-S) mission in the AOR."

104. The signatories to this document are the Republic of Latvia, the Ministry of Defence of the Republic of Bulgaria, the Ministry of Defence of the Kingdom of Denmark, the Secretary of the Armed Forces of the Dominican Republic, the Department of National Defence of the Philippines, the Secretary of Defence of the Republic of Honduras, the Ministry of Defence of the Republic of Hungary, the Ministry of Defence of the Republic of Kazakhstan, the Ministry of National Defence of the Republic of Lithuania, the Ministry of Defence of Mongolia, the Minister of Defence of the Kingdom of the Netherlands, the Ministry of Defence of the Republic of Nicaragua, the Ministry of Defence of the Kingdom of Norway, the Ministry of National Defence of Romania, the Ministry of Defence of the Republic of El Salvador, the Ministry of Defence of the Slovak Republic, the Ministry of Defence of the Kingdom of Spain, the Ministry of Defence of the Kingdom of Thailand, the Ministry of Defence of Ukraine and the Minister of National Defence of the Republic of Poland.

COMPLAINTS

105. The applicant alleged violations of Article 2 in its procedural aspect.

106. He complained that the investigation had been insufficiently independent, for the following reasons:

(a) The Royal Military Constabulary unit in Iraq had been under the sole command of the Netherlands battalion commander; there had been no presence of the public prosecution service. Since the members of the unit shared their living quarters with the regular troops, the distance between them and the individuals they might be called upon to investigate had been 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 who did not belong to the judiciary, also placed full reliance on the results of the very limited investigations by the Royal Military Constabulary.

107. The applicant also complained that the investigation had been insufficiently effective, for the following reasons:

(a) No statements had been taken from the 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, had been 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. had not been questioned for the first time until seven hours after the incident, and had not been separated from the other witnesses during that period. 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) Furthermore, the list obtained by Lieutenant A. had not been 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 during that period. 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 had been treated in a similarly careless fashion. In particular, no detailed translation had been made of the report concerning the bullet fragments taken from the body.

108. Finally, the applicant complained that Mr Azhar Sabah Jaloud's next-of-kin had been insufficiently involved in the investigation and informed of its progress. In particular, no attempt had ever been made to contact Mr Azhar Sabah Jaloud's family; nor had anyone taken the trouble to inform them of the decision not to prosecute Lieutenant A.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

A. Admissibility

1. The Government's preliminary objection

109. The Government disputed the admissibility of the application on the ground that Mr Azhar Sabah Jaloud had not fallen within the "jurisdiction" of the respondent Contracting Party within the meaning of Article 1 of the Convention.

110. As it did in *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, § 102, ECHR 2011, the Court will join this objection to the merits.

2. Conclusion on admissibility

111. The Court considers, in the light of the parties' submissions, that the application raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. No other ground for declaring it inadmissible has been established. Without prejudice to its decision on the Government's preliminary objection, which it will decide below, the Court will therefore declare the application admissible.

B. Jurisdiction

1. Arguments before the Court

a. The respondent Government

112. The Netherlands Government argued that the events complained of did not fall within the "jurisdiction" of the Netherlands within the meaning of Article 1 of the Convention. They asked the Court to distinguish the present case from *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, ECHR 2011.

113. Firstly, the Netherlands was not an "occupying power" in terms of international humanitarian law. Only the United States and the United Kingdom were "occupying powers", having been so designated by United Nations Security Council Resolution 1483; this distinguished them from the other States working under the Coalition Provisional Authority.

114. Nor had the Netherlands assumed in Iraq any of the public powers normally to be exercised by a sovereign government. These powers were

entirely in the hands of the United States and the United Kingdom, which had set up the Coalition Provisional Authority.

115. The Netherlands contingent had at all times been under the operational control of the commander of MND (SE), an officer from the United Kingdom.

116. Although in the early stages of SFIR operations Netherlands troops had had to involve themselves in law enforcement, in the course of 2003 that responsibility had passed into the hands of Iraqi authorities. By the time of the events complained of, therefore, police powers were not exercised by Netherlands authorities or troops.

117. In *Al-Skeini and Others*, the Court had found the United Kingdom to have "jurisdiction" within the meaning of Article 1 of the Convention because the deaths in issue had occurred as a result of the actions of United Kingdom soldiers during the course of, or contiguous to, security operations, notably military patrols, carried out by them. In contrast, the death of Mr Azhar Sabah Jaloud had occurred at a vehicle checkpoint established and manned by the ICDC. Although Netherlands military personnel had been there at the relevant time to observe and advise, this did not imply a hierarchical relationship such as would render the Netherlands responsible: authority rested with the Iraqi security forces.

118. Netherlands forces had not at any time exercised physical authority or control over Mr Azhar Sabah Jaloud, since he had never been in their custody. More generally, Netherlands forces had been present in south-eastern Iraq in limited strength and they had not had the degree of control needed to bring the area within Netherlands "jurisdiction" for purposes of Article 1.

119. The fact of a serviceman firing at a person, even assuming it could be established that the shot was fatal, was not in itself sufficient for jurisdiction in this sense to arise. The respondent Government pointed to *Banković and Others v. Belgium and Others* (GC) (dec.), no. 52207/99, ECHR 2001-XII, in which the Court had found that the mere fact of being the victim of an attack by bomber aircraft of a particular State did not suffice to bring a person within the jurisdiction of that State.

120. Finally, even assuming that at the relevant time the Netherlands exercised effective control over the vehicle checkpoint, the area in question was so limited that there would no longer be any meaningful difference between "effective overall control of an area" and "State agent authority and control".

b. The intervening Government

121. The United Kingdom Government stressed the "essentially territorial" nature of jurisdiction within the meaning of Article 1; any extension outside the territory of a Contracting State was exceptional. They interpreted the above-mentioned *Banković* decision, in particular its § 65, as

implying that the notion of "jurisdiction" should not be allowed to "evolve", or "incrementally develop", in the same way as the law in respect of the substantive rights and freedoms guaranteed by the Convention; in their words, the "living instrument" doctrine was inapplicable.

122. They argued that a Contracting State which exercised "effective control over an area" outside its national territory, whether as a result of lawful or unlawful military action, had the responsibility under Article 1 to secure within that area the entire range of substantive rights set out in the Convention and those additional Protocols which it had ratified. From this it followed, in their submission, that the circumstances in which this exception to the territorial nature of jurisdiction might be applied were necessarily very limited.

