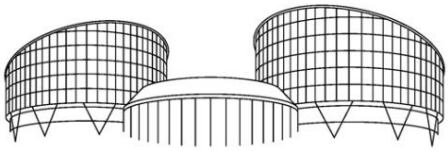

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

BIG ROOM

JALOUD CASE v. THE NETHERLANDS

(Application no . 47708/08)

STOP

STRASBOURG

November 20, 2014

This judgment is final. It may undergo shape adjustments.

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ABBREVIATIONS AND ACRONYMS

AOR	Area *of operational responsibility*
CD-ROM	Read-only digital optical disc
ECHR	European Court of Human Rights, Collection of judgments and decisions (from 1999 to the present)
CENTCOM	*American Central* Command
CFLCC	*Command)* Coalition Forces *Land Component Commander*
CIDC	Iraqi Civil Defense Corps
C.I.J.	International Court of Justice
CPA	*Coalition* Provisional Authority *Authority)*
CSNU	United Nations Security Council
DMN (C-S)	South Central Multinational Division
DMN (SE)	Southeast Multinational Division
DR	European Commission of Human Rights, Decisions and reports
EUR	Euro (currency)
FORPRONU	United Nations Protection Force (Bosnia and Herzegovina 1992-1995)
GC	Big room
GST	Government support *teams*
LJN	*National Case Law Number* (Numéro de jurisprudence nationale, Pays-Bas)
PLACE	Communication lines
I'LL TAKE	North Atlantic Treaty Organization
WALL	Draft articles on the responsibility of international organizations (International Law Commission)
PCV	Vehicle checkpoint
ON	Memorandum of Understanding
PJCC	Provisional Joint Coordination Center *(Provisional Joint Coordination Center* – emergency services and local administration in Iraq)
UNDER	Disembarkation point
RCSNU	United Nations Security Council Resolution
Collection	European Court of Human Rights, Collection of judgments and decisions (1996-1998)
ROE	*Rules of* engagement
COUNTY	Stabilization Force in *Iraq*

In the case of Jaloud v. The Netherlands,

The European Court of Human Rights, sitting as a Grand Room 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 Gritco,
Iulia Antoanella Motoc, *judges,*
and Michael O'Boyle, *Deputy Registrar,*

After having deliberated in private on February 19 and September 10, 2014,

Renders the following judgment, adopted on the latter date:

PROCEDURE

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

2. The applicant was represented by Mr L. Zegveld and Mr AW Eikelboom, lawyers in Amsterdam. The Dutch Government (“the Government”) was represented by its Agent, Mr. AA Böcker, of the Ministry of Foreign Affairs.

3. The applicant alleged in particular that the investigation into the death of his son, Mr Azhar Sabah Jaloud, had been inadequate. He saw this as a violation of Article 2 of the Convention.

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

5. On July 9, 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, as well as Santiago Quesada, section clerk , relinquished jurisdiction in favor of the Grand Chamber, none of the parties having objected (Articles 30 of the Convention and 72 of the Rules of Court).

6. The composition of the Grand Chamber was decided in accordance with the provisions of Articles 26 §§ 4 and 5 of the Convention and 24 of the Rules. Subsequently, Elisabeth Steiner, substitute judge, replaced Kristina Pardalos, who was unable to attend.

7. Both the applicant and the Government filed written observations. Observations were also received from the British government, which the President had authorized to intervene in the proceedings (Articles 36 § 2 of the Convention and 44 § 2 of the Rules). The intervening Government was represented by its Agent, Ms R. Tomlinson, of the Foreign and Commonwealth Office.

8. A hearing took place in public at the Human Rights Palace
man, in Strasbourg, February 19, 2014 (article 59 § 3 of the regulations).

Appeared:

– for the respondent government
MM.R. BÖCKER, Ministry of Foreign Affairs, *agent,*
Mr. KUIJER, Ministry of Security and Justice,
B. VAN HOEK, public minister,
Commander H. WARNAR, Ministry of Defense,
Army General Staff, *advisors ;*

– for the applicant
Mes L. ZEGVELD,
A.-W. ACORN TREE, *advice ;*

– for the British government, intervening government
Ms. R. TOMLINSON, Ministry of Foreign Affairs
and of the Commonwealth, *agent,*
MM.J. EADIE QC, *advice,*
J. BENSON, Ministry of Foreign Affairs
and Commonwealth, *advise,*
Ms. M. ADDIS, Ministry of Foreign Affairs
et du Commonwealth, *observer.*

The Court heard Mr Böcker, Mr Eikelboom, Mr Zegveld and Mr Eadie in their statements as well as their responses to the questions asked by the judges.

ACTUALLY

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

A. The circumstances of the case

1. The death of Mr. Azhar Sabah Jaloud

10. On April 21, 2004, at approximately 2:12 a.m., an unknown car approached a vehicle control post (VCP) called "B-13" on the main supply road, "Jackson", to the north from the town of Ar-Rumaythah, in the province of Al-Muthanna, in southeastern Iraq.
The vehicle slowed down and turned. Shots were fired from inside the car at the people, all members of the Iraqi Civil Defense Corps (ICDC), who were guarding the PCV. The guards fought back. No one was hit; the car left and disappeared into the night.

11. Called by Sergeant Hussam Saad, of the CIDC, who commanded the checkpoint, a patrol of six Dutch soldiers led by Lieutenant A. arrived on site around 2:30 a.m.

12. About fifteen minutes later, a Mercedes car approached the PCV at high speed. She hit one of the barrels that had been placed in the middle of the road as the checkpoint, but continued forward. Shots were fired at the car: Lieutenant A. fired twenty-eight rounds from a Diemaco assault rifle; it is also possible that shots were fired from a Kalashnikov AK-47 by one or more members of the CIDC (paragraphs 21 and 49-52 below). The driver then stopped the car.

13. The applicant's son, Mr Azhar Sabah Jaloud, occupied the passenger seat in the front of the car. He had been hit in several places, notably in the chest. The Dutch soldiers took him out of the car and tried to administer first aid, but he died. He was pronounced dead an hour after the shooting.

14. The body was x-rayed. The photos show objects, identified as metallic, lodged in the chest and other parts of the body.

15. An autopsy was carried out by an Iraqi doctor, who wrote a brief report in Arabic. Metallic objects, identifiable as bullet fragments, were found in the body.

16. It was not determined by whom the bullet(s) had been fired, nor what weapon had been used.

2. The investigation

a) The start of the investigation

17. According to a report drawn up by Sergeant First Class *(wachtmeester 1st klasse)* Schellingerhout, of the Royal Constabulary *(Koninklijke marechaussee),* As-Samawah detachment, a telephone call reporting the shooting had been received at 3 25 p.m. in the battalion operations room. According to this call, a car had hit the PCV.
Shots were fired by Dutch and Iraqi armed forces. The passenger in the car was injured and taken to hospital. The royal constabulary was called to investigate.

18. A guard group *(piketgroep)* of the royal constabulary consisting of seven people accompanied by an interpreter left at 3:50 a.m. and arrived on site around 4:50 a.m. Sergeants first class Broekman and Van Laar, of the royal constabulary , began collecting evidence at 5 a.m. At the same time, members of the Royal Constabulary in The Hague, as well as the prosecutor at the Arnhem District Court *(rechtbank) ,* were informed of the incident.

b) Seizure of the remains, car and personal weapons of the Lieutenant A. and Sergeant Hussam Saad, from the CIDC

19. The remains were seized by the adjutant *(warrant officer)* Kortman, Royal Constabulary, at 7:30 a.m. and transported to Camp Smitty Mobile Hospital. At 11:45 a.m., after obtaining written permission from a local court, the body was transferred to As-Samawah General Hospital.
The autopsy was carried out by an Iraqi doctor, in the absence of any police witness.

20. The Mercedes was seized around 5:10 a.m. by Warrant Officer Kortman, then towed to Camp Smitty.

21. Around 7:50 a.m., Sergeant First Class Schellingerhout seized Sergeant Hussam Saad's Kalashnikov AK-47; around 11:55 a.m. he also seized Lieutenant A's Diemaco C7A1 rifle. Subsequently, both weapons were tagged and made available to the Arnhem prosecutor.

c) Statements taken by members of the royal constabulary

22. The following statements were submitted to the authorities responsible for the investigation and to the judicial bodies within the framework of the internal procedure.

i. M. Dawoud Joad Kathim

23. On April 21, 2004 at around 5:05 a.m., Warrant Officer Mercx, of the royal constabulary, took the statement of the driver of the Mercedes, Mr. Dawoud Joad Kathim, with the assistance of an interpreter. Mr. Dawoud Joad Kathim stated that the previous evening he had drunk two cans of beer, no more, and that he

hadn't been drunk. He hadn't noticed the checkpoint until it was too late to avoid hitting two barrels. It was dark at the time and there were no lights. To his surprise, his car had come under gunfire as he passed through the checkpoint.
His friend, Mr. Azhar Sabah Jaloud, was hit. He had heard him say that he was dying. He wanted to file a complaint because the checkpoint had not been clearly marked.

ii. Sergeant Hussam Saad, CIDC

24. On 21 April 2004 at around 5:15 a.m., Sergeant First Class Weerdenburg, of the Royal Constabulary, took the statement of Sergeant Hussam Saad, of the CIDC. The latter stated that he had reported shots coming from a car around 2:10 a.m.; Lieutenant A. arrived around 2:30 a.m. Along with him, another Dutch soldier and the interpreter, he went looking for cartridge cases. He suddenly heard a loud noise and saw a car approaching from Ar-Rumaythah. Ordered to stop, it nevertheless continued to move forward. He then heard shots coming from the left side of the road. For his part, he had not opened fire.

iii. Other CIDC members

25. Sergeant First Class Weerdenburg then questioned the other Iraqi soldiers, but they did not provide relevant information.

iv. M. Walied Abd Al Hussain Madjied

26. On April 21, 2004 at around 7 a.m., Sergeant Klinkenberg, of the Royal Constabulary, took the statement of Mr. Walied Abd Al Hussain Madjied, an interpreter employed by the CIDC. The person concerned stated that he had accompanied the patrol led by Lieutenant A between two checkpoints. On his arrival at PCV B1.3, he had been informed of the first shooting by Sergeant Hussam Saad, of the CIDC, and he had joined Lieutenant A. and others in searching for shell casings. He suddenly heard a sound of barrels being overturned, turned around and saw a car approaching. He shouted “Stop, stop, stop!” ", but the car continued on its way. On the other side of the road, a Dutch soldier had shot at the car. Once it stopped, he served as interpreter for its occupants. The passenger's left arm was covered in blood and the driver smelled of alcohol.

v. Le sergent Teunissen

27. On 21 April 2004 at around 9:30 a.m., Sergeant First Class Van Laar and Sergeant Klinkenberg, of the Royal Constabulary, took the statement

of infantry *sergeant* Teunissen. He stated that he had arrived at PCV B1.3 at 2 a.m. and had received information there from the CIDC sergeant. With his lieutenant, the CIDC sergeant and the interpreter, he had gone up the road, looking for shell casings. About 100 meters from the PCV gatehouse, he turned around when a noise startled him. He had seen a car enter the PCV at high speed; when she crossed the PCV, he heard shots coming from the PCV. He and his three companions had dived to the ground for cover. When the car reached them, shots were fired from across the road, where the lieutenant was. He shouted “Stop shooting!” ”, but had not been heard. When the shooting stopped, the car stopped. The passenger was bleeding from his lower body and left shoulder. Sergeant Teunissen and Private Finkelnberg took him out of the car, laid him on the ground and dressed his wounds. With Lieutenant A., he tried to resuscitate him, until the doctor told him that it was useless.

vi. Lieutenant A., first testimony

28. On April 21, 2004 around 11:15 a.m., Sergeants First Class Broekman and Van Laar, of the Royal Constabulary, interviewed Lieutenant A., after warning him that his statements could be used against him. Lieutenant A. stated that he was responsible for supervising two vehicle checkpoints, one of which was PCV B1.3, on the "Jackson" road, north of Ar-Rumaythah. After the first shooting was reported, he arrived at PCV B1.3 around 2:30 a.m.; he had planned to carry out a reconnaissance tour of the area on foot, in the company of Sergeant Teunissen and the CIDC sergeant. Around 2:45 a.m., a noise made him jump. Looking back, he saw the bright light of two car headlights approaching. Shots were then fired from that direction and, upon hearing them, he dove to the side of the road to take cover. He was convinced that the shots came from inside the car. When the car reached him, he cocked his rifle; he opened fire on the rear of the car as soon as it passed. He had fired twenty-eight rounds in targeted fire. He had responded to the danger resulting from being targeted first. He had used the entire contents of one magazine, twenty-eight rounds, which took about seven seconds. The passenger having been injured, he and Sergeant Teunissen tried to resuscitate him until help arrived. At that point, the injured man no longer had a pulse. Shortly after, the company commander arrived; Lieutenant A. had reported to him.

are you coming. Le soldier Finkelnberg

29. On 23 April 2004 at around 1:50 p.m., Warrant Officer Kortman and Sergeant First Class Broekman, of the Royal Constabulary, took a statement

of Private Finkelnberg. The latter declared that, on April 21, 2004 at 2 a.m., accompanied in particular by Lieutenant A. and Sergeant Teunissen, he had arrived at PCV B1.4, where the CIDC sergeant had reported to Lieutenant A. that a shooting had taken place. took place at PCV B1.3. The patrol then went to this checkpoint, where it arrived at 2:30 a.m. Lieutenant A., Sergeant Teunissen, the CIDC sergeant and the interpreter had gone up the road towards Hamza, at the search for sockets. A dark-colored car approached at high speed and passed by him, then passed through the checkpoint, hitting barrels placed on the road. Through his image intensifier, he had seen Lieutenant A., on the left side of the road, taking cover; he then saw flashes coming from the barrels of several weapons on the left side of the road and heard shots coming from that direction. The shots were single shots. At one point, he saw the car stop. During the gunfire, he heard Sergeant Teunissen shout, “Stop shooting!” ". He went to the vehicle and cut the passenger's clothes. While Sergeant Teunissen provided first aid, he searched the car for weapons. He had found a cooler containing an almost empty bottle of alcoholic beverage. He then joined Sergeant Teunissen and Lieutenant A. in their attempts to resuscitate the passenger, until death was noted. In his testimony, Private Finkelnberg criticized Lieutenant A. for firing while his own men were on the other side of the road and for firing so many rounds; he also criticized the CIDC for firing in the general direction of its own forces.

viii. Cavalry Sergeant Quist

30. On April 23, 2004 at around 1:50 p.m., Sergeant Major *(opperwachtmeester)* Wolfs and Sergeant First Class Van Laar, of the Royal Constabulary, took the statement of Cavalry Sergeant *(wachtmeester)* Quist.
The latter stated that on April 21, 2004 around 2 a.m., he had been at PCV B1.4 with Lieutenant A. and the other members of his patrol unit, which was led by Sergeant Teunissen. A shooting had taken place at PCV B1.3, where they had gone. When they arrived, he did not see any CIDC members at the checkpoint, but he did see a group of people on the left side of the road, opposite the gatehouse. He had parked his vehicle, after which Lieutenant A., Sergeant Teunissen, interpreter Walied and the CIDC sergeant set off on foot towards the north, looking for shell casings. At one point he had seen a car approaching at high speed from Ar-Rumaythah; when the car reached the checkpoint, it hit barrels or rocks that had been placed there. He had heard automatic fire coming from where the CIDC members were located, which then stopped. There had been more gunfire about 100 yards away, but he couldn't tell who

had fired at the front. It seemed to him that the shots had been fired from several weapons. He had seen the vehicle stop 50 meters away. He had reported on the situation. He had seen Lieutenant A. and Sergeant Teunissen trying to resuscitate the victim.

ix. Lieutenant A., second testimony

31. On 23 April 2004 at around 3:35 p.m., Sergeant First Class Broekman and Warrant Officer Kortman, of the Royal Constabulary, took Lieutenant A's second statement. The applicant stated that the very last time he had seen the CIDC sergeant, he was at the checkpoint and "tinkering" (klungelen) with his AK-47 rifle. Lieutenant A. had told the sergeant not to point his weapon at him. Regarding the shooting, he added that as far as he remembered he had probably been lying down on a flat part of the road; he had not fired while standing. He gave mouth-to-mouth resuscitation to the injured passenger in the car and remembered that he smelled of alcohol. The CIDC deputy company commander had given him a list showing the names of the CIDC members who had fired their weapons and the corresponding number of rounds, and he had requested new ammunition.

d) Other investigation reports

i. The Mercedes test

32. On 22 April 2004, Warrant Officer Voorthuijzen and Sergeant Heijden, of the Royal Constabulary, examined the car seized the day before by Warrant Officer Kortman. It was a black Mercedes Benz, model 320 E AMG. The vehicle had black registration plates with inscriptions in the Arabic alphabet visibly covering white plates on which letters in the Latin alphabet and numbers appeared in black. The car had damage that could have resulted from a high-speed collision with foreign objects. The rear window was broken. Holes were found at the rear of the car, on the right and left sides of the body, as well as in the seats. Pieces of metal were found in different places; one of them, identified as a bullet fragment, had apparently passed through the passenger seat. The conclusion reached by the examination was that the car had been targeted from both the left and right sides: on the left, with a weapon firing ammunition of a caliber less than 6 mm; on the right, with a weapon firing ammunition with a caliber greater than 6 mm. The precise angles of the shots at the car could not be determined, however.

ii. X-rays and photographs

33. On 9 May 2004, Warrant Officer Voorthuijzen and Sergeant Klinkenberg, of the Royal Constabulary, received a CD-ROM containing the x-rays

carried out on the body of Azhar Sabah Jaloud. They showed the presence of metal fragments in the left side of the rib cage, the left hip and the left forearm. The x-rays were taken by Warrant Officer Dalinga, radiology technician at Camp Smitty (As-Samawah, Al-Muthanna province).