123. Even so, in § 80 of *Al-Skeini and Others* the Court had agreed with the British Court of Appeal that it would have been unrealistic for United Kingdom forces in Basrah City and elsewhere in Iraq to be expected to guarantee the entire gamut of substantive Convention rights to the local population.

124. In *Al-Skeini and Others* and in other cases the Court had found Article 1 jurisdiction to exist based on exclusive physical power and control and actual or purported legal authority over an individual (hypothetically in *Issa and Others v. Turkey*, no. 31821/96, 16 November 2004, but in reality in *Öcalan v. Turkey* [GC], no. 46221/99, ECHR 2005-IV; *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, ECHR 2010; and *Medvedyev and Others v. France* [GC], no. 3394/03, ECHR 2010). In contrast, in the above-mentioned *Banković and Others* decision the physical act of bombing had not been seen as an example of physical power and control such as might give rise to extra-territorial jurisdiction; consequently, neither should the physical act of shooting at a moving vehicle occupied by individuals not in detention.

125. An essential difference between the present case and *Al-Skeini and Others* was the fact that in the latter case the United Kingdom was recognised as an "occupying power" within the meaning of Article 42 of the Hague Rules and therefore had the attendant duty under Article 43 of those Rules to exercise the powers normally belonging to the State.

126. Finally, if the Court were to conclude that the Netherlands had jurisdiction in the present case, there was a "real risk" that Contracting States might in future be "deterred from answering the call of the United Nations Security Council to contribute troops to United Nations mandated forces, to the detriment of the United Nations Security council's mission to secure international peace and security".

c. The applicant

127. In the applicant's submission the matters complained of came within the jurisdiction of the Netherlands.

128. In the first place, jurisdiction arose by virtue of the control enjoyed by the Netherlands over its own servicemen. Through them, the Netherlands exercised some key public powers. The Coalition Provisional Authority was not run by the United States and the United Kingdom alone; while these two States had taken upon themselves tasks of an administrative and coordinative nature, other States – including the Netherlands – participated by enforcing the CPA's authority and providing security. This comprised "the exercise of some of the public powers normally to be exercised by a sovereign government".

129. Netherlands troops were exercising such public powers when, with the "consent, invitation or acquiescence" of the CPA, it oversaw the ICDC at the checkpoint.

130. As was reflected in the official position of the Netherlands Government, the Netherlands at all times retained full command over Netherlands military personnel.

131. In the second place, the Netherlands enjoyed jurisdiction by virtue of its effective military control over the area in question. Citing *Issa and Others v. Turkey*, no. 31821/96, 16 November 2004, the applicant argued that jurisdiction could arise even if military control was limited in time and geographical projection.

132. In the third place, the Netherlands enjoyed jurisdiction as an "occupying power" within the meaning of Article 42 of the Hague Rules. Although admittedly only the United States and the United Kingdom were actually named as "occupying powers" by United Nations Security Council resolution 1483, the determination of that status within the meaning of the Hague Rules was a question of fact, not of choice.

133. The MND (C-S) Memorandum of Understanding (see paragraph 103 above) – which the applicant took to be the same, for present purposes, as the Memorandum of Understanding applicable in the present case – actually referred to the Hague Rules, from which it followed that those Rules were applicable.

134. In the fourth place, no other State had control over the events in issue. The United Kingdom had no direct military responsibility in Al-Muthanna province; nor in any case had the Netherlands ever sought to defer jurisdiction to it. Nor did any Iraqi civilian administration or military or police forces exist at the relevant time; during this period, it was the CPA which exercised the powers of government, alongside other members of the military coalition, including the Netherlands.

135. As to the facts of the case, Netherlands military personnel had been in control of the vehicle checkpoint, and had authority over the Iraqi personnel manning it. Moreover, the Netherlands Royal Military Constabulary had carried out the investigation: they had seized ICDC Sergeant Hussam Saad's rifle, Mr Dawoud Joad Kathim's car and Mr Azhar

Sabah Jaloud's body. This meant that the Netherlands had exercised "some of the public powers normally to be exercised by a sovereign government".

136. Finally, the Netherlands Minister of Defence, in his letter of 18 June 2007 transmitting the report of the Van den Berg Committee to Parliament, had endorsed that committee's conclusion that the Convention applied to Netherlands troops in their dealings with Iraqi nationals in Iraq.

2. The Court's assessment

a. The MND (C-S) (Multinational Division, Central-South) Memorandum of Understanding

137. Speaking at the Court's hearing, the Agent of the Government stated, in response to a question from the Court, that the Netherlands defence authorities had declined to declassify the Memorandum of Understanding applicable between the United Kingdom and the Netherlands in Al-Muthanna Province for the Court's use; however, the MND (C-S)) Memorandum of Understanding "[gave] a good idea of the kind of document we [were] talking about".

138. The Court notes that the signatories to the MND (C-S) Memorandum of Understanding include the defence authorities of a multitude of SFIR troop contributors, including the Netherlands Minister of Defence (see paragraph 104 above). It also observes that the section of the MND (SE) Memorandum of Understanding that the Government have been prepared to divulge (see paragraph 100 above) is very similar, though not identical, to the corresponding section of the MND (C-S) Memorandum of Understanding (see paragraph 103 above), and that the Agent of the respondent Government has not made mention of, or even suggested, the existence of any significant substantive difference between the two memoranda. In these circumstances, the Court will proceed on the basis that the two documents are in the relevant respects the same. It will nonetheless use the MND (C-S) Memorandum of Understanding with appropriate caution.

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 (compare *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, § 109, see paragraph 95 above). 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' (see *Soering v. the United Kingdom*, 7 July 1989, § 86, Series A no. 161; *Banković and Others v. Belgium and Others* [GC] (dec.), no. 52207/99, § 66, ECHR 2001‑XII). '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 (see *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 311, ECHR 2004‑VII).

(α) The territorial principle

131. A State's jurisdictional competence under Article 1 is primarily territorial (see *Soering*, cited above, § 86; *Banković*, cited above, §§ 61 and 67; *Ilaşcu*, cited above, § 312). Jurisdiction is presumed to be exercised normally throughout the State's territory (*Ilaşcu*, cited above, § 312; *Assanidze v. Georgia* [GC], no. 71503/01, § 139, ECHR 2004‑II). 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 (*Banković*, cited above, § 67).

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 (see *Drozd and Janousek v. France and Spain*, judgment of 26 June 1992, Series A no. 240, § 91; *Loizidou v. Turkey (preliminary objections)*, 23 March 1995, § 62, Series A no. 310; *Loizidou v. Turkey (merits)*, 18 December 1996, § 52, *Reports of Judgments and Decisions* 1996‑VI; and *Banković*, cited above, 69)...

135. .. [T]he Court has recognised the exercise of extra-territorial jurisdiction by a Contracting State when, through the consent, invitation or acquiescence of the Government of that territory, it exercises all or some of the public powers normally to be exercised by that Government (*Banković*, cited above, § 71). Thus where, in accordance with custom, treaty or other agreement, authorities of the Contracting State carry out executive or judicial functions on the territory of another State, the Contracting State may be responsible for breaches of the Convention thereby incurred, as long as the acts in question are attributable to it rather than to the territorial State (see *Drozd and Janousek*, cited above; *Gentilhomme and Others v. France*, nos. 48205/99, 48207/99 and 48209/99, judgment of 14 May 2002; and also *X and Y v. Switzerland*, nos. 7289/75 and 7349/76, Commission's admissibility decision of 14 July 1977, DR 9, p. 57).

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. This principle has been applied where an individual is taken into the custody of State agents abroad. For example, in *Öcalan v. Turkey* [GC], no. 46221/99, § 91, ECHR 2005‑IV, the Court held that 'directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was effectively

under Turkish authority and therefore within the "jurisdiction" of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory'. In *Issa and Others v. Turkey*, no. 31821/96, 16 November 2004, the Court indicated that, had it been established that Turkish soldiers had taken the applicants' relatives into custody in Northern Iraq, taken them to a nearby cave and executed them, the deceased would have been within Turkish jurisdiction by virtue of the soldiers' authority and control over them. In *Al-Saadoon and Mufdhi v. the United Kingdom* (dec.), no. 61498/08, §§ 86-89, 30 June 2009, the Court held that two Iraqi nationals detained in British-controlled military prisons in Iraq fell within the jurisdiction of the United Kingdom, since the United Kingdom exercised total and exclusive control over the prisons and the individuals detained in them. Finally, in *Medvedyev and Others v. France* [GC], no. 3394/03, § 67, ECHR 2010-..., the Court held that the applicants were within French jurisdiction by virtue of the exercise by French agents of full and exclusive control over a ship and its crew from the time of its interception in international waters. The Court does not consider that jurisdiction in the above cases arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. 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. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control, whether it be exercised directly, through the Contracting State's own armed forces, or through a subordinate local administration (*Loizidou (preliminary objections)*, cited above, § 62; *Cyprus v. Turkey* [GC], no. 25781/94, § 76, ECHR 2001‑IV, *Banković*, cited above, § 70; *Ilaşcu*, cited above, §§ 314-316; *Loizidou (merits)*, cited above, § 52). 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 (*Cyprus v. Turkey*, cited above, §§ 76-77).

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 (see *Loizidou (merits)*, cited above, §§ 16 and 56; *Ilaşcu*, cited above, § 387). 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 (see *Ilaşcu*, cited above, §§ 388-394)...."

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* (cited above, § 143) and in *Al-Jedda v. the United Kingdom* [GC], no. 27021/08, § 77, ECHR 2011, 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 (see, *inter alia*, *Loizidou v. Turkey* (preliminary objections), 23 March 1995, Series A no. 310, and *Cyprus v. Turkey* [GC], no. 25781/94, ECHR 2001-IV), or that of Russia in respect of the situation in Moldovan territory east of the Dniester (see, *inter alia*, *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, ECHR 2004‑VII, and *Catan and Others v. the Republic of Moldova and Russia* [GC], nos. 43370/04, 8252/05 and 18454/06, ECHR 2012 (extracts)).

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 (see, *mutatis mutandis*, *Pellegrini v. Italy*, no. 30882/96, § 40, ECHR 2001-VIII, and *K. v. Italy*, no. 38805/97, § 21, ECHR 2004-VIII). 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).

144. United Nations Security Council Resolution 1483 reflected the presence in Iraq of forces from a plurality of United Nations Member States working under an "Authority" (the Coalition Provisional Authority) comprised of the United States and the United Kingdom. While reaffirming "the sovereignty and territorial integrity of Iraq", this Resolution called upon "all concerned", regardless of Occupying Power status, to "comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907" (see paragraph 93 above).

145. In the wake of Resolution 1483, United Nations Security Council Resolution 1511 also "underscored" the sovereignty of the State of Iraq. It

urged United Nations Member States to contribute to this multinational force for the purpose of restoring stability and security and called upon Member States, as well as international and regional organisations, to contribute to the training and equipping of Iraqi police and security forces (see paragraph 94 above).

146. The practical elaboration of the multinational force was shaped by a network of Memoranda of Understanding defining the interrelations between the various armed contingents present in Iraq. The letter sent to the Lower House of Parliament on 6 June 2003 by the Ministers of Foreign Affairs and Defence (see paragraph 57 above) emphasises that the Netherlands Government retained full command over the Netherlands contingent in Iraq. The Court understands, in view of the wording of paragraph 5.2 of the MND (C-S) Memorandum of Understanding (see paragraph 103 above), that this information was based on the MND-SE Memorandum of Understanding.

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 (see paragraph 100 above), 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.

148. Thus it was on this basis that an *aide-mémoire* for SFIR commanders and a soldier's card were issued to Netherlands personnel by the Netherlands Government (see paragraph 59 above).

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.

150. It is not decisive either that the checkpoint was nominally manned by Iraqi ICDC personnel. The Court notes that under Coalition Provisional Authority Order no. 28 ("Establishment Of The Iraqi Civil Defense Corps", see paragraph 99 above) the duties of the ICDC did not include enforcement of domestic law in subordination of the Iraqi authorities; in fact, the ICDC was supervised by, and subordinate to, officers from the Coalition forces (see paragraphs 1(4)(a), 4(1) and 7).

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, see paragraph 98 above; see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, § 406, paragraph 97 above)).

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 checkpoint had been set up in the execution of SFIR's mission, under United Nations Security Council Resolution 1483 (see paragraph 93 above), to restore conditions of stability and security conducive to the creation of an effective administration in the country. 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 (see *Catan*, cited above, § 115). 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.

e. The Government's preliminary objection

156. The Court dismisses the Government's preliminary objection, which it had joined to the merits (see paragraph 110 above). It must now consider the validity of the applicant's complaints.

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."

The respondent Government denied that there had been any such violation.