34. The file contains photocopies of the aforementioned x-rays, as well as photographs. They are accompanied by descriptions contained in an official report from Warrant Officer Kortman. Among the photographs are shots, some taken during the day, others apparently at night, of a road and a checkpoint. Several show cartridges and casings on the ground, including some described as being of caliber 7 x 39 mm (like those fired by the Kalashnikov AK-47)1, and a quantity of casings of caliber 5.56 x 45 mm according to the indications data (like those fired by the Diemaco C7A1 rifle), stacked next to each other. Other photographs show the body of a man injured in one arm, in the upper left part of the back and in the right buttock. Other images show a dark-colored Mercedes; details are given on the presence of holes in the bodywork and trim which may have been caused by bullets.

iii. Report by Lieutenant Colonel Awadu Kareem Hadi, CIDC

35. On April 22, 2004, Lieutenant Colonel Awadu Kareem Hadi, commander of CIDC Battalion 603, sent a report from his battalion headquarters to Iraqi police headquarters. This report reads as follows (the applicant submitted a rough handwritten translation from Arabic to English):

> "Details on the accident which occurred on (04/20/2004) and information from the premier bataillon (Ar-Rumaythah) :
>
> At the time (9:5 p.m. *[sic]* after midnight) of the date (04/20/2004) *[sic],* a car of type (Mercedes) arrives at high speed from the direction of (Al Hamza) and drives towards (Al Nassiriya). When she reaches the checkpoint location, she does not stop and crashes into the obstacles present at the checkpoint. She ignores the cries of the soldiers who order her to stop, continues on her way and does not stop. After that, the Dutch soldiers saw that there was nothing to do, fired on the car and injured an individual ([Azhar Sabah Jaloud]). He dies. He was sitting next to the driver.
>
> Salutations.
>
> [signature] Lieutenant-colonel Awadu Kareem Hadi
>
> Copy to PJCC »

1. Actually 7.62 x 39mm.

iv. Metal fragments

36. An official report from Warrant Officer Voorthuizen, of the Royal Constabulary, dated June 21, 2004 indicates that a document in Arabic arrived on June 2, 2004; translated orally by an interpreter, it was identified as a Baghdad police report. According to this document, three metal fragments had been examined in Baghdad at the request of the Al-Muthanna police, with a view to identifying the ammunition from which they came and the weapon that had fired them; these fragments being too few in number, their origin could not however be determined. A copy of the document written in Arabic is attached to Warrant Officer Voorthuijzen's report. It is not specified to whom the metal fragments were entrusted or where they were kept.

e) Iraqi document

37. On April 21, 2004, Mr. Dawoud Joad Kathim, the driver of the Mercedes, filed a complaint with the Iraqi police against the soldiers who had fired at his car. It appears from his statements, as recorded in writing, that Mr. Dawoud Joad Kathim wrongly believed that the foreign troops involved were Polish and not Dutch.
Mr. Dawoud Joad Kathim also indicated that the interpreter had told him to declare that all the shots had been fired by the CIDC, when in reality he had not seen any member of the CIDC shooting.

f) Supplementary report containing testimony from ICDT members

38. After the Chamber had relinquished jurisdiction in favor of the Grand Chamber, the Government provided the Court with an official record of the testimony of members of the ICDT. The applicant provided an English translation carried out by a sworn translator. The text below is the French translation, established by the Court Registry, of this translation:

« Name: **A Saad Mossah**

Weapon number: GL 5574

Ammunition: 4 x 30 cartridges

“During the second incident, I was lying in a place where I was safe on all sides. I saw a car coming from Ar-Rumaythah approaching the PCV at high speed. I saw it hit two barrels near the PCV and continue on its way. My superior [CIDC Sergeant Hussam Saad] came forward with the interpreter and two Dutch soldiers and then I heard a lot of gunshots. I didn't fire any shots myself. I can't tell you anything more. »

Nom : **Haider Shareef**

Weapon number: EU 0481 1984

Ammunition: 4 magazines and 120 rounds in total

“I can't tell you anything about the first incident because at that time I was sleeping in the gatehouse.

As for the second incident, I was standing near the PCV when I saw a Mercedes heading towards it. I saw this car hit two barrels of oil then continue its route towards Hamsa. I heard the Dutch soldiers shouting “stop, stop!” » then I heard gunshots. I didn't see anything else because I was standing behind a hut on the other side of the gatehouse. »

INTERPRETER

Name: **Walid Abd Al Hussain Madjid**

Born on 25-10-1969 in Kuwait / Hawalli

“We started at midnight to carry out a patrol. We stayed here until 1:30 a.m. then drove back to the next checkpoint. When we arrived, the checkpoint commander said shots had been fired at the previous checkpoint. I heard Lieutenant V. [probably Lieutenant A.] say that I should get in the car and we returned to the checkpoint. When we arrived we asked for details. The checkpoint commander and Sergeant Hossam, from the CIDC, told us that after we left a truck stopped and its driver said an Opel vehicle was driving behind them. Then an Opel arrived nearby, turned around 100 meters before the checkpoint and turned off its lights. Then several shots were fired at the checkpoint from this vehicle. Sergeant Hussam Saad responded, emptying two of his magazines, each containing 30 cartridges, on this vehicle. Sergeant Hossman's men had also fired. After hearing this report, I went with Lieutenant V. to look for the cartridge cases. We passed the checkpoint, and that's when I heard the sound of barrels being tipped over.

I turned around and saw that a vehicle had hit the barrels and was heading towards us. I think this vehicle was not going fast. I distinctly saw him swerve. I shouted in Arabic “stop, stop, stop!” » but the vehicle continued to drive.
The man looked drunk and rolled up the windows. After the vehicle passed us, I heard gunshots. A Dutch sergeant then told me to take cover. He shouted to stop shooting. I shouted the same thing towards the people at CIDC. A Dutch soldier posted across the road continued to shoot, without stopping, even when the Dutch sergeant shouted to stop shooting.
When the vehicle stopped, on the instructions of the Dutch sergeant, I tried to speak to the occupants of the vehicle. I told the driver to get out and lay on the ground, which he did. When I started talking to the passenger in the front seat, I heard the driver say that he was injured. We then approached the vehicle and opened the front passenger side door. I saw blood on the passenger's left arm. I then went over to the driver's side, who said they had been drinking and didn't see there was a checkpoint.

The driver's breath smelled strongly of alcohol. Shots were fired again while the vehicle was already stopped, but I don't know where they came from.
When we went to collect the shell casings left during the first incident, everyone was moving away from the checkpoint; there was no one on the road and it was dark. There were no lights illuminating the checkpoint, which meant that it was not clear that there was a checkpoint there. I find it odd that shots were fired at the vehicle, because there was no exchange of fire at the time. I think a warning shot should have been fired and the vehicle would have stopped. I can also tell you that, while we

was looking for the shell casings that had fallen during the first incident, I was walking on the same side as the Dutch sergeant and the CIDC sergeant. As for the Dutch lieutenant, he walked on the other side. I don't know how many people were walking behind me then. I can also add that I do not know if shots were directed at the checkpoint from the vehicle during the second incident. »

On April 21, 2004, around 5:15 a.m., he was questioned:

Name: Hussam Saad, the person in question is SGT [sergeant] and CDT *[commander,* commander] of the CIDC.

Weapon number: 84MD5596; This is an AK-47 which was not loaded at the time of the interview.

The person concerned was also in possession of 2 complete magazines (2 x 30 cartridges).

One magazine was empty.

"When I took my post, I had 120 cartridges in my possession. Around 2:10 a.m., I fired 60 rounds. At this time, a car from Al Hamza arrived and stopped in front of the PCV. The vehicle's headlights were off. The car turned around and headed towards Al Hamza. I heard shots and saw gun flashes coming out of the car. I returned fire with my AK-47. At the start of this incident, I was standing in front of the gatehouse and afterwards I ran towards the vehicle with three other colleagues:

- Alla'a Adnan,

-Mohammad Khazem,

– Hameed Jaber.

These three colleagues also shot.

Around 2:15 a.m. the car suddenly left.

After that, we immediately called the base. Lieutenant A. arrived at our house 20 to 25 minutes later. The commander, the interpreter, Lieutenant A. and another person went to collect the cartridge cases. Meanwhile, a car approached the PCV; it was traveling on the main supply route, the Jackson Road, from Ruymaythah, and heading towards Al Hamza.

The commander was on the right side of the road (looking towards Al Hamza), where he was searching for shell casings. Lieutenant A. was on the left side of the road (still looking towards Al Hamza), busy with the same task.

I suddenly heard a sound like a car hitting the PCV barrels. I saw the car continue towards Al Hamza.

We tried to stop the car, shouting. Then we heard shots.
I heard shots coming from the left of the road (looking towards Al Hamza).
As far as I know, the occupants of the Mercedes did not shoot. A Dutch army soldier was standing on the right side of the road.

I myself did not fire a single bullet towards the Mercedes. »

On April 21, 2004 around 5:30 a.m. he was questioned:

Name: **Hameed Jaber**

Weapon number: 84MD0596

Munitions :

1 magazine containing 15 cartridges,

2 magazines containing 30 cartridges each,

1 magazine containing 25 cartridges.

“At the time of the second incident, I was lying behind the gatehouse. I saw and heard a car approaching; she came from Ar-Rumaythah. She crossed the PCV at high speed and hit two barrels. Then I heard gunshots. I don't know anything more. During the first incident, I fired 15 rounds. »

On April 21, 2004 around 6:15 a.m. he was questioned:

Name: **Haider Mohsen**

Weapon number: GB 4140

Ammunition: 4 magazines containing 30 cartridges each.

“During the first incident, I was sleeping. I couldn't get out because of the shots aimed at the gatehouse. When I came out, I saw a car driving away towards Al Hamza.

During the second incident, I saw a Mercedes approaching. I was standing at the PCV. We were at that time 360o safe . I heard the Mercedes hit the oil drums then I saw it continue at high speed towards Al Hamza.

I heard a Dutchman shout “stop!” ". But the car didn't stop.

I heard shots. I heard the car stop. I heard voices that came from the car radio; the sound was very loud. I didn't see anything else. »

On April 21, 2004 around 6 a.m. he was questioned:

Name: **Ali Hussein**

Weapon number: S41297

Munitions :

3 magazines containing 30 cartridges each,

1 magazine containing 26 cartridges.

“During the second incident, I was lying safe on all sides. I saw a car crossing the PCV at high speed towards Al Hamza. I heard a Dutch soldier shouting “stop, stop!” ". I didn't want to shoot because our men were walking in front of the PCV.

Then I heard gunshots. I fired 4 times during the first incident. I was then standing outside the gatehouse. »

On April 21, 2004 around 5:45 a.m. the following were questioned:

Name: **Ahmed Ghaleb**

Weapon number: S54469

Ammunition: 4 x 30 cartridges

“During the first incident, I was sleeping in the gatehouse. I didn't fire a single shot. During the second incident, I was lying safe on all sides,

very close to the gatehouse. I heard a car hit two barrels. The car continued at a brisk pace (it was clearly accelerating). Then I heard shots in front of the PCV. I don't know anything more. »

Name : **Alâa A Dnan**

Weapon number: 84 MD 0890

Ammunition: 3 magazines containing 30 cartridges and 1 magazine containing 22 cartridges

“I fired during the first incident. They were shots. *(sic)*

During the second incident, I was positioned in a [safe] location on all sides, lying on the left side of the road. I looked in Hamza's direction. I saw a car coming from Ar-Rumaythah. She crossed the PCV by knocking over two barrels. I didn't see what happened at the time, but I definitely heard gunshots. »

Name: **Ilia MOHAMMED KHAZEM,** foreman-chef

Weapon number: 84 MD 6151

Ammunition: 4 magazines containing a total of 120 cartridges

“I didn't fire a single shot last night because I didn't get an order to shoot. I stood near the PCV, facing Hamza's direction. At one point I heard a car hit an oil drum. The car continued on its way towards Hamza. I heard the Dutch shouting “stop!” » to the driver of the vehicle which had crossed the PCV. Then I heard shots. When I saw that the Mercedes had stopped, I also ran in its direction. I couldn't see who was standing on the left and right sides of the road because it was dark.

Murtada Khazaat

Yasser Abdul Alaal

Ahmed Shaker

Ali Hussein

The above-mentioned persons arrived at 4:10 a.m..”

Name: **SAHIB JASSIM**

Weapon number: 84 MV 7435

Ammunition: 4 magazines containing a total of 120 cartridges

“During the first incident, I was standing near the PCV. I saw a truck approaching the PCV coming from Hamza. The driver said he was being followed by a car and pointed to the vehicle in question. He added that it was an Opel. At one point, numerous shots were fired from the car.

In response, my colleagues all shot at the car. We started 360o training , after which the car continued on its way.

During the second incident, I was lying on the ground [safely] on all sides near the PCV. I saw a car arriving from Ar-Rumaythah. She was driving at high speed and hit an oil drum. She then went straight through the PCV and I heard gunshots. I can't tell you anything else that will clarify the situation. » »

3. The internal procedure

39. On 8 January 2007, Ms Zegveld, the applicant's lawyer, wrote on behalf of Mr Azhar Sabah Jaloud's relatives to the public prosecutor's office at the Arnhem District Court through the Registry of the Military Chamber. She requested information on the results of the investigation relating to the death of Mr Azhar Sabah Jaloud and on the decisions which had been adopted regarding the prosecution of possible suspects, with a view to initiating proceedings on the basis of Article 12 of the Code of Criminal Procedure *(Wetboek van Strafvordering)* (see below).

40. On January 11, 2007, the prosecutor replied that the investigation had been closed in June 2004, that Mr. Azhar Sabah Jaloud had probably (vermoedelijk) been hit by an Iraqi bullet, that the Dutch soldier who had also fired at the vehicle could invoke self-defence and that for this reason no suspect had been named among the members of the Dutch military personnel.

41. On February 1 , 2007, Mr. Zegveld wrote to the prosecutor to ask him, in particular, to include in the file the Rules of Engagement *(ROE)* and any reports relating to the investigations carried out by the Iraqi authorities.

42. On February 14, 2007, the prosecutor rejected these requests. Referring to the judgment of the European Court of Human Rights in the case of *Ramsahai and others v. Netherlands* (no. 52391/99, November 10, 2005), it considered that the procedure carried out under Article 12 of the Code of Criminal Procedure did not relate to the merits of a “criminal charge”, that Article 6 of the Convention did not therefore apply and that consequently the modalities of access to the file in such cases were different from those applicable in ordinary criminal proceedings.

43. On 2 October 2007, the applicant, represented by his lawyers, Mr Zegveld and Mr Pestman, filed with the Arnhem Court of Appeal, on the basis of Article 12 of the Code of Criminal Procedure, a request seeking the opening of proceedings against Lieutenant A. He maintained that no element corroborated the assertion that Mr. Azhar Sabah Jaloud had been killed by an Iraqi bullet, that the number of shots fired by Lieutenant A. attested to disproportionate violence, that Lieutenant A. had not fired a warning shot and had not heeded Sergeant Teunissen's call to cease fire, that under Article 50 of the Protocol Additional I to the Geneva Conventions and in the absence of any indication to the contrary, Mr. Azhar Sabah Jaloud should have been considered a civilian person and should therefore not have been the subject of targeted rifle fire and that of any way the use of deadly force by Lieutenant A. had not been necessary. The applicant also relied on the statement given to the Iraqi police by the driver of the car, according to which he had been told not to talk about the involvement of Dutch soldiers.

44. On 28 January 2008, the chief prosecutor *(hoofdacteur van justitie)* at the Arnhem District Court wrote to the chief advocate general *(hoofdadvocaat-generaal)* at the Arnhem Court of Appeal to recommend the rejection of the applicant's request. He attached to his letter a detailed statement from the prosecutor who had adopted (in July 2004) the decision not to prosecute Lieutenant A. According to the prosecutor in question, it had to be admitted that Lieutenant A. had shot at the car but it was not could not establish that he had caused the death of Mr. Azhar Sabah Jaloud; moreover, assuming that this was the case, Lieutenant A. could reasonably have thought that he was being attacked and that he had to defend himself. The prosecutor's letter also contained the following passage:

> "The specific responsibilities of the United States and the United Kingdom, the occupying powers, were recognized on the basis of United Nations Security Council Resolution No. 1483. Unlike the British forces, however, the Netherlands was not to be seen as an occupying power in Iraq: for the Netherlands, the SFIR constituted a peacekeeping operation (vredesoperatie).
> The government was of the opinion that the mission of the Dutch armed forces should be limited to supporting the British in the sector of southern Iraq which had been entrusted to them (Lower House of Parliament, 2002-23, no. 23432 , no . 16). The use of an operational force by the SFIR finds its legitimacy not in *jus in bello,* but in the mandate of the Security Council, the rules of engagement (ROE) based on said mandate, and the instruction card Dutch law on the use of force, which arises from these instruments. ROE permits the use of force against any person falling within the scope of the relevant rule. In certain cases, civilians may therefore be affected. The same is true – as reflected in the instruction on the use of force – of the fundamental right to self-defense. The commander's instructions and objective, combined with the perceived threat, are decisive in determining whether and, if so, how a soldier will use the authority to use force. »

45. For the chief prosecutor, it was also not possible to conclude that there had been a violation of Article 2 of the Convention under its procedural aspect. According to him, in fact, the Dutch troops present in Iraq did not exercise effective authority in that country and they were therefore not bound by the Convention.

46. On 1 February 2008, the Advocate General at the Arnhem Court of Appeal submitted a written opinion expressing the provisional opinion that the decision not to prosecute was unquestionable. For him, a Dutch soldier remained subject to Dutch criminal jurisdiction wherever he was in the world. However, UNSC Resolution 1483 indicated that the Cooperating States did not have the status of occupying powers, and the armed conflict had ended on the date of the death of Mr. Azhar Sabah Jaloud. Furthermore, even if it were accepted that a conflict was raging in Iraq at the time, given the circumstances of the incident – which for the Advocate General were unrelated to the conflict itself – it was not not possible to prosecute Lieutenant A. under the legislation relating to war crimes. The Advocate General concluded by saying that criminal law

ordinary law allowed Lieutenant A. to invoke self-defense but that, notwithstanding the absence of a conviction, the Dutch State was perhaps in a situation where it would be appropriate to pay ex gratia compensation.

47. On 18 March 2008, the Court of Appeal held a hearing. Ms Zegveld, the applicant's representative, requested certain investigative measures, in particular the addition to the file of copies – and translations, if necessary – of the rules of engagement and the relevant instructions based on them, of the autopsy report Iraqi and the statement given by Mr. Dawoud Joad Kathim to the Iraqi police. She also requested the hearing of Mr Madjied, the Iraqi interpreter, regarding Mr Dawoud Joad Kathim's allegations that the interpreter had told him not to talk about the involvement of Dutch soldiers. Furthermore, Ms. Zegveld questioned the conclusion that shots had been fired by members of the Iraqi force and maintained that Lieutenant A.'s actions had exceeded self-defense.

48. The Court of Appeal rendered its decision on April 7, 2008. It dismissed the request for the implementation of new investigative measures, considering that these would be of no use given the lapse of time since the facts in dispute, and she refused to order the opening of proceedings against Lieutenant A. In her reasons, she stated in particular the following:

> “The legitimization of the functional use of force in the area in question is found in the rules of engagement (ROE) and the SFIR instructions on the use of force (revised version of July 24, 2003), which are are inspired by the first document. Counsel [for the applicant] requested the Court of Appeal, in camera, to allow consultation of the ROE. However, these were not included in the file, and neither the court of appeal nor the attorney general have them. The SFIR's instructions on the use of force will serve as a criterion of analysis in this case. They indicate that the use of force is authorized in particular in the context of self-defense and when it comes to defending one's comrades in arms or other persons designated by the commander of the DMN (SE). Concerning targeted shooting, the instructions specify that they are permitted when [a member of the SFIR himself], his comrades in arms or people under his protection are threatened with violence likely to cause serious injury or death, and there is no other way to prevent it. Among the examples given are the situation where a person fires or points his weapon in the direction of the person concerned, his comrades in arms or persons under his protection, and that where a person knowingly directs a vehicle at the person concerned, his comrades in arms or people under his protection.
>
> It appears from the file that [Lieutenant A.], who was looking for traces of an incident that had occurred shortly before and during which shots had been fired from a car, found himself confronted on the spot with a car which had not respected the PCV and who rushed in its direction. At that point, shots were fired. [Lieutenant A.] thought they were coming from the car. This assumption is perfectly understandable, because nothing could make [Lieutenant A.] think that shots would be fired in his direction by his own unit or a friendly unit (the

> Dutch military personnel or ICDT members present). It does not matter that, according to [the applicant's] counsel, other people present there assessed the situation differently. After all, [Lieutenant A.] was in another place and he did not observe the situation in the same way as the group who were on the other side of the road and who also used an intensifier. 'picture. Likewise, the circumstance that [Lieutenant A.] fired when the car was passing makes no difference, since shortly before the checkpoint had been targeted by a vehicle which then moved away and [Lieutenant A.] Lieutenant A.] had to, as he indicated, take into account the fact that there were friendly troops on the other side of the road, whom he did not want to have in his line of sight. [The applicant's] counsel also suggested that [Lieutenant A.] could have fired a warning shot.
>
> According to the instructions on the use of force, a warning shot should only be fired if the circumstances of the operation allow it, and it does not need to be when, for example, the person concerned or other people in the immediate vicinity are subject to armed attack.
>
> In light of the above, the Court of Appeal considers that [Lieutenant A.] could reasonably believe that he and his comrades in arms were being targeted and that, based on this assumption, he acted in the limits of applicable instructions on the use of force.
>
> Therefore, the court of appeal concludes that the prosecutor's decision not to initiate prosecution was justified. »

B. The weapons used during the disputed events

1. The Diemaco C7A1s

49. The Diemaco C7A1 infantry rifle is the weapon commonly supplied to the Dutch army. Made in Canada, it is an improved version of the Armalite AR-15/Colt M16, a better-known American-designed rifle. It can fire in automatic mode and semi-automatic mode.
The magazines normally supplied to the Dutch armed forces can hold up to thirty rounds. In automatic mode, this weapon fires 700 to 940 rounds per minute.

50. Like the AR-15/M16, the Diemaco uses 5.56 x 45 mm (or 5.56 NATO) caliber cartridges. The bullet often spins and fragments as it enters a body at high speed, causing heavy tissue damage.

2. La Kalashnikov AK-47

51. The Kalashnikov AK-47 was originally Soviet designed and manufactured, but copies were produced in many countries. Once the main weapon of the Warsaw Pact infantry, this rifle – along with its copies **–** is today supplied to the armies of multiple countries, including local forces in Iraq.

52. Like the weapon itself, the ammunition used by the AK-47 (7.62 x 39 mm caliber cartridges) is produced in large quantities by many manufacturers. The standard bullet has a power of

considerable penetration; however, when it hits a body without actually passing through it, it can also twist and fragment, producing more or less the same effects as the 5.56 mm NATO bullet.

C. The military presence of the Netherlands in Iraq

1. The general context

53. From July 2003 to March 2005, Dutch troops participated, in battalions, in the Stabilization Force in Iraq (SFIR). Stationed in Al-Muthanna province, they were part of the Multinational Division South-East (MND-SE), placed under the command of a British armed forces officer.

54. The participation of Dutch forces in the DMN-SE was governed by a Memorandum of Understanding between the United Kingdom and the Kingdom of the Netherlands, to which the rules of engagement were annexed. These two documents were and remain classified “confidential”.

55. Dutch military personnel were provided with an aide-memoire prepared by the Dutch Chief of Defense Staff *(Chief Defensiestaf) .* This was a reference document containing a summary of the rules of engagement. Personnel also received instructions on the use of force *(Geweldsinstructie),* also written by the Chief of the Defense Staff.

56. For general information on the occupation of Iraq from May 1 , 2003 to June 28, 2004, see *Al-Skeini and others v. United Kingdom* ([GC], o 55721/07, n §§ 9-19, ECHR 2011).

2. The letter addressed to the Lower House of Parliament

57. On 6 June 2003, the Minister of Foreign Affairs *(Minister van Buitenlandse Zaken)* and the Minister of Defense *(Minister van Defensie)* jointly addressed 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 2002-2003, no. 23,432, o 116). This letter set n out in particular the reasons why the government had decided to participate in the SFIR by sending Dutch forces and provided general information. It contained the following passages:

> “As requested by the British, the Dutch units will be deployed in the south of Iraq, in the province of Al-Muthanna (...) This province is placed under the responsibility of a British division. The operational chain of command therefore passes through the British divisional headquarters, then through the American headquarters in Baghdad, and back to American Central Command *(CENTCOM),* which coordinates military direction.
>
> (...)

Mandate/legal basis

The basis for sending Dutch troops to Iraq is UN Security Council Resolution 1483. The government believes that the provisions of this resolution provide such a basis. The resolution is expressly based on Chapter VII of the United Nations Charter, and its first paragraph calls on member states and organizations “to assist the Iraqi people in their efforts to reform their institutions and rebuild the country and to] contribute to ensuring stability and security in Iraq in accordance with the (...) resolution”. More generally, the penultimate paragraph of the operative part of resolution 1483 asks member states and international and regional organizations “to contribute to the implementation of the (...) resolution”. The minutes of the Security Council meeting at which this resolution was adopted show that there is broad consensus on the premise that the resolution provides a basis for member states to send troops to Iraq, in the framework established by it.

In its preamble, the resolution makes clear that a distinction must be made between the United States and the United Kingdom, which are active in Iraq as occupying powers *(hoedanigheid) ,* and the States which do not have this status. quality. This observation by the Security Council, formulated in a resolution adopted under Chapter VII of the Charter of the United Nations, must be taken as an authoritative opinion regarding the status of the participating States and binding on the Member States of the United Nations.

Paragraph 5 of the resolution explicitly calls on all concerned States (including those not present as occupying Powers) to
“fully discharge their obligations under international law, in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907”). The Netherlands intends to respond to this call.

(...)

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 other troop-contributing countries are sufficiently involved in defining the general politico-military strategy of the security force and in the exchange of information. To this end, the United Kingdom will establish a “contributors committee” for the British sector, which will allow close consultation between government representatives, similar to the procedure that the British have developed for the ISAF [International Defense Force]. security assistance, deployed in Afghanistan] and which the Netherlands and Germany are now also following for ISAF. Troop-contributing countries will also participate in military leadership through their national representatives in operational headquarters.

(...)

Instructions for use of force (rules of engagement)

“Rules of Engagement” (ROE) are instructions to military units that outline the circumstances, conditions, degree and manner of authorized use of force. Their content is not published. ROEs are drafted based on military-operational and legal considerations. These include considerations relating to humanitarian law and the law of war, as well as political/diplomatic considerations. They are established with reference to a NATO document setting out guidelines for ROE.

As is customary in other peacekeeping operations, it is expected that the Netherlands will take over the ROE of the “lead state”, in this case the United Kingdom. The Netherlands may modify instructions for the use of force based on national guidelines and considerations.
The ROEs have not yet been finalized, but the government is keen for them to be robust, including broad powers for “force protection” and the creation of a secure and stable environment. On this basis, the government assumes that ROE will provide sufficient opportunity for task accomplishment even in the event of hostilities or riots.

The command structure

The entire operation in Iraq is placed under the command of US CENTCOM, within which a Coalition Forces Land Component Commander *(CFLCC)* ensures

direction from Baghdad. To this end, Iraq is divided into four sectors. Sectors in northern Iraq and the area around Baghdad will be led by the United States. Poland is responsible for another sector and the United Kingdom is responsible for southern Iraq. The Dutch battalion will be under the operational control of the British division as an independent unit *(zelfstandige eenheid).* As part of NATO's support for Poland, it was decided that part of the Dutch personnel would be based at the Polish headquarters. In addition, the Polish sector is contiguous to the American sector and the presence of Dutch personnel promotes better general coordination.

Moreover *(Overigens),* the Netherlands will at all times retain “full command” *over* Dutch military personnel. The Chief of the Defense Staff will ensure compliance with the mandate and military objective of the Dutch troops. If necessary, he will issue further directives on behalf of the Minister of Defense. »

3. The presence of the royal constabulary in Iraq

58. A unit of the Royal Constabulary was present in Iraq, attached to the Dutch forces. The applicant claims that she shared the quarters of the regular troops.

D. Instructions to Dutch SFIR personnel

59. The respondent government produced the versions dated July 24, 2003 of the aide-memoire for SFIR commanders and the SFIR soldier's card; these correspond to the documents which were given to Dutch staff. The relevant parts in the present case read as follows (translations by the Registry of the Court; the English language expressions used in the Dutch original are reproduced in italics):

1. The aide-mémoire for SFIR commanders

“This instruction note summarizes in a simplified manner, for the benefit of officers and non-commissioned officers, the rules of engagement (ROE) for the DMN (SE) and the restrictions which have been made there by the Countries- Down. If in doubt, please

refer to the English text of the ROE and the relevant declarations of the Netherlands. In the event of any conflict between this note and the ROE or the Dutch Statements, the ROE and the Dutch Statements shall control.

MISSION

1. Your mission is to contribute to the creation of a secure and stable environment in Iraq, so as to enable the reconstruction of the country and the transition to an independent and representative regime. The use of strictly necessary force is permitted in accordance with the conditions set out below.