158. The intervening Government did not address the merits of the applicant's complaints.

1. Arguments before the Court

a. The applicant

159. The applicant called into question the independence of the investigation into the death of Mr Azhar Sabah Jaloud and the ensuing proceedings.

160. Firstly, he questioned the independence of the Royal Military Constabulary unit in Iraq. He asked the Court to note that members of this unit shared the living quarters with the Netherlands SFIR troops and were therefore in close proximity with them. He also stated that since the public prosecutor to whom it was required to report was stationed in the Netherlands, the Royal Military Constabulary unit was, on a day-to-day basis, under the control of the Netherlands battalion commander.

161. The lack of independence of the Royal Military Constabulary unit had also tainted the decision of the public prosecution service not to prosecute Lieutenant A. That decision had been based overwhelmingly on the Royal Military Constabulary's investigation. The applicant relied on *Ergi v. Turkey*, 28 July 1998, *Reports* 1998-IV, in which the Court had found a violation of Article 2 under its procedural head, in that the public prosecutor responsible for the decision to decline jurisdiction had relied heavily on a conclusion drawn in an incident report by the gendarmerie.

162. The Military Chamber of the Arnhem Court of Appeal too had placed full reliance on the results of the very limited investigations by the Royal Military Constabulary. Instead, it ought to have ordered an investigation by an independent judge.

163. Finally, the presence of a serving military officer in the composition of the Military Chamber of the Arnhem Court of Appeal meant that the decision of that body could not be independent. The applicant cited *Akkoç v. Turkey*, nos. 22947/93 and 22948/93, ECHR 2000-X, and *Incal v. Turkey*, 9 June 1998, *Reports* 1998-IV.

164. The applicant also argued that the investigation had been inadequate.

165. He pointed in the first place to the failure to include in the domestic case-file the statements taken from the ICDC personnel who had been present at the checkpoint at the time of the shooting. The report of the Royal Military Constabulary, as submitted to the public prosecutor and the Military Chamber of the Arnhem Court of Appeal, had indicated only that these persons had been unable to state anything of relevance. In actual fact, detailed statements had been taken from individual ICDC members. These, however, had been withheld from the applicant and the Military Chamber of the Arnhem Court of Appeal and produced only during the proceedings before the Court.

166. The questioning of Mr Dawoud Joad Kathim, whom the applicant described as a "key witness" because he was the only civilian witness and the only survivor of the incident who had not been under the orders of Lieutenant A., had been extremely cursory. Moreover, his statement, as recorded by the Royal Military Constabulary investigators, was inconsistent with the statement recorded later the same day by an Iraqi official.

167. Lieutenant A. had not been questioned until seven hours after the incident and not kept separate from other witnesses during that period. He would therefore have had ample opportunity to discuss the incident with the other witnesses beforehand and to adapt his statement accordingly.

168. 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. Furthermore, the list obtained by Lieutenant A. was not added to the file, despite its potential importance to the case.

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

170. Other forensic evidence had been treated in a similarly careless fashion. In particular, no detailed translation had been made of the report on the bullet fragments removed from the body.

171. Finally, the applicant complained that Mr Azhar Sabah Jaloud's next-of-kin had been insufficiently involved in the investigation and informed of its progress. In particular, no attempt had ever been made to contact Mr Azhar Sabah Jaloud's family; nor had anyone taken the trouble to inform them of the decision not to prosecute Lieutenant A.

b. The respondent Government

172. The respondent Government submitted that there had been no violation of Article 2.

173. In their submission, no question of independence arose.

174. The Royal Military Constabulary had its own chain of command, and in conducting investigations answered only to the Public Prosecution Service; it was inevitable that the decision not to prosecute Lieutenant A. should be based on the report of their investigation. In any case, there was nothing to suggest a lack of independence on the part of the Military Chamber of the Arnhem Court of Appeal.

175. Likewise, the investigation had been sufficiently effective.

176. The Royal Military Constabulary had examined the scene of the incident and secured the available evidence immediately on arrival.

177. Lieutenant A., having himself reported the incident, had taken full responsibility for the shooting from the outset and there was no appearance of any attempt on his part to manipulate the evidence.

178. The ICDC personnel had in fact been questioned, but had been unable to report anything of significance. In any event, they were not suspects.

179. The statements taken from Mr Dawoud Joad Kathim by the Royal Military Constabulary and the Iraqi police were not contradictory, although the suggestion made in the latter statement that the interpreter had instructed him to claim that only ICDC personnel had fired was implausible.

180. The facilities for an autopsy not being available at the Netherlands camp, the body had had to be transferred into Iraqi care. It had been a decision of the Iraqi authorities to exclude Netherlands personnel from the autopsy.

181. In any event, the investigation had been sufficient to determine that, of the Netherlands soldiers present, only Lieutenant A. had fired at the car, and the criminal proceedings had focused on him.

182. Finally, the applicant had been sufficiently involved in the proceedings. He had been informed through his lawyer as soon as the latter so requested; and the information given had been sufficient for him to participate effectively in the complaint proceedings in which he had challenged the decision not to prosecute Lieutenant A.

2. The Court's assessment

a. As to whether shots were fired by Lieutenant A. only, or also by ICDC personnel

183. The Court must deal first with the applicant's submission that the available evidence, including in particular the statements which were taken from ICDC personnel but not added to the file of the domestic proceedings, shows that shots were fired only by Lieutenant A.

184. It is true that no ICDC member has admitted to having fired at the car in which Mr Azhar Sabah Jaloud was a passenger. The Court notes, however, that, according to the Royal Military Constabulary investigators, the car in which Mr Azhar Sabah Jaloud was a passenger was hit by bullets of different calibres, some smaller than 6mm, others larger (see paragraph 32 above). This would appear consistent with the use of at least two different types of firearms, quite conceivably the Diemaco C7A1 rifle issued to the Netherlands military (which fires the 5.56mm NATO round, see paragraph 50 above) and the Kalashnikov AK47 rifle carried by the ICDC (which fires a 7.62mm round, see paragraph 52 above). In these circumstances, the applicant's allegation that shots were fired only by Lieutenant A. cannot be verified.

185. In any event, the Court is called upon only to consider whether the procedural obligations resulting from Article 2 of the Convention have been met. There is therefore no need for it to make any findings of fact on this point.

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 alios*, agents of the State (see *McCann*, cited above, § 161). 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 (see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 110, ECHR 2005-VII). 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 (see, by implication, *McCann and Others*, cited above, §§ 150 and 162; *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 128, ECHR2001-III (extracts); *McKerr*, cited above,

§§ 143 and 151; *Shanaghan v. the United Kingdom*, no. 37715/97, §§ 100-125, 4 May 2001; *Finucane v. the United Kingdom*, no. 29178/95, §§ 77-78, ECHR 2003-VIII; *Nachova*, cited above, §§ 114-115; and also, *mutatis mutandis*, *Tzekov v. Bulgaria*, no. 45500/99, § 71, 23 February 2006).

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 (see, amongst other examples, *Güleç v. Turkey*, 27 July 1998, § 81, *Reports of Judgments and Decisions* 1998-IV; *Ergi v. Turkey*, 28 July 1998, §§ 79 and 82, *Reports* 1998-IV; *Ahmet Özkan and Others v. Turkey*, no. 21689/93, §§ 85-90 and 309-320 and 326-330, 6 April 2004; *Isayeva v. Russia*, no. 57950/00, §§ 180 and 210, 24 February 2005; *Kanlıbaş v. Turkey*, no. 32444/96, §§ 39-51, 8 December 2005). 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 (see, for example, *Bazorkina v. Russia*, no. 69481/01, § 121, 27 July 2006). 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 (see, amongst many other examples, *Kaya v. Turkey*, 19 February 1998, §§ 86-92, *Reports of Judgments and Decisions* 1998-I; *Ergi*, cited above, §§ 82-85; *Tanrıkulu v. Turkey* [GC], no. 23763/94, §§ 101-110, ECHR 1999-IV; *Khashiyev and Akayeva v. Russia*, nos. 57942/00 and 57945/00, §§ 156-166, 24 February 2005; *Isayeva*, cited above, §§ 215-224; *Musayev and Others v. Russia*, nos. 57941/00, 58699/00 and 60403/00, §§ 158-165, 26 July 2007).

165. What form of investigation will achieve the purposes of Article 2 may vary depending on the circumstances. However, whatever mode is employed, the authorities must act of their own motion once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures (see *Ahmet Özkan and Others*, cited above, § 310; *Isayeva*, cited above, § 210). Civil proceedings, which are undertaken on the initiative of the next-of-kin, not the authorities, and which do not involve the identification or punishment of any alleged perpetrator, cannot be taken into account in the assessment of the State's compliance with its procedural obligations under Article 2 of the Convention (see, for example, *Hugh Jordan*, cited above, § 141). Moreover, the procedural obligation of the State under Article 2 cannot be satisfied merely by awarding damages (see *McKerr*, cited above, § 121; *Bazorkina*, cited above, § 117).

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 (see *Ahmet Özkan and Others*, cited above, § 312; *Isayeva*, cited above, § 212 and the cases cited therein).

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. This means not only a lack of hierarchical or institutional connection but also a practical independence (see, for example, *Shanaghan*, cited above, § 104). 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 to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the victim's next-of-kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (see *Ahmet Özkan and Others*, cited above, §§ 311-314; *Isayeva*, cited above, §§ 211-214 and the cases cited therein)."

c. Independence of the investigation

i. The Royal Military Constabulary unit in Iraq

187. The applicant questioned the independence of the Royal Military Constabulary unit which undertook the initial investigation, on the ground that they lived in close proximity to the Royal Army personnel whom he blames for his son's death. The Government submitted that the Royal Military Constabulary was sufficiently independent.

188. The Court notes that the independence, and hence the effectiveness, of an investigation into an allegedly unlawful killing may be called into question if the investigators and the investigated maintain close relations with one another (compare *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, § 337, ECHR 2007-II).

189. The Government did not deny that at the relevant time the Royal Military Constabulary unit shared its living quarters with Royal Army personnel. However, no circumstances have been suggested, or become apparent, that might lead the Court to find that this in itself affected the independence of the Royal Military Constabulary unit to the point of impairing the quality of its investigations.

190. Nor does the Court find it established that the physical distance separating the Royal Military Constabulary unit stationed in Iraq from the public prosecutor in charge of its investigations, who was based in Arnhem, led to the subordination of the Royal Military Constabulary unit to the Netherlands Royal Army battalion commander on a day-to-day basis. The applicant has not submitted any evidence capable of supporting this suggestion.

ii. Dependence on Royal Military Constabulary reports

191. The applicant submitted that the public prosecution service had placed excessive reliance on the Royal Military Constabulary reports. The Government disputed this.

192. Public prosecutors inevitably rely on the police for information and support. This does not in itself suffice to conclude that they lack sufficient independence vis-à-vis the police (see, *mutatis mutandis*, *Ramsahai*, cited above, § 344).

193. Moreover, the Royal Military Constabulary unit was stationed in Iraq precisely to carry out police work such as that here in issue. The Public Prosecutor's reliance on its reports therefore raises no issue in itself.

194. The Court understands the main thrust of this complaint to be that the investigation was ineffective and the resulting reports unreliable. It will address the applicant's concerns about the quality of the Royal Military Constabulary investigation separately below.

iii. The military member of the Military Chamber of the Arnhem Court of Appeal

195. The applicant argued that the independence of the Military Chamber of the Court of Appeal was tainted by the presence of a serving military officer in its midst. The Government argued that the independence of the Military Chamber of the Court of Appeal was guaranteed.

196. In the present case, the Court has had regard to the composition of the Military Chamber as a whole. It sits as a three-member chamber composed of two civilian members of the Arnhem Court of Appeal and one military member. The military member is a senior officer qualified for judicial office; he is promoted to titular flag, general or air rank if he does not already hold that substantive rank (see paragraph 64 above). In his judicial role he is not subject to military authority and discipline; his functional independence and impartiality are the same as those of civilian judges (see paragraph 65 above). That being so, the Court is prepared to accept that the Military Chamber offers guarantees sufficient for the purposes of Article 2 of the Convention.

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).

198. Following the Chamber's relinquishment of jurisdiction to the Grand Chamber, the Government submitted an official record of the questioning of the ICDC members by Royal Military Constabulary officers (see paragraph 38 above). It transpires that this document contains information that might potentially have been of assistance to the Military Chamber of the Arnhem Court of Appeal, including accounts of the number

of shots fired by each serviceman and the amount of ammunition remaining, and a far more detailed rendering of the statement made by the interpreter Mr Walied Abd Al Hussain Madjied.

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 (see, among many other authorities, *McCann and Others v. the United Kingdom*, 27 September 1995, § 149, Series A no. 324; *Kelly and Others v. the United Kingdom*, no. 30054/96, § 93, 4 May 2001; and *Isayeva v. Russia*, no. 57950/00, § 173, 24 February 2005). 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 (see *Kaya v. Turkey*, 19 February 1998, § 87, *Reports* 1998-I).