GENERAL RULES

2. The use of force is only permitted if other means are insufficient.
Please note the following:

a) do not under any circumstances use more force than is strictly necessary to accomplish your task;

b) collateral damage (to people or property) must be avoided as much as possible.

SELF-DEFENSE

3. The use of strictly necessary force, including when it risks causing death or serious injury *(deadly force)* and involves the use of authorized weapons, is permitted:

a) to ensure your own defense;

b) to prevent the theft or destruction of property belonging to the SFIR and essential to the execution of the mission.

USE OF FORCE FOR OTHER REASONS

4. Regardless of the right to self-defense, the use of strictly necessary force, including when it risks causing death or serious injury *(deadly force)* and involves the use of authorized weapons, is permitted:

a) to defend your comrades in arms or any other persons designated by the commander of the DMN (SE) *(designated persons) ;*

(b) to prevent the theft or destruction of property designated by the commanding officer la DMN (S-E) *(designated property) ;*

(c) to prevent unauthorized access to military installations belonging to the SFIR or other locations designated by the DMN Commander (SE) (including designated property), e.g. restricted military areas *(Military Restricted Areas) ;*

d) to apprehend, search or disarm enemy units which threaten the security of SFIR units or other persons designated by the commander of the SFIR DMN (SE) in the execution of the mission;

e) against any hostile act or hostile intention;

f) if ordered by your field commander.

(...)

SUMMONS PROCEDURE

6. If the circumstances of the operation permit, you must warn that you are going to open fire. It is permitted, for example, to open fire without warning in the following situations:

a) if you or others in the immediate vicinity are the subject of an armed attack; Or

(b) whether issuing a summons would put you or others at increased risk of being killed or seriously injured.

7. You will give a summons by shouting:

“STABILIZATION FORCE!” STOP OR I’LL SHOOT! »

then, in the local language,

« OEGAF DFEE-SJ! OUCH ILLA ARMIE BILL GO! »2

(“It’s the army! Stop or I’ll shoot!”)

8. If the warning has no effect, you can trigger a warning shot if the field commander orders it or in execution of standing instructions.

HOSTILE ACT AND HOSTILE INTENTION

9. A hostile act *is* an act of aggression amounting to an attack or threat of attack with the use of force likely to cause death or serious injury directed against your comrades in arms, persons designated or designated property. Here are non-limiting examples of hostile acts:

a) a person who shoots at you, at your comrades in arms, at people designated or on designated property;

(b) a person who places explosives or incendiary devices or throws them towards you, your comrades in arms, designated persons or designated property;

c) a person who knowingly drives a vehicle at you, your companions weapons, designated persons or designated property.

(...)

OBLIGATION TO USE ONLY STRICTLY NECESSARY FORCE

11. Once the use of force is permitted, you are required to limit it to what is strictly necessary. Take all possible precautions to avoid escalation and to limit collateral damage as much as possible. It is prohibited to attack civilians themselves, except in self-defense. It is prohibited to attack objects of a strictly civil or religious nature, unless they are used for military purposes.

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

a) carry out only targeted fire;

b) avoid firing more shots than necessary;

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2. Transliteration into Dutch.

c) take all necessary precautions to avoid collateral damage (to people and property); And

d) cease fire as soon as the situation permits. You must then secure the sector and take care of the injured.

OTHER COMMAND INSTRUCTIONS

(...)

18. Prevent, and report to the hierarchy, any suspicion of violation of the law international humanitarian. »

(...)

2. The SFIR soldier's card

« MISSION

1. Your mission is to contribute to the creation of a secure and stable environment in Iraq, so as to enable the reconstruction of the country and the transition to an independent and representative regime.

USE OF FORCE

2. The use of force is permitted in the following cases:

a) in self-defense;

b) to defend your comrades in arms or any other persons designated by the commander of the DMN (SE);

c) to prevent the theft or destruction of assets belonging to the SFIR and essential to the execution of the mission, or other assets designated by the command of the DMN (SE);

(d) to prevent unauthorized access to military installations belonging to the SFIR or other locations designated by the DMN Commander (SE) (including designated assets), e.g. Military Restricted *Areas*
Areas) ;

e) to apprehend, search or disarm enemy units which threaten the security of SFIR units or other persons designated by the commander of the SFIR DMN (SE) in the execution of the mission;

f) if ordered by your field commander.

GENERAL RULES

3. The use of force is only permitted if other means are insufficient. Please note the following:

a) try to avoid escalation;

b) under no circumstances use more force than is strictly necessary to the accomplishment of your task;

c) collateral damage (to people or property) must be avoided as much as possible.

4. Any person who attacks you or others, or who enters without authorization, by force or not, into an SFIR military installation or other places designated by the Commander of the DMN (SE) can be stopped and

searched for the purpose of disarming him until it is established that he no longer has weapons enabling him to kill or injure you or others. You can seize and, if necessary, neutralize – for immediate use – any dangerous object endangering people, property or the execution of the mission.

5. As soon as the execution of the mission permits, any person arrested must be handed over to the competent authorities of Iraq or the occupying forces (United Kingdom).

6. Treat everyone with humanity.

7. Collect the wounded and take care of them regardless of their side.

8. Don't collect "war trophies."

9. Prevent violations of international humanitarian law and report any violations or suspected violations to your commander.

10. Report any use of force to your commander.

SUMMATION AND SUMMATION SHOTS

11. If the situation permits, you must issue a warning before carrying out targeted fire. We must warn [those interested] that if they do not stop or if they do not put an end to the dangerous act you will fire.

You will give a summons by shouting:

"STABILIZATION FORCE!" STOP OR I'LL SHOOT! »

then, in the local language,

« OEGAF DFEE-SJ! OUCH ILLA ARMIE BILL GO! »

("It's the army! Stop or I'll shoot!")

12. If the warning has no effect, you can trigger a warning shot if the field commander orders it or in execution of orders given to you.

TARGETED SHOOTING

13. You may open fire with targeted fire if you, your comrades in arms or persons under your protection are threatened with violence likely to cause serious injury or death and if there is no no other way to prevent them.

Here are examples:

– you can shoot at a person who draws or points his weapon in your direction or in that of your comrades in arms or people under your protection;

– you can shoot at a person who places explosives or incendiary devices or throws them or is about to throw them at you, your comrades in arms or people under your protection;

– you can shoot a person who knowingly drives a vehicle at you, your comrades in arms or people under your protection.

FORCE MINIMAL

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

– carry out only targeted shots;

– avoid firing more shots than necessary; And

– cease fire as soon as the situation allows.

15. It is prohibited to knowingly use force against civilians, except in cases of necessary for the purposes of self-defense.

16. It is prohibited to attack property of a strictly civil or religious nature, except:

a) if they are used for military purposes; And

b) if your commander orders you to do so.

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

18. It is prohibited to use tear gas. »

E. The royal constabulary

60. The Royal Constabulary is a body of the army which is at the same level as the Royal Navy *(Koninklijke Marine),* the Royal Land Force *(Koninklijke Landmacht)* and the Royal Air Force *(Koninklijke Luchtmacht) .* Its members have military status and rank. It has its own chain of command; its commander holds the rank of lieutenant general *(luitenant-general)* and reports directly to the Minister of Defense.

61. The functions of the Royal Constabulary, as far as they are relevant to the present case, include "carrying out policing tasks for the Netherlands and other armed forces, as well as for international military headquarters , and persons belonging to these armed forces and these headquarters" (article 6 § 1 b) of the Police Act 1993 – *Politiewet 1993).*

62. Members of the royal constabulary undergo both military and police training. Non-commissioned officers holding the rank of sergeant *(wachtmeester)* or higher may be appointed agents with investigative powers *(opsporingsambtenaren) ;* officers in certain categories may be appointed auxiliary prosecutors *(hulpofficeren van justitie).*

63. As military police officers or military police investigators, members of the Royal Constabulary are subordinate to the prosecutor at the Arnhem District Court.

F. The military chamber of the Arnhem Court of Appeal

64. At the material time, Article 9 of the Code of Military Criminal Procedure *(Wet Militaire Strafrechtspraak)* provided that the sections of the military chamber of the Arnhem Court of Appeal were composed of two judges of the Court of Appeal of Arnhem. appeal – one of whom presided – and a military member. This last

was an active soldier with the rank of captain *(kapitein ter zee,* royal navy), colonel *(kolonel,* royal army), colonel of aviation *(kolonel,* royal air force) or a higher grade, and also having the qualifications required to be a magistrate; he was promoted to the honorary rank of rear admiral *(commander,* royal navy), brigadier general *(brigadegeneraal,* royal army) or air brigadier general *(commodore,* royal air force) if he did not have not already actually this grade. He could not have belonged to the royal constabulary. He was appointed for a four-year term, renewable once for the same duration; compulsory retirement was set at sixty years (article 6 § 4 of the code of military criminal procedure).

65. Article 68 § 2 of the Judicial Organization Act *(Wet op de rechterlijke organisetie)* states that the military members of the military chamber of the Arnhem Court of Appeal hear cases as judges on a on an equal footing with their civilian colleagues and are subject to the same duty of confidentiality (articles 7 and 13 of the law) and the same rules of functional independence and impartiality (article 12); they are also subject to the same control of the manner in which they conduct themselves in the exercise of their functions as civil judges (article 13 (a) to (g)). This control, which concerns very specific aspects of their behavior, is carried out by the Court of Cassation *(Hoge Raad)* and required – at the request of an interested party or ex officio **–** by the public prosecutor *(procureur-general).* near the Court of Cassation.

G. Relevant domestic law and procedure

66. The following provisions of domestic law are relevant in this case.

1. The Constitution of the Kingdom of the Netherlands

Article 97

"1. The Kingdom of the Netherlands has armed forces for the defense and protection of its interests, as well as for the maintenance and promotion of the international legal order.

2. The armed forces are placed under the supreme authority of the government. »

2. Le code pénal (Penal Code)

Article 41

“1. A person who commits an act necessary to defend his physical integrity *[lijf]* or that of others, his sexual integrity *[eerbaarheid]* or that of others, his property or that of others against immediate unlawful aggression incurs no penalty for this act.

2. A person who exceeds the limits of the necessary defense incurs no penalty if his act results from violent emotion which is the immediate consequence of an attack. »

Article 42

“A person who commits an act prescribed by law incurs no penalty. »

Article 43

“1. A person who commits an act for the purposes of carrying out an official order given by the authority vested with the required jurisdiction shall not incur any penalty for that act.

2. The fact that an official order was given in the absence of necessary competence does not confer impunity, unless the subordinate person who executed it believed in good faith that the order was given by a authority acting within the framework of its competences and whether compliance with this order fell within the framework of its subordinate status. »

3. Le code pénal Militaire (Code of Military Criminal Justice)

Article 4

“Dutch criminal law applies to military personnel who commit any wrongdoing outside the Netherlands. »

Article 38

"1. No penalty is incurred by a person who, within the limits of his powers, commits an act authorized by the law of war, or who cannot be sanctioned without there being a violation of a treaty in force between the Netherlands and the power with which the Netherlands is at war, or of a possible settlement adopted under such a treaty.

2. No penalty is incurred by a soldier who uses force in the legitimate execution of his task and in a manner compatible with the rules laid down for the accomplishment of this task. »

Article 71

“For the purposes of this code, the term “war” encompasses an armed conflict which cannot be considered a war strictly speaking and in which the Kingdom is engaged, whether for the purposes of individual or collective self-defense or recovery. international peace and security. »

Article 135

“The expression “service instruction” [dienstvoorschrift] means a written decision of general scope issued in the form or by virtue of a general administrative measure for the Kingdom or for one of the countries of the Kingdom3 *[bij of*

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3. The Kingdom of the Netherlands is made up of autonomous “countries”. At the material time, these were the Kingdom in Europe (the Netherlands proper) and the island of Aruba and the Netherlands Antilles (territories located in the Caribbean).

pursuant to an order in council or administrative order or a written decision of general application issued by or pursuant to a national ordinance or national decree] et qui concerne un intérêt de la fonction nationale quel qu'il soit *[any military service interest]* et comporte un ordre ou une interdiction visant le personnelmilitary. »

4. The law on military criminal procedure (Wet Militaire criminal justice)

Article 1

« (...)

3. The Code of Criminal Procedure applies unless otherwise provided in this Law. »

Article 8

« (...)

2. Within the Arnhem Court of Appeal, a section composed of several judges called the “military chamber” has exclusive jurisdiction to examine appeals against appealable decisions rendered by the military chambers of the district court referred to in Article 3 [the Arnhem District Court]. This chamber also examines complaints filed under article 12 of the code of criminal procedure. »

5. Le code de procédure pénale (Code of Criminal Procedure)

Article 12

"1. If the perpetrator of a wrongdoing is not prosecuted or if the proceedings against him are dropped, any person with a direct interest *(rechtstreeks belanghebbende)* may file a written complaint with the court of appeal in the jurisdiction in which the decision not to initiate proceedings or to terminate proceedings was taken.

(...) »

Article 148

"1. The prosecutor is responsible for investigating offenses which fall within the jurisdiction of the district court in which he officiates and for investigating offenses within the jurisdiction of that district court which fall within the jurisdiction of other courts. district or cantonal courts.

2. To this end, he gives orders to the other persons responsible for [these] investigations (...)”

H. The relevant internal jurisprudence

1. The Eric O affair.

67. On December 27, 2007, Sergeant Major *Eric* O., a member of the Marine Corps *(Korps Mariniers)* who commanded a unit

responsible for recovering the load of a container which was located on the side of the “Jackson” road, fired a warning shot towards the ground to ward off a group of looters. The bullet ricocheted off the surface of the ground, mortally wounding one of the raiders.

68. Sergeant Major O. was prosecuted for disobeying official instructions for having used force in excess of that authorized by the aide-mémoire and instructions on the use of force, or, in the alternative, for homicide recklessly.

69. Following an appeal by the public prosecutor against the acquittal pronounced at first instance, the military chamber of the Arnhem Court of Appeal confirmed the acquittal of Sergeant Major O. In its judgment of 4 May 2005 *(Landelijk Jurisprudentie Nummer* [National Jurisprudence Number], “LJN” AT4988), the appeal court concluded that the rules of engagement constituted official instructions despite their secret nature and that Sergeant Major O. had acted within the limits of the said rules and had not been reckless.

2. Les affaires Mustafiÿ *et* Nuhanoviÿ

70. In 1992, Bosnia and Herzegovina proclaimed its independence from the Socialist Federal Republic of Yugoslavia. A war ensued which lasted until December 1995. Under resolution 743 (1992) of February 21, 1992, the United Nations Security Council established a United Nations Protection Force (UNPROFOR). Among the troop-contributing states was the Netherlands, which provided an airborne infantry battalion. Known as "Dutchbat", it was deployed as a UN-led peacekeeping force in and around the then government-held town of Srebrenica in eastern Bosnia. majority Bosnian population of the Republic of Bosnia and Herzegovina.

71. On 10 July 1995, the Bosnian Serb army attacked the Srebrenica “safe zone” with significantly superior forces. It invaded the area and took control of it despite the presence of the Dutchbat battalion, which in the end only controlled a camp in the village of Potoÿari. Over the next few days, Bosnian men who had fallen into the hands of the Bosnian Serb army were separated from women and children and then killed. It is now generally accepted as established fact that more than 7,000 Bosnian men and boys, perhaps as many as 8,000, died at the hands of the Bosnian Serb Army and Serb paramilitary forces during what is now now known as the “Srebrenica massacre”.

72. Surviving relatives of three men killed during this massacre in July 1995 brought civil actions against the Dutch State before the courts of the Netherlands.

73. The plaintiffs in the first case *(Mustafiÿ v. the Dutch State)* were surviving relatives of an electrician who had been a *de facto* employee of the Dutchbat but had not benefited from the status conferred on persons directly employed by the Dutchbat. United Nations. The complainants alleged that the Dutch State had breached its contractual obligations on the grounds that the deputy commander of the Dutchbat battalion had refused to allow the applicant to stay with his family at the Potoÿari camp, so much so that he had to leave the camp that day, although, according to them, the command of the Dutchbat battalion should have protected him by keeping him inside and evacuating him with the battalion itself. Alternatively, they argued that there had been fault. The plaintiff in the second case *(Nuhanoviÿ v. the Dutch State)* had himself been a *de facto* employee of the Dutchbat battalion, for which he had worked as an interpreter, also without enjoying the status of UN employee. ; his father and brother had been killed in the massacre. He alleged that there had been misconduct, considering that the deputy commander of the Dutchbat battalion had closed access to the camp to the two men.

74. On 6 September 2013, the Court of Cassation ruled on the two cases (LJN BZ9225, *Nuhanoviÿ,* and LJN BZ9228, *Mustafiÿ).* In their relevant passages in the present case, the two judgments, the essential parts of which are identical, read as follows (extract from the *Nuhanoviÿ judgment) :*

[Translation from the Registry]

> “3.10.1. In the first part of the cassation appeal, it is alleged that in points 5.7 and 5.8 of the legal conclusions of its interlocutory judgment the court of appeal did not recognize that a UN military contingent established on the basis of Chapter VII of the United Nations Charter and placed under the command and control of the United Nations – in this case UNPROFOR, of which the Dutchbat battalion was a part – was an organ of the United Nations. This means that the attribution of the behavior of this military contingent should fall under Article 6 of the PAROI [draft articles of the International Law Commission on the responsibility of international organizations (63rd session of the International Law Commission, UN Doc A/66/10, forthcoming in the Yearbook of the International Law Commission, 2011, vol. II, part two)] and not article 7 of PAROI.
> According to this part of the appeal, the application of Article 6 of the PAROI implies that the conduct of the Dutchbat battalion should, in principle, always be attributed to the United Nations.
>
> 3.10.2. According to the commentary relating to article 7 of the PAROI (...), this rule of attribution applies, in particular, to the situation where a State places military contingents at the disposal of the United Nations. for a peacekeeping operation and where command and control is transferred to the United Nations while the detachment State retains its disciplinary powers and criminal jurisdiction (the “organic command”). It is implicit in the conclusions of the Court of Appeal that this situation corresponds to that of the present case. After all, in point 5.10 of the legal conclusions of the interlocutory judgment, the court of appeal declared – and this aspect is not called into question in the cassation appeal – that it was not disputed that the The Netherlands, a troop-contributing state, had retained control over personnel matters

military personnel concerned, who had remained in the service of the Netherlands, and that they had retained the power to sanction members of these military personnel under disciplinary law and criminal law. The argument invoked in the first part of the cassation appeal, according to which the court of appeal did not apply the attribution rule of article 6 of the PAROI, choosing, wrongly, to apply the rule of attribution of article 7 of the PAROI, is therefore not valid.

3.11.1. The second part of the appeal consists of a series of arguments directed against the legal conclusions contained in points 5.8 to 5.20 of the interlocutory judgment, in which the Court of Appeal defined the criterion of effective control by applying to the present case the attribution rule of article 7 of the PAROI.

3.11.2. Insofar as these grounds of appeal postulate that international law excludes conduct from being attributable to both an international organization and a State, and that the Court of Appeal therefore wrongly started from the idea that it was possible that both the United Nations and the State had effective control over the disputed behavior of the Dutchbat battalion, these means are based on an erroneous interpretation of the law. As indicated above in point 3.9.4., international law, in particular article 7 of the PAROI combined with article 48 § 1 of the PAROI, does not exclude the double attribution of a given behavior.

It follows that it was open to the Court of Appeal not to rule on whether the United Nations exercised effective control over the behavior of the Dutchbat battalion in the early evening of July 13, 1995. Assuming That this was the case does not necessarily mean that the United Nations had exclusive responsibility.

3.11.3. To the extent that it is argued in these grounds of the cassation appeal that the Court of Appeal applied an erroneous criterion in determining whether the State exercised effective control over the Dutchbat battalion at the time of the contested conduct, these grounds are also based on an erroneous interpretation of the law. To determine whether the State exercised effective control, it is not necessary that it contravened the UN command structure by issuing instructions to the Dutchbat battalion or independently exercised operational command. It appears from the commentary relating to Article 7 of the PAROI (...) that the attribution of conduct to the State of secondment or to the international organization is based on the de facto control exercised over the specific conduct, framework in which it is necessary to take into account all the factual circumstances and the context specific to the case. In the contested legal conclusions, the Court of Appeal sought, in light of all the circumstances and the specific context of the case, whether the State had exercised de facto control over the disputed conduct of the Dutchbat battalion. . The Court of Appeal therefore did not interpret or apply the law erroneously. »

The Court of Cassation therefore confirmed the judgment by which the Court of Appeal had declared the Dutch State responsible for the deaths of the three men.

I. Other internal documents

1. Evaluation report on the application of military criminal procedure to operations carried out abroad

75. This report, dated 31 August 2006, was drawn up by a commission composed of a senior civil servant, a former chief advocate general at the Arnhem Court of Appeal and a judge. It was ordered by the Minister of Defense, at the request of the Lower House of Parliament, following the shock wave caused by the *Eric O.* affair (paragraphs 67-69 above).

76. This report addresses in particular the question of jurisdiction, within the meaning of Article 1 of the Convention. In this regard, it includes the following passage (p. 30):

> "The formal extraterritorial effect of the Convention seems to be limited to certain particular cases. This does not change the fact that the standards arising from the Convention have general application for Dutch military operations abroad. In particular, the Convention is the origin of important fundamental standards which can be applied to criminal investigations into the use of force resulting in death or injury (...)"

The report then analyzes the domestic case law relating to the material and procedural aspects of Article 2 of the Convention.

77. He mentions changes already made to pursuit policy and the way rules of engagement and other instructions are relayed to field commanders since the *Eric* O affair. He suggests further adjustments.

78. He reiterates the criticisms of the unpreparedness of the personnel of the royal constabulary for police work in areas of operation abroad but indicates that in 2006 "we have already invested a lot to improve the quality of police activities military" and that more will be done in the following months.

79. Furthermore, the report indicates that insufficient knowledge of the field by the public prosecutor, made up of civilian lawyers, has sometimes led to too hasty decisions to prosecute members of the military, the Eric O. *case* being cited as the illustration. However, here too the report shows improvements.

80. The shooting from which this application originates is mentioned among the concrete cases studied by the commission but the incident is not examined in detail.

2. The Van den Berg commission report

81. In response to allegations that Iraqi citizens had suffered ill-treatment and even torture at the hands of Dutch soldiers, the Minister of Defense ordered an investigation to be carried out by an official commission. This was composed of a former

MP (the president, JT van den Berg, who gave his name to the commission), a sitting MP, a retired lieutenant general and a retired rear admiral.

82. The report containing the commission's conclusions was published in June 2007. It indicates that an earlier version of this same document was read and commented on by two legal experts, one of them being Mr. Zegveld, who is now today the representative of the applicant.

83. The report mentions frictions within the royal constabulary unit in question – which, in particular, was not adequately trained in police-style criminal investigations – and tensions between the said unit and the marine battalions which were the first Dutch contingents sent to Iraq (before the battalion of the Royal Army, which was based there at the time of the death of Mr. Azhar Sabah Jaloud).

84. The report also indicates that the Netherlands was not an “occupying power” and had therefore made certain reservations. Among other things, Dutch forces did not have the power to detain a person or prosecute offenders.

Anyone arrested by Dutch forces was to be handed over to either the British army or Iraqi authorities, depending on the nature of the suspicion. “Conversations” with persons so arrested were authorized in the context of force protection.

85. The report also addresses the question of whether a person who is outside the Kingdom of the Netherlands, in an area where Dutch forces are operating in an armed conflict, can be said to fall within the scope of the jurisdiction of the Netherlands; he answers in the affirmative.

86. On 18 June 2007, the Minister of Defense presented this report to the Lower House of Parliament, accompanied by a letter commenting on some of the findings contained therein but approving its conclusions.

3. The final evaluation report

87. A final assessment report was published after the complete withdrawal of the last Dutch contingent. It indicates that the Dutch government had attached certain "reservations" to the tasks of the Dutch troops, according to which the Netherlands would not assume administrative functions and would not carry out "executive activities intended to ensure the maintenance of order ". These reservations were dictated by the Netherlands' wish not to be considered a *de facto occupying power.*

88. On the choice of methods, the report states that initially it was a question of not insisting on the military presence and that the idea was to avoid as much as possible the use of patrols and checkpoints. In practice, however, it appeared that the best way to ensure security was through frequent patrols, day and night.

night, and the establishment of vehicle checkpoints on routes likely to be used by criminals or terrorists.

89. In another passage, the report mentions a number of incidents where Dutch soldiers came under fire, notably at vehicle checkpoints. It clarifies that in cases where Iraqis were injured or killed, no act contrary to the rules of engagement was established. He reports that an Iraqi wounded by Dutch fire was treated for several weeks in the Netherlands.

J. Relevant international law

1. The Hague Regulations

90. The definition of what is meant by an occupying power and the content of the obligations of such a power as relevant in the present case appear essentially in articles 42 to 56 of the Regulations concerning the laws and customs of war on land (The Hague, October 18, 1907; “The Hague Regulations”).

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

Article 42

“A territory is considered occupied when it is placed in fact under the authority of the enemy army. The occupation only extends to territories where this authority is established and able to be exercised. »

Article 43

"The authority of the legal power having passed in fact into the hands of the occupier, the latter will take all the measures which depend on him with a view to re-establishing and ensuring, as far as possible, order and public life 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 Convention (IV) relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949; “the Fourth Geneva Convention”) set out precisely the obligations of an occupying power. Articles 6 and 29 of the Fourth Geneva Convention read as follows:

Article 6

“This Convention shall apply from the start of any conflict or occupation referred to in Article 2.

In the territory of the Parties to the conflict, the application of the Convention will cease at the end general military operations.

In occupied territory, the application of this Convention will cease one year after the general end of military operations; nevertheless, the Occupying Power will be bound

for the duration of the occupation – provided that this Power exercises the functions of government in the territory in question – 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 power there are protected persons is responsible for the treatment applied to them by its agents, without prejudice to the individual responsibilities which may be incurred. »

3. United Nations Security Council Resolutions

93. The United Nations Security Council ("the Security Council") adopted resolution 1483 (2003) at its 4761st meeting, on 22 May 2003.
The relevant parts in this case read as follows:

"The Security Council,

Recalling all its previous resolutions on the matter,

Reaffirming the sovereignty and territorial integrity of Iraq,

(...)

Taking note of the letter that the Permanent Representatives of the United States of America and the United Kingdom of Great Britain and Northern Ireland addressed to its President on 8 May 2003 (S/2003/538) and recognizing the specific powers, responsibilities and obligations of such States as occupying Powers acting under unified command (the "Authority"), under applicable international law,

Noting that other States which are not occupying Powers are currently working or could work under the auspices of the Authority,

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

(...)

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

1. *Calls upon* Member States and relevant organizations to assist the Iraqi people in their efforts to reform their institutions and rebuild the country and to contribute to ensuring stability and security in Iraq in accordance with this resolution;

2. *Urges* all Member States in a position to do so to respond immediately to the humanitarian appeals made by the United Nations and other international bodies for Iraq and to contribute to meeting the humanitarian and other needs of the Iraqi population by providing food and medical supplies as well as the resources necessary for the reconstruction of Iraq and the rehabilitation of its economic infrastructure;

(...)

4. *Requests* the Authority, in accordance with the Charter of the United Nations and relevant provisions of international law, to promote the welfare of

Iraqi population by ensuring effective administration of the territory, in particular by working to restore security and stability and to create the conditions allowing the Iraqi people to freely determine their political future;

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

(...)

8. *Requests* the Secretary-General to designate a special representative for Iraq who will be independently responsible for reporting regularly to the Council on the activities he will carry out under this resolution, for coordinating the action of United Nations in the aftermath of the conflict in Iraq, to coordinate the efforts of United Nations agencies and international organizations providing humanitarian assistance and facilitating reconstruction activities in Iraq and, in coordination with the Authority, to come helping the Iraqi population by:

(a) Coordinating humanitarian and reconstruction assistance provided by United Nations agencies and the activities carried out by them and non-governmental organizations;

b) Facilitating the voluntary repatriation of refugees and displaced persons in order and security;

(c) Working tirelessly with the Authority, the Iraqi people and other relevant parties to create and re-establish national and local institutions for the establishment of representative government, including working together to facilitate a successful process on the establishment of a representative Iraqi government, recognized by the international community;

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

(e) Promoting economic recovery and the creation of conditions conducive to sustainable development, including through coordination with national and regional organizations, as appropriate, and with civil society, donors and international financial institutions;

f) Encouraging the efforts of the international community to ensure that essential civil administration functions are ensured;

g) Ensuring the promotion of the protection of human rights;

h) Supporting international efforts to operationalize the Iraqi civil police again;

i) Supporting the efforts of the international community to promote legal and judicial reforms;

9. *Supports* the formation by the Iraqi people, with the assistance of the Authority and in collaboration with the Special Representative, of an Iraqi interim administration which will serve as an Iraqi-led transitional administration until a Government representative, recognized by the international community, is established by the Iraqi people and assumes the responsibilities of the Authority;

(...)

26. *Request* to Member States and international and regional organizations to contribute to the application of this resolution;

27. *Decides* to remain seized of the matter. »

94. At its 4844th meeting, on 16 October 2003, the Security Council adopted resolution 1511 (2003), the relevant parts of which state:

"The Security Council,

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

Emphasizing that the sovereignty of Iraq resides in the Iraqi State, *reaffirming* the right of the Iraqi people to freely determine their political future and to have control over their own natural resources, *reiterating its resolve* that the day Iraqis will govern themselves comes quickly, and *recognizing* the importance of international support, particularly from countries in the region, Iraq's neighbors and regional organizations, in moving this process forward rapidly,

Considering that international support for the restoration of stability and security is essential for the well-being of the Iraqi people and for all concerned to be able to carry out their tasks in the interests of the Iraqi people, and *welcoming* the contribution made by Member States in this regard pursuant to resolution 1483 (2003),

(...)

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

(...)

13. *Considers* that security and stability condition the success of the political process envisaged in paragraph 7 above and the ability of the United Nations to truly contribute to this process and to the application 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, in particular to ensure the conditions necessary for the implementation of the timetable and program, 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 elements of the infrastructure humanitarian and economic;

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

(...)

16. *Stresses* the importance of establishing an effective Iraqi police and security force to maintain order and security and combat terrorism, as set out in paragraph 4 of resolution 1483 (2003) , and *calls* on Member States and international and regional organizations to contribute to the training and equipment of the Iraqi police and security forces;

(...)

25. *Requests* the United States of America, on behalf of the multinational force referred to in paragraph 13 above, to report to it, as appropriate and at least every six months, on the efforts and progress made by this strength;

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

4. Jurisprudence of the International Court of Justice

a) *Legal consequences of building a wall in the territory occupied Palestinian*

95. In its advisory opinion *Legal consequences of the construction of a wall in the occupied Palestinian territory (ICJ Reports 2004,* p. 136), the International Court of Justice ruled as follows:

"109. The Court will observe that, if the jurisdiction of States is above all territorial, it can sometimes be exercised outside the national territory. Given the object and purpose of the international covenant relating to civil and political rights, it would appear natural that, even in the latter hypothesis, the States parties to the covenant are required to respect its provisions.