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 (see, *inter alia*, *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 107, ECHR 2001-III (extracts); *McKerr v. the United Kingdom*, no. 28883/95, § 113, ECHR 2001-III; *Finucane v. the United Kingdom*, no. 29178/95, § 69, ECHR 2003-VIII; *Makaratzis v. Greece* [GC], no. 50385/99, § 74, ECHR 2004-XI; *Tahsin Acar v. Turkey* [GC], no. 26307/95, § 223, ECHR 2004-III; and *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, § 301, ECHR 2011), 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 (see, *inter alia* and *mutatis mutandis*, *Edwards v. the United Kingdom*, 16 December 1992, § 36, Series A no. 247-B; *Rowe and Davis v. the United Kingdom* [GC], no. 28901/95, § 60, ECHR 2000-II; *I.J.L. and Others v. the United Kingdom*, nos. 29522/95, 30056/96 and 30574/96, § 112, ECHR 2000-IX; and *Dowsett v. the United Kingdom*, no. 39482/98, § 41, ECHR 2003-VII).

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 (Article 38 of the Military Criminal Code, see paragraph 66 above). 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 claim putative self-defence (see paragraph 48 above). It did not, however, address aspects relevant to the question 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.

ii. The questioning of Mr Dawoud Joad Kathim

204. The applicant submitted that the brevity of the statement made by the driver of the car, Mr Dawoud Joad Kathim, as taken down by a Royal Military Constabulary investigator (see paragraph 23 above), also reflected on the quality of the investigation. He also pointed to the differences between this statement and the statement which Mr Dawoud Joad Kathim made later the same day to an Iraqi official (see paragraph 37 above). In the Government's view, in contrast, any differences between the two statements were insufficient to cast doubt on the effectiveness of the investigation.

205. The Court considers that no conclusion can be drawn from the brevity of Mr Dawoud Joad Kathim's first statement, as such. The discrepancies between the first and second statements may justify doubts as to the reliability of either statement, as recorded, but the Court cannot conclude on that ground alone that the investigation was inadequate.

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. The Government submitted that Lieutenant A. did nothing to interfere with the investigation.

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 (*loc. cit.*, § 330).

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 (see paragraph 31 above).

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

212. The applicant complained about the conditions under which the autopsy had taken place and about the resulting report. The Government argued that the autopsy had been as effective as it could have been in the circumstances.

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. In the Government's view, the investigation was nonetheless adequate.

218. The Court notes that fragments of metal identified as bullet fragments were taken from the body of Mr Azhar Sabah Jaloud. The Netherlands investigators seem to have lost all trace of them since that point (see paragraph 36 above).

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.

e. The alleged failure to involve the applicant in the investigation

221. The applicant claimed that no effort was made to contact the next-of-kin of the deceased.

222. The Government alleged that Netherlands Royal Military Constabulary investigators spoke to the applicant and other next-of-kin at the time of the autopsy, but left when it appeared that the family were preparing to take them hostage.

223. The applicant disputed the Government's account, which, since no pertinent written record has been submitted, cannot be verified.

224. Whatever the truth of either version of events, the Court finds it established that the applicant was, at his request, granted access to the investigation file; he was in fact in a position to submit it to the Court. Access to the file was also sufficient to enable him to bring proceedings under Article 12 of the Code of Criminal Procedure, in the course of which he was in a position to put up a very effective challenge to the decision not to prosecute Lieutenant A.

225. The Court therefore finds no indication that the proceedings were deficient on this point (see *Ramsahai*, cited above, §§ 349-350).

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.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

229. Article 41 of the Convention provides as follows:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

230. The applicant submitted claims in respect of non-pecuniary damage and costs and expenses.

231. The intervening Government did not comment on the applicant's just-satisfaction claims.

A. Damage

232. The applicant asked the Court to order the Government to "remedy the violations of Article 2 which [had] occurred by, to the extent possible, performing another, thorough investigation into the death of [his] son, to prosecute those involved, and to keep the applicant fully informed of both the investigation and the prosecution, if applicable". He also claimed 25,000 euros (EUR) in respect of non-pecuniary damage.

233. The respondent Government considered an order such as that sought by the applicant inappropriate. They left the award of monetary compensation to the Court's discretion, while pointing out that the awards made in *Al-Skeini* had been lower.

234. As regards the applicant's request to order an effective investigation followed by a prosecution, the Court reiterates the general principle that the respondent State remains free to choose the means by which it will discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment, and that it is only in exceptional circumstances that the Court will indicate what steps should be taken (see, for example, *Assanidze v. Georgia* [GC], no. 71503/01, §§ 202-203, ECHR 2004-II, and *Hutten-Czapska v. Poland* [GC], no. 35014/97, §§ 238-239, ECHR 2006-VIII). Consequently it considers that it falls to the Committee of Ministers of the Council of Europe acting under Article 46 of the Convention to address the issues as to what, if anything, may be required in practical terms by way of compliance (see, among many other references, *Al-Skeini*, § 181).

235. As regards the monetary claims, the Court points out that in *Al-Skeini*, which also concerned a violation of the procedural head of Article 2, it awarded the applicants the sums which they claimed (ibid., § 182). In the present case, the Court considers it equitable to award to the applicant the sum which he claims, namely EUR 25,000.

B. Costs and expenses

236. The applicant claimed a total of EUR 13,200 for 120 hours of work by his lawyers. He stated, however, that he had requested domestic legal aid and would not maintain his claim if this were granted.

237. The applicant submitted a further statement of travel and subsistence expenses, incurred by his two counsel to enable them to attend the hearing, and for postage. The total of these sums, for which vouchers were submitted, came to EUR 1,372.06.

238. The respondent Government submitted that no issue could arise in so far as the sums claimed were covered by domestic legal aid and declined to comment on the additional sum.

239. The applicant has not informed the Court that domestic legal aid has been refused in respect of the sum referred to in paragraph 236 above. It cannot therefore be established that it concerns expenses "actually incurred". That being so, no corresponding award can be made.

240. The Court accepts the additional claim set out in paragraph 237 above in full.

C. Default interest

241. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Joins* the Government's preliminary objection to the merits;

2. *Declares* the application admissible;

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;

5. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, EUR 25,000 (twenty-five thousand euros), plus any tax that may be chargeable on this sum, in respect of non-pecuniary damage;
   (b) that the respondent State is to pay the applicant, within three months, EUR 1,372.06 (one thousand three hundred and seventy-two euros and six cents), plus any tax that may be chargeable to the applicant on this sum, in respect of costs and expenses;
   (c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 20 November 2014.