The constant practice of the Human Rights Committee is in this direction. He considered in fact that the pact is applicable in the case where a State exercises its jurisdiction in foreign territory. It ruled on the legality of Uruguay's action in the case of arrests carried out by Uruguayan agents in Brazil or Argentina (case 52/79, López *Burgos v. Uruguay ;* case 56/79, *Lilian Celiberti de Cusariego v. Uruguay).* The Committee did the same in the case of the confiscation of a passport by a Uruguayan consulate in Germany (case 106/81, *Montero v. Uruguay).*

The preparatory work for the pact confirms the interpretation given by the Committee to article 2 of this instrument. It follows in fact that, by adopting the wording they retained, the authors of the pact did not intend to cause States to escape their obligations when they exercise their jurisdiction outside the national territory. They only wanted to prevent people residing abroad from being able to claim rights towards their State of origin which do not fall within the jurisdiction of the latter, but that of the State of residence (see the discussion of the preliminary draft to the Commission on Human Rights, E/CN.4/SR.194, para 46; and United Nations, *Official Records of the General Assembly, tenth session, annexes,* A/2929, part. 2, chap. V, para. 4 (1955)).

110. The Court notes in this regard the position adopted by Israel, with regard to the applicability of the Covenant, in its communications to the Human Rights Committee, as well as the views of the Committee.

In 1998, Israel declared that it had, when drafting its report to the Committee, had to examine the question of "whether persons residing in the occupied territories actually fell within the jurisdiction of Israel" for the purposes of implementing the pact (CCPRC/SR. 1675, para. 21 *[Registrar's translation]).* This State considered that "the pact and instruments of a similar nature did not apply directly to the situation [which then prevailed] in the occupied territories" (ibid, para. 27).

In its concluding observations after examining the report, the Committee expressed concern about Israel's attitude, noting “the duration of [its] presence in [the] occupied [territories], [its] ambiguous attitude ... regarding their future status, as well as the de facto jurisdiction exercised there by the Israeli security forces” (CCPR/C/79/ Add.93, para. 10). In 2003, faced with the unchanged position of Israel, which considered that "the pact does not apply beyond its own territory, notably in the West Bank and Gaza...", the Committee arrived at the following conclusion:

"in the present circumstances, the provisions of the Covenant apply for the benefit of the population of the occupied territories, with regard to all acts carried out by the authorities or agents of the State Party in these territories, which compromise the enjoyment of the rights enshrined in the Covenant and are the responsibility of the State of Israel in accordance with the principles of public international law” (CCPR/CO/78/1SR, para. 11).

111. Ultimately, the Court considers that the International Covenant on Civil and Political Rights is applicable to the acts of a State acting in the exercise of its jurisdiction outside its own territory. »

b) *Armed activities in the territory of the Congo (Democratic Republic of Congo v. Uganda)*

96. In its judgment *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) (ICJ Reports 2005,* p. 168), the International Court of Justice expressed itself as follows:

"172. The Court will observe that, according to customary international law as reflected in Article 42 of the Hague Regulations of 1907, a territory is considered occupied when it is placed in fact under the authority of the enemy army, and that the occupation extends only to the territory where this authority is established and able to be exercised (see *Legal consequences of the construction of a wall in the occupied Palestinian territory, advisory opinion, ICJ Reports 2004,* p. 167, para. 78, and p. 172, para. 89).

173. With a view to reaching a conclusion on whether a State whose military forces are present in the territory of another State as a result of an intervention is an “occupying Power” within the meaning of the *jus in bello,* the Court will first examine whether there is sufficient evidence demonstrating that said authority was actually established and exercised in the areas in question by the intervening State. The Court must in this case satisfy itself that the Ugandan armed forces present in the DRC [Democratic Republic of Congo] were not only stationed in this or that place, but that they had also substituted their own authority for that of the Government Congolese. If this were the case, it would not matter what justification Uganda gave for its occupation, nor would it matter whether or not Uganda established a structured military administration of the occupied territory.

(...)

179. The Court having concluded that Uganda was an occupying power in Ituri at the relevant time, the latter is therefore held responsible for both any act of its armed forces contrary to its international obligations and for failure of the vigilance required to prevent violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own behalf.

180. The Court notes that Uganda is responsible for all acts and omissions of its armed forces on the territory of the DRC, which violate its obligations under the rules, relevant and applicable to the situation of the DRC. species, international human rights law and international humanitarian law.

(...)

213. The Court now turns to the question whether the acts and omissions of the UPDF [Uganda People's Defense Forces], their officers and soldiers are attributable to Uganda. The behavior of the UPDF as a whole is clearly attributable to Uganda, since it is the behavior of an organ of state. In accordance with a well-established rule of international law, which is of a customary nature, “the conduct of any organ of a State must be regarded as an act of that State” (Dispute *relating to the immunity from jurisdiction of a special rapporteur of the Commission on Human Rights, advisory opinion, ICJ*

Collection 1999 (I), p. 87, para. 62). The individual behavior of UPDF soldiers and officers must be considered as the behavior of a state organ. In the opinion of the Court, by virtue of the status and military function of Ugandan soldiers in the DRC, their behavior is attributable to Uganda. The argument that the persons concerned did not act in the circumstances of the present case as persons exercising public authority is therefore unfounded.

214. Furthermore, whether or not members of the UPDF acted contrary to instructions or exceeded their mandate is also irrelevant to the attribution of the conduct of the UPDF to Uganda.
According to a well-established rule, of a customary nature, set out in Article 3 of the Fourth Hague Convention concerning the Laws and Customs of War on Land of 1907 as well as in Article 91 of Additional Protocol I to the Geneva Conventions of 1949, a party to an armed conflict is responsible for all acts of persons who are 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 the judgment *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro (ICJ Reports 2007,* p. 43), the International Court of Justice stated that follows:

“399. The provision [Article 8 of the Articles of the International Law Commission on State Responsibility] must be understood in the light of the Court's jurisprudence on this point, and in particular the judgment of 1986 in the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* cited above (para. 391). In this judgment, after having, as stated above, rejected the thesis according to which the *contras* were assimilated to organs of the United States because they would have been placed under the "total dependence" of the latter , the Court added that the defendant's liability could however be engaged if it was proven that he himself had “ordered or imposed the perpetration of acts contrary to human rights and humanitarian law alleged by the State Applicant” (ICJ *Reports 1986,* p. 64, para. 115), which led it to the following important conclusion:

> “For the legal responsibility of the latter [the United States] to be engaged, it should in principle be established that they had effective control of the military or paramilitary operations [led by the contras] during which the violations in question took *place* . would be produced. » (Ibid., p. 65.)

400. The criterion thus defined is distinct from that – explained above – which makes it possible to assimilate to an organ of a State a person or an entity to which domestic law does not confer this status. On the one hand, it is no longer necessary here to demonstrate that the persons having carried out the acts allegedly contrary to international law were generally placed under the “total dependence” of the respondent State; it must be proven that these people acted according to the instructions or under the “effective control” of the latter. But, on the other hand, it is necessary to demonstrate that this “effective control” was exercised, or that these instructions were given, during each of the operations during which the alleged violations occurred, and not not in general, with regard to all the actions carried out by the persons or groups of persons having committed the said violations.

(...)

406. It should then be noted that the criterion of “global control” presents the major flaw of extending the scope of State responsibility well beyond the fundamental principle which governs the law of international responsibility, namely that a State is only responsible for its own behavior, that is to say for that of people who, in whatever capacity, act on its behalf. This is the case of acts carried out by its official organs, and also by persons or entities which, although the internal law of the State does not formally recognize them as such, must be assimilated to organs of the State because They find themselves placed under his total dependence. Apart from these cases, acts committed by persons or groups of persons – who are neither organs of the State nor comparable to such organs – can only engage the responsibility of the State if these acts, assuming whether internationally wrongful, are attributable to it under the norm of customary international law reflected in the aforementioned article 8 [article 8 of the International Law Commission's Articles on State Responsibility]. This is the case when an organ of the State provided the instructions, or gave the directives, on the basis of which the perpetrators of the unlawful act acted or when it exercised effective control over the action during of which the wrongfulness was committed. In this regard, the criterion of “overall control” is unsuitable, because it stretches too far, almost to the point of breaking it, the link which must exist between the behavior of State organs and responsibility.

international of the latter. »

5. The Articles of the International Law Commission on the state responsibility

98. The Articles on State Responsibility and the Commentaries thereto were adopted by the International Law Commission at its 53rd session in 2001 and were submitted to the United Nations General Assembly as part of the report of the International Law Commission reflecting the work of this session (A/56/10). The report was published in the Yearbook of the International Law Commission (2001, vol.
II, second part). In their relevant portions in this case, the articles and commentaries thereto adopted with the articles themselves read as follows (references in the footnotes have been omitted):

Article 2
Elements of the internationally wrongful act of the State

"There is an internationally wrongful act of the State when conduct consistent in an action or omission:

a) Is attributable to the State under international law; And

(b) Constitutes a violation of an international obligation of the State. »

The commentary on this article states in particular the following:

"5) For a given conduct to be qualified as an internationally wrongful act, it must above all be conduct attributable to the State.
The State is a real organized entity, a legal person with full standing under international law. But recognizing this does not mean denying the elementary truth that the State as such is not capable of acting. An "act of the State" necessarily involves an action or omission of a human being or a group: "States can only act by means and through the person of their agents and representatives". The issue is who should be considered acting on behalf of the State, i.e. what constitutes an "act of the State" for the purposes of State responsibility.

6) When we speak of the attribution of behavior to the State, we mean by State a subject of international law. In many legal systems, organs of state consist of different legal persons (ministries or other entities) which are considered to have distinct rights and obligations under which they alone are subject to legal action. justice and accountability. For the purposes of international law of State responsibility, this conception is different. The State is considered as a unit, consistent with the fact that it is recognized as a single legal person under international law. In this, as in other respects, the attribution of behavior to the State is necessarily a normative operation. What is decisive here is that there are sufficient links between a given event and conduct (whether an action or an omission) attributable to the State under one or more the other of the rules set out in Chapter II.

7) The second condition for there to be an internationally wrongful act of the State is that the conduct attributable to the State constitutes a violation by that State of an international obligation existing on it (...)

12) In subparagraph a, the term "attribution" is used to designate the operation of attaching a given action or omission to the State. In international practice and jurisprudence, the term "imputation" is also used. But the term "attribution" helps avoid implying that the legal process of attributing state behavior is a fiction, or that the behavior in question is "actually" someone else's.

13) Paragraph (b) refers to a violation of an international obligation and not a violation of a rule or norm of international law. What matters in this case is not simply the existence of a rule, but its application in the particular case to the responsible State. The term "obligation" is commonly used in international jurisprudence and practice as well as in doctrine to cover all possibilities. The word "obligation" refers only to an obligation under international law, which Article 3 specifies. »

Article 6

Behavior of an organ made available to the State by another State

“The behavior of an organ placed at the disposal of the State by another State, provided that this organ acts in the exercise of public power prerogatives of the State at whose disposal it is, is considered to be a fact of the first State according to international law. »

The commentary on this article states in particular the following:

"2) The expression "made available" expresses the essential condition which must be fulfilled for the conduct of the organ concerned to be, in international law, considered as an act of the receiving State and not of the 'Sending status. The notion of an organ “placed at the disposal” of the host State is precise and implies that the organ acts with the consent, under the authority and for the purposes of the host State.
The body in question must not only be responsible for carrying out functions specific to the State at whose disposal it is placed. In the exercise of the functions entrusted to it by the beneficiary State, the body must also act in liaison with the apparatus of that State and under the exclusive direction and control of the latter, and not on instructions of the sending State. Article 6 therefore does not deal with ordinary situations of interstate cooperation or collaboration, under a treaty or otherwise.

3) Among the examples of situations which could fall within the framework of this limited notion of an organ of a State "placed at the disposal" of another State could include the case of a section of health or other services placed under orders from another country to help control an epidemic or deal with the consequences of a natural disaster, or from judges charged in special cases with acting as judicial bodies of another state. On the other hand, the case of the simple provision of aid or assistance by the organs of a State to another State on the territory of the latter is not covered by Article 6. Thus, forces Armed forces may be sent to the territory of another State to assist it in the exercise of the right of collective self-defense or for other purposes. When the forces in question remain under the authority of the sending State, they exercise public authority prerogatives of that State and not of the receiving State. It is also possible that the organ of a State acts on joint instructions from that State and another, or that an entity is a joint organ of several States. In such cases, the conduct in question is attributable to both States under other provisions of this chapter.

(4) The crucial element for the purposes of Article 6 is therefore the establishment of a functional link between the body 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 organs of a State, sent to another State for the purposes of the first State or even for common purposes, which retain their own autonomy and their own status, for example cultural missions, diplomatic or consular missions or foreign aid or relief organizations. Also excluded from the scope of Article 6 are situations where the functions of the “beneficiary” State are exercised without its consent, as is the case when a State, placed in a situation of dependence, territorial occupation or otherwise, is forced to tolerate that the action of its own organs is sidelined and replaced to a greater or lesser extent by that of organs of the other State.

(5) Two other conditions must be met for section 6 to apply.
Firstly, the body in question must have the status of an organ of the sending State and, secondly, it must act in the exercise of public authority prerogatives of the receiving State. The first of these conditions excludes from the scope of Article 6 the behavior of private entities or individuals who have never had the

status as an organ of the sending State. For example, experts or advisers made available to a State under technical assistance programs generally do not have the status of organs of the sending State. The second condition is that the body made available to a State by another State must “act in the exercise of public power prerogatives” of the host State. There will only be an act attributable to the host State if the lent body acts in the exercise of public authority prerogatives of that State. Given the number of cases of cooperative actions carried out by States in areas such as mutual defense, aid and development, Article 6 only covers a precise and limited notion of “transferred responsibility”. This situation is, however, not unknown in State practice. »

Article 8

Conduct under state direction or control

“The conduct of a person or group of persons is considered an act of the State under international law if that person or group of persons, in engaging in that conduct, is in fact acting on the instructions or the directives or under the control of that State. »

The commentary on this article states in particular the following:

“2) The attribution to the State of conduct which it in fact authorized is widely accepted by international jurisprudence. It does not matter in such a case whether the person(s) in question are private persons, or whether their behavior constitutes a “public activity” or not. Most of the time these are situations where state bodies supplement their own action by recruiting individuals or groups of private individuals as "auxiliaries", or encourage them to act in this capacity while remaining in outside official state structures. These may be, for example, individuals or groups of private persons who, although not specifically recruited by the State and not part of the police or armed forces of the State, are employed as auxiliaries or sent as “volunteers” to neighboring countries, or who carry out special missions abroad on instructions from the State.

(...)

5) The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia has also examined these issues. In the *Tadiÿ case,* the Chamber emphasized that:

> To impute acts carried out by individuals to the State, international law requires that it exercise control over them. The *degree of review* required may, however, vary depending on the factual circumstances specific to each case. The Appeals Chamber considers that international law cannot require very close control in all cases.