Michael O'Boyle
Registrar

Dean Spielmann
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Spielmann, joined by Judge Raimondi;

(b) joint concurring opinion of Judges Casadevall, Berro-Lefèvre, Šikuta, Hirvelä, López Guerra, Sajó and Silvis;

(c) concurring opinion of Judge Motoc.

D.S.
M.O'B.

CONCURRING OPINION OF JUDGE SPIELMANN, JOINED BY JUDGE RAIMONDI

Translation

1. I had no difficulty in voting for the finding that Mr Azhar Sabah Jaloud's death occurred within the "jurisdiction" of the Netherlands, as that term is to be interpreted for the purpose of Article 1 of the Convention.

2. This finding is set out in paragraph 152 of the judgment and did not require any additional elaboration with regard to the concept of attribution.

3. The concept of "attribution" is indeed to be distinguished from that of "jurisdiction" as the latter has been interpreted in the Court's case-law (see, recently, *Hassan v. the United Kingdom* [GC], no. 29750/09, § 74, 16 September 2014, which essentially reproduces the explanations in the *Al-Skeini* judgment (*Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, §§ 130-141, ECHR 2011). The concept of "jurisdiction" essentially refers to the territorial principle, State agent authority and control, effective control over an area and the Convention legal space.

4. In contrast, the concept of "attribution" essentially concerns the sensitive issue of the "imputability" of internationally wrongful acts. Salmon's Dictionary has the following entry for the term "attribution":

> "With regard to international-law responsibility, the fact of ascribing to a subject of international law the acts or omissions of individuals or bodies under its effective authority or acting on its behalf". [Translation]

(*Dictionnaire droit international public*, edited by Jean Salmon, Preface by Gilbert Guillaume, Brussels, Bruylant, 2001).

5. The "codicil" of paragraphs 154 and 155, along with the unnecessary references to the case-law of the International Court of Justice (see paragraphs 95-97) and to the International Law Commission's Articles on State Responsibility in the part of the judgment setting out the relevant international law, is ambiguous, subsidiary and incomprehensible.

- Ambiguous, because the majority's reasoning takes care to point out 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 [1].

1. By referring, and rightfully so, to the judgment in *Catan and Others v. Moldova and Russia*, from which it is appropriate to quote paragraph 115 *in extenso*:
"115. The Government of the Russian Federation contend that the Court could only find that Russia was in effective control if it found that the 'Government' of the 'MRT' could be regarded as an organ of the Russian State in accordance with the approach of the International Court of Justice in the Case Concerning the Application of the Convention on the Prevention and Punishment of Genocide (*Bosnia and Herzegovina v. Serbia and*

- Subsidiary, because as soon as the Court concludes that the criteria for establishing the jurisdiction of the Netherlands have been met (see paragraph 152), it is no longer necessary, in order to dismiss the Government's preliminary objection, to reconsider the facts behind the applicant's complaints deriving from alleged acts and omissions of Netherlands military personnel and investigative and judicial authorities.

- Incomprehensible, because the majority's reasoning in paragraph 155 merely builds on the reasoning with regard to the establishment of "jurisdiction".

6. It is in paragraph 152 that the Court settles this question, holding that the respondent State was exercising its "jurisdiction" within the limits of its SFIR mission and for the purpose of asserting authority and control over persons passing through the checkpoint.

7. There was therefore no need to examine the non-issue of "attribution", which is completely separate from the question of "jurisdiction". More fundamentally, the Court should in any event be careful not to conflate the notions of jurisdiction under Article 1 with the concept of State responsibility under general international law. Efforts to seek to elucidate the former by reference to the latter are conceptually unsound and likely to cause further confusion in an already difficult area of law.

Montenegro (see paragraph 76 above). The Court recalls that in the judgment relied upon by the Government of the Russian Federation, the International Court of Justice was concerned with determining when the conduct of a person or group of persons could be attributed to a State, so that the State could be held responsible under international law in respect of that conduct. In the instant case, however, the Court is concerned with a different question, namely whether facts complained of by an applicant fell within the jurisdiction of a respondent State within the meaning of Article 1 of the Convention. As the summary of the Court's case-law set out above demonstrates, 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 international law."

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

1. This judgment establishes that a Contracting State may have its own jurisdiction under the Convention in respect of military operations conducted abroad as part of a stabilisation force in cooperation with another State which enjoys full status as an Occupying Power. Like the United States of America, the United Kingdom was an occupying power in Iraq in 2004 within the meaning of United Nations Security Council Resolution 1483, whereas the Netherlands military merely assisted the United Kingdom in this occupation. However, the Netherlands authorities remained in full command of their military in the Iraqi province of Al Muthanna, and they exercised full authority and responsibility for establishing security in that region. Thus, Iraqi citizens passing a vehicle checkpoint between Ar Rumaythah and Hamsa, run by ICDC (Iraqi military) personnel who were operating under exclusive Netherlands command, found themselves within the jurisdiction of the Netherlands, as it is defined by the Court's interpretation of Article 1 of the Convention. We agree with this part of the judgment, which is in line with and logically builds on the Court's earlier case-law on jurisdiction, most notably *Al-Skeini and Others v. the United Kingdom* ([GC], no. 55721/07, ECHR 2011). It follows that the Netherlands were under a procedural obligation to investigate the tragic shooting incident which led to the death of the applicant's son, and to do so in an effective and diligent manner (see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, §§ 110 and 112-13, ECHR 2005-VII, and *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, §§ 321,322, ECHR 2007 II). We agree that the Netherlands had this procedural obligation under the Convention. However, we respectfully disagree with some of the majority's reasoning underpinning the finding of a procedural violation by the Netherlands.

2. It is important to realize the full context of the tragic incident. The applicant's son was shot in Iraq at a vehicle checkpoint under Netherlands command in the night of 21 April 2004. Prior to this incident the checkpoint had come under fire from a car at 2.10 a.m. on the same night and the Iraqi military at the VCP had returned fire, apparently without causing casualties on either side. Netherlands servicemen had been called to the vehicle checkpoint to investigate that shooting. Their investigation started at 2.30 a.m. Fifteen minutes later, the car in which Mr Jaloud was sitting next to the driver approached the VCP at speed. The driver of the car, who had drunk a couple of beers, later submitted that he had not even seen the checkpoint. His car struck barrels alongside the road, causing a loud and sudden noise. The car continued on its way at speed and there were shouts to stop, followed immediately by shooting, after which the car came to a

halt. It became clear that Mr Jaloud had been mortally wounded. Contrary to what some of the servicemen present, including lieutenant A., had thought, it transpired that no shots had been fired from the car.