The Appeals Chamber found that the degree of control by the Yugoslav authorities over these armed forces required under international law for the armed conflict to be considered international was "a comprehensive control going beyond their simple financing and equipment *and* involving also participation in the planning and supervision of their military operations. In the course of their argument, the majority of members found it necessary to reject the approach taken by the ICJ in the case of *Military and Paramilitary Activities in and against Nicaragua* but the questions of law and the factual situation do not were not the same as those before the Court in this case. The mandate of the Tribunal concerns questions of individual criminal responsibility, not the

responsibility of States, and the question that arose in the case under consideration related not to responsibility but to the applicable rules of international humanitarian law. In any event, it must be determined on a case-by-case basis whether or not a particular conduct occurred under the control of a State and whether the extent to which that conduct was controlled justifies the conduct being attributed to said State. »

K. Relevant Documents on the Occupation of Iraq

1. *Coalition* Provisional Authority (CPA) *Decree No.* 28

99. Coalition Provisional Authority Executive Order No. 28, entitled "Establishment of the Iraqi Civil Defense Corps," was adopted on March 9, 2003, by the Administrator of the Coalition Provisional Authority, Ambassador L .Paul Bremer. The relevant extracts in this case state:

[Translation from the Registry]

" *By virtue* of the powers conferred on me as administrator of the Coalition Provisional Authority (CPA), having regard to the laws and customs of war and in compliance with the relevant resolutions of the United Nations Security Council, in particular resolution 1483 (2003),

Noting that Resolution 1483 calls on Member States to assist the Iraqi people in their efforts to reform their institutions and rebuild the country and to contribute to ensuring stability and security in Iraq,

Aware of the need to quickly confront the threats that illicit acts and disasters weigh on public security and stability,

Recognizing that the continued attacks and acts of sabotage by the remaining Ba'athists and the terrorist intentions to undermine security in Iraq call for the creation of an interim Iraqi police force, which should cooperate with the Coalition Forces to deal with the threats and preserve security in Iraq,

I decree the following:

Article 1
Creation of the Iraqi Civil Defense Corps

1) An Iraqi civil defense corps is provisionally created; the decision to maintain or dissolve this Corps will be made by a representative government, recognized by the international community and established by the Iraqi people.

2) The Iraqi Civil Defense Corps is a security and emergency services body for Iraq. Made up of Iraqis, it intervenes in support of operations carried out by the military forces of the Coalition in Iraq to fight against organized groups and individuals who use violence against the Iraqi population and its national infrastructure.

3) To support Coalition operations intended to provide security and stability to the Iraqi people, the Iraqi Civil Defense Corps is authorized to perform policing duties, including: conducting patrols in urban and rural areas; carry out search and seizure operations for illegal and other weapons

contraband items; ensure the security of fixed sites, checkpoints, sectors, routes and convoys; ensure crowd and riot control; offer its intervention services during a disaster; provide search and rescue services; support humanitarian missions and disaster recovery operations, including through transport services; conduct joint patrols with Coalition Forces; participate in other activities aimed at establishing positive relations between the Iraqi population and the Coalition authorities, in particular by serving as community liaisons.

4) The Iraqi Civil Defense Corps is distinct from the Iraqi police force and the New Iraqi Army. It intervenes to reinforce the police forces but is designed to carry out operations going beyond the remit of the police.

a) While serving and under the supervision of Coalition Forces, members of the Iraqi Civil Defense Corps are not subject to the direction or control of the Iraqi police. Except as otherwise provided in this Instrument, the Iraqi Civil Defense Corps does not have, or exercise, law enforcement functions.

b) The Iraqi Civil Defense Corps is not a component of the New Iraqi Army established under CPA Decree No. 22 on the establishment of the New Iraqi Army (CPA/ORD/9 August 2003/22) and n is not subject to orders from the chain of command of the New Iraqi Army.

(...)

Article 4

Operation of the Iraqi Civil Defense Corps

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

(2) Operational or tactical command of units of the Iraqi Civil Defense Corps active alongside the Coalition Forces is vested in a Coalition Forces officer designated by the senior military commander of the Coalition Forces in Iraq under the terms of Article 7 below (...)

Article 7

Delegation of authority

The Administrator of the Coalition Provisional Authority may delegate to the senior military commander of the Coalition Forces in Iraq responsibilities, to be determined by him, under this instrument. The senior military commander of Coalition Forces in Iraq may in turn delegate responsibilities under this instrument to persons under his command. »

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

100. The respondent government submitted the following extract from the memorandum of understanding which governed the procedures agreed between the Netherlands and the United Kingdom:

[Translation from the Registry]

"14.1 Members of the DMN (SE) may possess and carry weapons and ammunition in Iraq in accordance with the national service rules and procedures applicable to them for the purposes of the mission of the DMN (SE) and when there. are authorized by the DMN Commander (SE).

14.2 The ROEs applicable to the DMN (SE) are set out in Annex F. It is the protection of the force, not the mission of the DMN (SE), that is the essential factor in the level of permissiveness provided for in the ROE profile. Participants may, in the context of national instructions or explanations to national contingent commanders, indicate their intention to apply a different level of permissiveness to their own forces, provided that:

(a) any differences are communicated to the legal advisor to the commander of the DMN (SE) before the application of the ROE in question in Iraq.

b) no difference implies a degree of permissiveness greater than that authorized by the ROE of the DMN (SE).

14.3 Being classified secret, Annex E [this is probably Annex F] is published separately, in restricted circulation. Signing this memorandum of understanding nevertheless constitutes acceptance of the ROE contained in Appendix 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. During his intervention during the Court hearing, the Respondent Government Agent stated that the Memorandum of Understanding was a classified document and that the Minister of Defense had refused to declassify it for the purposes of its presentation to the courtyard.

3. The DMN (CS) Memorandum of Understanding (Multinational Division, south-central)

103. Latvian forces participated in the SFIR as part of the multinational division based in south-central Iraq and under Polish command. The applicable Memorandum of Understanding was published by the Government of the Republic of Latvia in *Latvijas Vÿstnesis* (No. 5 (3163), January 11, 2005), an official publication dedicated to legal acts and official announcements. Its relevant parts read as follows:

[Translation from the Registry]

" **SECTION FOUR — MANDATE**

4.1. Under UNSCR 1483, the SFIR DMN (CS) is mandated to assist the Authority in preserving stability and security in Iraq by providing personnel, equipment and other resources to operate under its unified command in accordance with UNSCR 1483. agreement presented in section five below. The main tasks of the DMN (CS) are set out in the mission statement which is annexed to this memorandum of understanding (ME) (...)

4.2. The members of the DMN (CS) carry out their tasks in a rigorous, fair and equitable manner and refrain from any act incompatible with their independent nature. The foregoing is without prejudice to the right of the SFIR to act in self-defense or extended self-defense, as well as force protection and mission implementation.

SECTION FIVE — NMD COMMAND AND CONTROL (CS)

5.1. The command of the DMN (CS) is ensured by the Republic of Poland. This coordinates the establishment of the DMN (CS) structure and ensures that the Participants are kept informed of the progress of the implementation of this structure.

5.2. Members of national contingents remain under the full command of the Participant concerned, through the National Contingent Commander/High National Representative. Operational control of all national contingents participating in the DMN (CS) is vested in a senior commander.

5.3. Participants are responsible for planning and executing the movement of their forces and resupply from depots and to points of disembarkation (POD), following strategic lines of communication (LOC).
This responsibility may be delegated to other bodies acting on behalf of the Participants. Reception, consolidation, forward routing (RSOM) operations, including port customs clearance operations, are carried out in accordance with the standing instructions in force, unless otherwise decided. Tactical control of all aspects of strategic and tactical LOCs is vested in the various organizations responsible for movement control at the operational level (CJTF-7).

5.4. The DMN Commander (CS) is authorized to coordinate the logistical means of the national support element, in order to meet operational needs or to ensure deconfliction in the use of limited infrastructure or resources. In this context, the provisions of section eleven may apply. The logistical means constituting all or part of a Participant's contribution to the DMN (CS) are under the control referred to in paragraph 5.2 above.

5.5. A transfer of authority (TOA) over forces made in favor of the DMN Commander (CS) in accordance with the DMN command status above is carried out at the total operational capability (FOC) declared by the contingent commanders (NCC). Once the TOA has been completed, the Participants confirm the command status of their forces by notification to the DMN Commander (CS).

5.6. The national contingent commander/high national representative is responsible for maintaining order and discipline within the national contingent under his command.

5.7. The Commander of the DMN (CS) may request the withdrawal of any personnel assigned to the DMN (CS). National Contingent Commanders/Senior National Representatives will consider any such request and endeavor to comply if their own national rules allow them to do so.

5.8. The DMN Commander (CS) is responsible for coordination with the CPA in the DMN (CS) Area of Operational Responsibility (AOR). After consultation with the Participants concerned, the brigade commanders designate representatives, who must act as military contacts with the CPA at the

within their brigade AOR, and keep the DMN Commander (CS) informed. These representatives also sit on a joint coordination commission.

5.9. English is the official working and command language in the DMN (CS) up to battalion level, except for Battle Group 1."

(...)

SECTION FOURTEEN — RULES OF ENGAGEMENT (ROE) / CARRY OF WEAPONS AND AMMUNITION

14.1. Members of the DMN (CS) may possess and carry weapons and ammunition in Iraq for the purpose of the DMN (CS) mission when authorized to do so by the Commander of the DMN (CS).

14.2. The ROEs applicable to the DMN (CS) are part of the DMN Operational Order (CS). It is the protection of the Force, and not the mission of the DMN (SE), which constitutes the essential criterion for the level of permissiveness envisaged by the ROE profile. Participants may indicate, through national instructions or explanations to national contingent commanders, their intention to apply a different level of permissiveness to their own forces, provided that:

a) any initial discrepancy is communicated to the DMN Commander (CS) before a TOA. Other differences can be communicated if necessary.

b) No difference entails a degree of permissiveness greater than that authorized by the ROE of the DMN (CS).

SECTION SIXTEEN — CLAIMS

16.1. Except as otherwise provided in this MOU, each Participant waives any claim that it may raise against another Participant due to an act of omission of any other Participant or members of the latter's national contingent in the performance of tasks. official related to this MOU having caused injury (even fatal) to members of its national contingent or damage or loss of property belonging to it or belonging to members of its national contingent.

16.2. If the Participants concerned decide in relation to a claim that damage, loss, injury or death was caused by a careless act, careless omission, willful misconduct or gross negligence of a sole Participant, its military personnel or its officials or agents, the costs related to any possible liability are borne by that Participant alone.

16.3. If more than one Participant is responsible for the injury, death, loss or damage, or if it is impossible to attribute liability to a specific Participant, the processing and settlement of the claim shall be subject to agreement between the Participants concerned. The cost of processing and settling the claim is shared equitably between the Participants concerned.

16.4. Claims from third parties relating in particular to loss or damage to property, bodily injury, illness, death or any other situation caused by or attributed to the workforce of the DMN (CS) or to any individual employed by it - whether ordinarily residing in Iraq or not, and not related to military combat operations, are addressed to the Participant for whose personnel, property, activities or other resources of the national contingent are believed to be responsible

of the damage in question, to be treated according to the national laws of the participating State.

16.5. Third party complaints are first collected by DMN HQ (CS) and then forwarded to the Participant held responsible. Where more than one Participant is responsible for the injury, death, loss or damage, or it is impossible to attribute liability thereto to a specific Participant, the costs of processing and settling the claims Claims are distributed equitably among the Participants concerned.

ANNEX A
AU ON FROM DMN (CS)

STABILIZATION FORCE DMN (CS) MISSION STATEMENT

Introduction

1. As part of the mission, the Participants contribute to the accomplishment of essential tasks. These also involve increasing collaboration with the Coalition Provisional Authority (CPA) and the local Iraqi population for the re-establishment and establishment of local institutions.

DMN (CS) Area of Operational Responsibility (AOR)

2. The MND (CS) AOR of the Stabilization Force in Iraq (SFIR) encompasses five provinces: Babil, Karbala, Wasit, Al-Qadisiyya and An-Najaf. A map provisional showing the AOR of the DMN (CS) is contained in Appendix 1 of this Annex.

Main tasks

3. The DMN (CS) of the SFIR accomplishes in the AOR, in support of the Mission, a set of tasks defined according to the evolution of the situation. The main tasks are:

a) External Security/Border Security. Task led by the DMN (CS) of the SFIR. Protection of key points, including land border surveillance and assisting in the creation and training of an Iraqi border security force.

b) Internal security. Task led by the DMN (CS) of the SFIR. Preservation of a climate of security, in particular through intelligence activities intended to eliminate the threat emanating from armed and subversive groups.

c) Force Protection. Task led by the DMN (CS) of the SFIR. This task encompasses all aspects of ongoing operations aimed at ensuring the security of the SFIR and, for a limited period, CPA personnel throughout the AOR.

d) Security of fixed sites. Task led by the DMN (CS) of the SFIR. This task includes responsibility for maintaining security at critical and sensitive AOR sites.

e) Governance and infrastructure support. Task led by the CPA. The DMN (CS) of the SFIR must, for a limited period, support the efforts of the CPA (CS) aimed at establishing local governance based on the rule of law and ensuring justice and equal rights to all Iraqi citizens in the AOR, regardless of ethnicity, religion or gender. The DMN (CS) of the SFIR contributes to the achievement of this objective by working at the local and regional levels to establish governance mechanisms and

of civil administration, until the CPA is able to work with the local Iraqi population to establish full governance. The DMN (CS) of the SFIR continues to pursue this objective within the AOR with Government Support Teams (GST), until the Local Governance Teams (LGT) of the CPA are operational in the 'AOR. The SFIR DMN (CS) Commander continues to liaise with the GSTs once the CPA takes control, and works closely with the CPA (CS) to synchronize military operations with the activities of the Coalition. Additional support can be provided over a limited period as part of the establishment and maintenance of Iraqi infrastructure.

f) Development of policing. Task led by the CPA. The SFIR DMN (CS) provides support over a limited period. The DMN (CS) of the SFIR continues to contribute to the development of the Civil Police Force, in particular through the conduct of joint patrols, the creation of a police evaluation team, the establishment of a procedure for filing of complaints, and support to local Iraqi courts and magistrates for maintaining public order. Once the transition to the CPA and the local Iraqi population has been completed, the DMN (CS) of the SFIR retains a liaison role for the purposes of coordinating policing, training and surveillance activities alongside the 'army.

g) War criminals. Task led by the CPA. Support from the DMN (CS) of the SFIR may be necessary to facilitate the detention of persons suspected of war crimes in the AOR.

h) Restoration of basic services. Task led by the CPA. The SFIR DMN (CS) provides support for a limited period, until contracted Iraqi civilian personnel can take over. The DMN (CS) of the SFIR is responsible, with the help of the CPA, for facilitating the establishment of basic services in the AOR.

i) Constitution of the Iraqi army. Task led by the CPA. The SFIR's DMN (CS) provides theoretical military support, but the staffing, training and equipping of an Iraqi military structure is the responsibility of the CPA.

4. Under the Fourth Geneva Convention (on civilians), the only authority acting as a “detaining power” in the AOR is the Commander of the DMN (CS) of the SFIR, who acts on behalf of the 'Authority.

5. The Commander of the DMN (CS) of the SFIR liaises as necessary with the political, social and religious leaders of the AOR, so that the religious, ethnic and cultural sensitivities of Iraq are duly respected by members of the DMN (CS) of the SFIR.

Identification

6. Members of the military and paramilitary personnel of the DMN (CS) of the SFIR wear the uniform and weapons that their instructions authorize them to carry. While on duty, members of the Iraqi Civil Police Force must be clearly identifiable by uniform or other distinctive signs, and may carry weapons based on authorizations contained in CPA regulations and decrees and once [I Iraqi administration established.

Threat assessment

7. Coalition Forces believe that the domestic threat to stability in Iraq comes from armed factions jockeying for power and influence.

political influence, the last Baathist supporters and their dissident organizations, criminals and terrorists. Externally, the threat is limited and neighboring states are cooperative. The situation is dynamic and subject to change. As the position of the DMN (CS) of the SFIR may require readjustment following the evolution of the situation, the Participants must demonstrate flexibility.

8. Participants must fully understand the need to communicate to the Commander of the DMN (CS) of the SFIR any information affecting the security of the mission, its personnel, its equipment and its sites.

Composition of the DMN (CS)

9. It is understood that once the DMN (CS) is established, its composition may change.

Final authority on interpretation

10. The DMN Commander (CS) is the final authority for the interpretation of this mission statement in the context of operations.