3. The Netherlands Royal Military Constabulary, present in the region, was called on to begin an investigation into the death of Mr Jaloud. It started doing so as early as 4.50 a.m. The Netherlands Royal Military Constabulary has standing to conduct such investigations, independently from the military command, in respect of Netherlands service personnel. On the basis of a report of their investigations in Iraq, various other documents and a hearing, the Arnhem Court of Appeal later dismissed a request from the applicant for the prosecution of the Netherlands lieutenant A., who had admitted to firing at the passing car. The Netherlands appeal court found that the lieutenant had acted within the military instructions on legitimate (putative) self-defence.

4. It is clear, as the Court has stated on several occasions, that where the death to be investigated under Article 2 of the Convention occurs in circumstances of armed conflict or in an otherwise unstable region, obstacles may be placed in the way of investigators and concrete constraints may compel the use of less effective measures of investigation. The key question then is whether the investigation into the shooting was conducted in a sufficiently effective and diligent manner, in the sense that it would have been capable of leading to the identification and punishment of those responsible. This is not an obligation of results, but of means. In view of the criteria just mentioned, the procedural obligations under Article 2 also cover proceedings in which it is decided whether or not a person under suspicion should be charged in connection with his or her responsibility for the incident under investigation, although this is not the determination of a criminal charge itself and Article 6 of the Convention does not apply (see *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, §§ 359-360, ECHR 2007-II).

5. What is undisputed is that the Royal Military Constabulary acted promptly once the matter had come to their attention. It further appears that the investigation was effective, in so far as it determined (a) the cause of death, and (b) identified the Netherlands officer who may have caused the death by shooting. The key question before the Netherlands appeal court was whether the officer should face charges, depending on whether he had or had not acted in compliance with the instruction on the use of force. Under the procedural obligation of Article 2 of the Convention, it is crucial that a judicial authority, in determining whether a serviceman should face further charges or whether he had acted in a justifiable manner within the instructions on the use of force, has the proper information at its disposal. The Arnhem Court of Appeal should have had at its disposal the full witness statements that were taken after the incident, but it appears that only a rather selective summary of these were present in the court file. While it cannot be

speculated whether the court of appeal would have reached another conclusion had it been in a position to read all of the witness statements, this is a serious flaw in the quality of the investigation. So far we agree with the position taken by the majority of the Grand Chamber. However, we 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.

CONCURRING OPINION OF JUDGE MOTOC

(Translation)

1. A human being's path to self-awareness is similar to that of Sisyphus. Albert Camus's essay provides a remarkable illustration of the history of philosophy in this regard. But can we expect such self-awareness on the part of a court with regard to issues as difficult as the one addressed in this judgment? Will the Court not be condemned to remain "estranged from itself"? In the language of philosophy of law, and having regard to the principle of "law as integrity" as it has been interpreted by Ronald Dworkin, it seems that a court can never explicitly admit to the various interpretive approaches of *stare decisis*.

2. It is well known that Article 1 of the Convention remains one of the most problematic in terms of its application, and there are several contradictions in the manner in which the Court has interpreted it (see, for example, *Banković and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, § 75, ECHR 2001-XII, and *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, §§ 136-137, ECHR 2011). While the Court has made remarkable efforts to provide clarification in the present judgment, we consider that this progress has been in the direction of general international law and international humanitarian law only.

3. Let us begin with general international law. Firstly, at the pre-interpretive stage the Court very clearly expresses its position on the International Law Commission's Articles on State Responsibility (see paragraph 98 of the judgment) and the case-law of the International Court of Justice (see paragraphs 95-97). Above all, however, for the first time in this case the Court specifies that it is ruling on the imputability resulting from application of the relevant Articles on State Responsibility of the International Law Commission. Thus, with regard to responsibility under international law, it states that "the alleged acts and omissions of Netherlands military personnel and investigative and judicial authorities" are such as to be capable of "giving rise to the responsibility of the Netherlands under the Convention". Imputability was necessary in order to complement the legal logic arising from general international law, particularly State responsibility, with all the consequences that are entailed (see, in particular, M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, Oxford University Press, 2011).

4. Similar comments can be made with regard to humanitarian law. Again at the pre-interpretive stage, the judgment quotes the relevant articles of the Regulations concerning the Laws and Customs of War on Land ("the Hague Regulations", 1907) and the Fourth Geneva Convention.

5. However, one problem remains unresolved: that of the place to be given to human rights. Although the present judgment quotes the *Catan and Others v. Moldova and Russia* judgment ([GC], nos. 43370/04, 8252/05 and 18454/06, ECHR 2012), particularly its paragraph 115, and reiterates that the test for establishing the existence of "jurisdiction" under Article 1 of the Convention has not been equated with the test for establishing a State's responsibility for an internationally wrongful act under general international law, it goes no further than that. Once the Court has – for the first time – ruled on "imputability" and has thus moved in the direction of general international law, it must still provide clarification on the differences between the State's responsibility under general international law and under the Convention, particularly – in the present case – under Article 1.

6. Several questions remain outstanding in a general manner with regard to the relationship between human-rights standards when those human rights are applied within a State's territory and when they are applied outside it, by virtue of the extraterritoriality resulting from Article 1 (see, for example, S. Besson, *The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to*, Leiden Journal of International Law, Dec. 2012, pp. 857-884). Although the Court's task in this case was facilitated by the shortcomings of the Arnhem Court of Appeal, the general question remains unanswered. Can we speak of different standards in human rights protection which are to be applied by one and the same State, and, if so, on the basis of which criteria?

7. One final remark: the United Kingdom's argument concerning the "real risk" that States might be reticent to respond to calls from the United Nations Security to take part in an intervention under that body's mandate (see paragraph 126 of the judgment) is, in our opinion, insubstantial from a legal perspective. Soldiers who take part in peace-keeping operations or are members of multi-national forces cannot enjoy immunity simply on account of the fact that their State is participating in such operations.

8. In conclusion, while the present judgment makes progress as regards the applicability of general international law, questions concerning the relationship between general international law and the human rights provided for in Article 1 have still to be clarified, as do the various conflicts of norms which may arise in the course of that Article's application.