Résumé

11. This mission statement sets out the obligations and responsibilities of the Participants and describes the main tasks of the SFIR DMN (CS) mission in the AOR. »

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

GRIEFS

105. The applicant alleges violations of Article 2 under its procedural aspect.

106. In his view, the investigation was not sufficiently independent, for the following reasons:

a) The Royal Constabulary unit present in Iraq would have been under the sole authority of the Dutch battalion commander; there would not have been

no presence of the public prosecutor. The members of the unit having, according to the applicant, shared the quarters of the regular troops, there was not enough distance between them and the individuals on whom they could be called upon to investigate.

b) The Arnhem public prosecutor decided not to initiate proceedings against Lieutenant A. solely on the basis of the reports of the Royal Constabulary, in which he placed excessive confidence.

c) The military chamber of the Arnhem Court of Appeal, which would have included among its members an active officer not belonging to the judiciary, would also have relied entirely on the results of the investigation – very limited to the eyes of the applicant – of the royal constabulary.

107. The applicant further considers that the investigation was not sufficiently effective, for the following reasons:

a) The statements of the members of the CIDC who witnessed the shooting were not taken, an investigator from the royal constabulary having, according to the applicant, decided that they had no relevant information to provide.

b) The interrogation of Mr. Dawoud Joad Kathim, the driver of the Mercedes, was said to have been extremely superficial. However, for the applicant, to the extent that the person concerned had been the only civilian witness and therefore the only witness without a hierarchical or other functional link with Lieutenant A., his testimony was important. Furthermore, his statement, as recorded by investigators from the Royal Constabulary, would not have matched that delivered by him to an Iraqi official later the same day.

c) Lieutenant A. would not have undergone his first interrogation until seven hours after the facts in dispute and he would not have been separated from the other witnesses during this period of time; he would therefore have had plenty of time to talk about the shooting with the other witnesses before being questioned and to adapt his comments accordingly.

d) The day after the events, Lieutenant A. declared that he had been able to obtain from the deputy commander of the CIDC the list of CIDC members who had used their weapons as well as the number of cartridges fired. The applicant considers that the fact that Lieutenant A., the main suspect, was able to obtain this information from a key witness also undermined the effectiveness of the investigation.

e) Furthermore, despite its potential importance for the case, the list obtained by Lieutenant A. would not have been included in the file.

f) The royal constabulary allegedly disposed of the body of Mr. Azhar Sabah Jaloud for several hours without, however, carrying out an autopsy. The remains were then transferred to an Iraqi civilian hospital, where an autopsy was carried out in the absence of representatives of the

royal marshal. The autopsy report would have been included in the file as is, without being translated.

g) Other scientific and technical evidence would have been treated with similar negligence. In particular, the report concerning the bullet fragments removed from the body was allegedly not translated *verbatim.*

108. Finally, the applicant alleges that those close to Mr Azhar Sabah Jaloud were not sufficiently involved in the investigation and informed of its progress. Thus, no one would have ever sought to contact the family of Mr. Azhar Sabah Jaloud, and no one would have taken the trouble to inform the relatives of the decision not to prosecute Lieutenant A.

PLACE

I. ON THE ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

A. On admissibility

1. The Government's preliminary objection

109. The Government contests the admissibility of the application, maintaining that Mr Azhar Sabah Jaloud was not within the “jurisdiction” of the respondent Contracting Party within the meaning of Article 1 of the Convention.

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

2. Conclusion on admissibility

111. In light of the parties' observations, the Court considers that the application raises important questions of fact and law from a Convention perspective which call for examination on the merits. It therefore concludes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 a) of the Convention. Noting that it faces no other grounds for inadmissibility, it therefore declares it admissible, without prejudice to its decision on the Government's preliminary objection, on which it will rule below.

B. On jurisdiction

1. Theses of the parties

a) The respondent government

112. The Dutch government considers that the disputed facts do not fall within the “jurisdiction” of the Netherlands within the meaning of Article 1 of the Convention. He asks the Court to distinguish between the present case and the *Al-Skeini et al.* case (cited above).

113. He maintains first of all that the Netherlands was not an “occupying power” within the meaning of international humanitarian law. It indicates that only the United States and the United Kingdom, explicitly designated as “occupying powers” by United Nations Security Council Resolution 1483, had this status. He considers that this characteristic distinguishes them from other States having operated under the aegis of
the Coalition Provisional Authority.

114. Furthermore, the Netherlands would not have exercised in Iraq any of the prerogatives of public power which would normally be those of a sovereign State. These prerogatives would have belonged entirely to the United States and the United Kingdom, which would have set up the Coalition Provisional Authority.

115. The Dutch contingent would at all times have been under the operational control of the DMN Commander (SE), who was a British officer.

116. The Government adds that although during the initial phase of SFIR operations the Dutch forces were required to assume law enforcement functions, this responsibility was transferred to the Iraqi authorities during 2003. From then on, at the time of the facts in dispute, the police powers were not exercised by the Dutch authorities or forces.

117. The Government indicate that in its *Al-Skeini and Others* judgment the Court concluded that the United Kingdom exercised “jurisdiction” within the meaning of Article 1 of the Convention because the deaths in question had been caused by the acts of British soldiers during or in the context
security operations, including military patrols, carried out by these forces. In the present case, conversely, Mr. Azhar Sabah Jaloud allegedly died at a vehicle checkpoint set up and manned by the CIDC. At the time of the events, Dutch soldiers were certainly present for the purposes of observation and advice, but this would not imply the existence of a hierarchical relationship capable of bringing into play the responsibility of the Netherlands: this It is believed that the Iraqi security forces held power over this checkpoint.

118. The Government argues that at no time did the Dutch forces exercise physical power or control over Mr Azhar Sabah Jaloud, who, according to them, was never under their surveillance. More generally, the number of Dutch forces present in south-eastern Iraq would have been limited and would not have exercised the level of control necessary to bring the area under Dutch "jurisdiction" within the meaning of Article 1. .

119. The fact of a soldier having shot a person, even if it could be established that the shot was fatal, would not in itself be sufficient to conclude that there is jurisdiction in this sense. In the case *of Bankoviÿ and others v. Belgium and others* ((dec.) [GC], no. 52207/99, CEDH 2001-XII), the Court would have said that the simple fact for a person to have been the victim of a missile launched from a bomber of a given State was not sufficient to bring it within the jurisdiction of that State.

120. Finally, the Government considers that even if it were admitted that at the time the Netherlands exercised effective control over the vehicle checkpoint, the area concerned was so limited that there would no longer be any difference significance between "overall effective control over an area" and "authority and control exercised by a state agent".

b) The intervening government

121. The British government invokes the "mainly territorial" nature of the jurisdiction within the meaning of Article 1; its extension beyond the territory of a Contracting State would be exceptional. The *Bankoviÿ and others* decision cited above, in particular paragraph 65 thereof, would imply that the notion of "jurisdiction" should not be allowed to "evolve" or "develop progressively" in the same way as the law relating to guaranteed material rights and freedoms. by the Convention. The "living instrument" doctrine would not be applicable.

122. The intervening government maintains that when, following a military action, legal or not, a State exercises "effective control over an area" located outside its territory, Article 1 requires it to recognize in this area the full range of substantive rights set out in the Convention and in the Additional Protocols it has ratified. Consequently, the circumstances in which this exception to the territorial nature of the jurisdiction would be intended to apply would necessarily be very limited.

123. In paragraph 80 of the *Al-Skeini and Others* judgment , the Court would have agreed with the conclusion of the British Court of Appeal that it would have been unrealistic to expect that the British forces, in the town of Basra and elsewhere in Iraq recognize all the material rights arising from the Convention for the local population.

124. In *Al-Skeini and others* as in other cases, the Court would have held that jurisdiction within the meaning of Article 1 existed on the basis of exclusive physical power and control and legal authority (real or presumed) on an individual (hypothetically in *Issa and others v. Turkey,* no. 31821/96, 16 November 2004, but real 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*
vs. *France* [GC], no. 3394/03, CEDH 2010). On the contrary, in the *Bankoviÿ and Others decision,* cited above, the material action of bombing was not considered as an example of the exercise of physical power and control capable of leading to the conclusion of the existence of extraterritorial jurisdiction. Accordingly, the same should apply to the material action of shooting at a moving vehicle occupied by non-detainees.

125. A major difference between the present case and the *Al-Skeini and others* case would lie in the fact that in the latter case the United Kingdom was recognized as an “occupying power” within the meaning of Article 42 of the Regulation of the Hague and was therefore required under Article 43 of the same regulation to exercise the powers which normally belong to the State.

126. Finally, the British Government considers that if the Court were to conclude that the Netherlands exercised jurisdiction in the present case there would be a “real risk” of seeing the Contracting States prove in the future reluctant to “respond to the calls by the United Nations Security Council to send troops for UN-mandated intervention, [which would be] to the detriment of the Council's mission to maintain international peace and security" .

c) The applicant

127. The applicant considers that the facts denounced by him fell within the jurisdiction of the Netherlands.

128. This would be the case, firstly, because of the control that the Netherlands would have exercised over its military, through which that country would have assumed certain crucial prerogatives of public power.
The CPA would not have been led by the United States and United Kingdom alone; these two countries would have carried out the administrative and coordination tasks, but other states – including the Netherlands – would have contributed contribution by implementing the authority of the CPA and ensuring security. This would have included the exercise of “certain of the prerogatives of public power normally exercised by [a sovereign State]”.

129. Dutch troops allegedly exercised such prerogatives when, by virtue of “the consent, invitation or acquiescence” of the CPA, they supervised the CIDC at the checkpoint.

130. As is apparent from the official position of the Dutch government, the Netherlands would have had full command over the Dutch military at all times.

131. Secondly, the Netherlands would have had jurisdiction by virtue of the effective military control that it would have exercised over the area in question. Invoking the *Issa and others v. Turkey* (no. 31821/96, November 16, 2004), the applicant argues that there can be jurisdiction even if military control is limited in time and in its geographical deployment.

132. Thirdly, the jurisdiction of the Netherlands would be based on its status as an “occupying power” within the meaning of Article 42 of the Hague Regulations. While recognizing that only the United States and the United Kingdom were truly designated as “occupying powers” by United Nations Security Council Resolution 1483, the applicant considers that possession of this status within the meaning of the Hague Regulation is a question of fact and not of choice.

133. The applicant indicates that the DMN (CS) memorandum of understanding (paragraph 103 above), which he considers for the purposes of the case to be identical to the memorandum of understanding applicable to the present case, refers to the Hague Regulation, from which he deduces that this regulation applies.

134. Fourth, no other State would have had control over the events in question. The United Kingdom would have had no direct military responsibility in the province of Al-Muthanna and the Netherlands would in any case never have sought to transfer their jurisdiction to it. Furthermore, there would not have existed at the relevant time an Iraqi civil administration nor an Iraqi army or police, and it was the CPA which would have exercised the prerogatives of public power with the other members of the military coalition. , including the Netherlands.

135. As for the facts of the case, the Dutch military allegedly exercised their control over the PCV and their authority over the Iraqi personnel assigned to it. In addition, the Royal Netherlands Constabulary would have carried out the investigation: they would have seized the rifle of Sergeant Hussam Saad, of the CIDC, the car of Mr. Dawoud Joad Kathim and the body of Mr. Azhar Sabah Jaloud. This would mean that the Netherlands assumed “some of the prerogatives of public power normally exercised by [a sovereign state]”.

136. Finally, the Dutch Minister of Defense, in his letter of June 18, 2007 transmitting the report of the Van den Berg Commission to Parliament, would have subscribed to the conclusion of this report according to which the Convention applied to Dutch troops in their relations with Iraqi nationals in Iraq.

2. Assessment of the Court

a) The DMN (CS) Memorandum of Understanding (Central Multinational Division south)

137. At the hearing before the Court, the Agent of the Respondent Government, responding to a question posed by the Court, stated that the Dutch defense authorities had refused to declassify the Protocol for the Court's benefit. agreement applicable to the United Kingdom and the Netherlands in the province of Al-Muthanna. However, he added that the DMN (CS) Memorandum of Understanding "gives a good idea of the type of document it is."

138. The Court notes that among the signatories of the DMN (CS) memorandum of understanding are the authorities responsible for the defense of numerous States contributing troops to the SFIR, in particular the Dutch Minister of Defense (paragraph 104 above). It further observes that the part of the DMN (SE) memorandum of understanding which the respondent government agreed to disclose (paragraph 100 above) is very similar, although not identical, to the corresponding part of the memorandum of understanding agreement of the DMN (CS) (paragraph 103 above), and that the agent of the respondent government did not refer, or even allude, to the existence of any notable difference between the two protocols of agreement. Therefore, the Court will assume that the two documents are identical in relevant aspects. It will nevertheless exercise caution in using the DMN (CS) memorandum of understanding.

b) The applicable principles

139. The Court observes that although the jurisdiction of States is mainly territorial, it can sometimes be exercised outside the national territory (see, for comparison, *Legal consequences of the construction of a wall in the occupied Palestinian territory, advisory opinion , ICJ Reports 2004,* p. 136, § 109 – paragraph 95 above). The Court recalls that in its *Al-Skeini and Others* judgment (cited above, §§ 130-139), it summarized as follows the principles relating to the exercise of jurisdiction, within the meaning of Article 1 of the Convention, in outside the territory of the Contracting States:

> "130. (...) Under the terms of [article 1 of the Convention], the commitment of the Contracting States is limited to "recognizing" (in English "to secure") *to* persons within their "jurisdiction" the enumerated rights and freedoms *(Soering v. United Kingdom,* 7 July 1989, § 86, Series A no. 161, and *Bankoviÿ* decision cited above, § 66). "Jurisdiction", within the meaning of Article 1, is a *sine qua non condition.* It must have been exercised for a Contracting State to be held responsible for acts or omissions attributable to it which give rise to an allegation of violation of the rights and freedoms set out in the Convention (Ilaÿcu and others, cited *above ,* § 311).

ÿ) The principle of territoriality

131. The jurisdiction of a State, within the meaning of Article 1, is mainly territorial *(Soering,* cited above, § 86, *Bankoviÿ,* decision cited above, §§ 61 and 67, and *Ilaÿcu,* cited above, § 312). It is presumed to be exercised normally throughout its territory *(Ilaÿcu,* cited above, § 312, and *Assanidzé v. Georgia* [GC], no. 71503/01, § 139, ECHR 2004-II). Conversely, the acts of the Contracting States carried out or producing effects outside their territory can only in exceptional circumstances be considered as the exercise by them of their jurisdiction, within the meaning of Article 1 (Bankoviÿ , cited above, § 67).

132. To date, the Court has recognized in its case-law a certain number of exceptional circumstances capable of giving rise to the exercise by the Contracting State of its jurisdiction outside its own borders. In each case, it is in the light of the particular facts of the case that the existence of such circumstances requiring and justifying the Court's finding of an extraterritorial exercise of its jurisdiction by the State must be assessed.

ÿ) The authority and control of a state agent

133. The Court has recognized in its jurisprudence that, as an exception to the principle of territoriality, the jurisdiction of a Contracting State within the meaning of Article 1 may extend to the acts of its organs which have effects outside its territory. *(Drozd and Janousek,* cited above, § 91, *Loizidou* (preliminary objections), cited above, § 62, and *Loizidou v. Turkey* (merits), 18 December 1996, § 52, *Reports of Judgments and Decisions* 1996-VI, and *Bankoviÿ,* decision cited above, § 69). (...).

(...)

135. (...) [T]he Court found the extraterritorial exercise of its jurisdiction by the Contracting State which, by virtue of the consent, invitation or acquiescence of the local government, assumes the together or some of the prerogatives of public authority normally exercised by it *(Bankoviÿ,* aforementioned decision, § 71). Consequently, whenever, in accordance with a rule of customary, conventional or other international law, its organs assume executive or judicial functions in a territory other than its own, a Contracting State may be held responsible for violations of the Convention committed in the exercise of these functions, provided that the facts in question are attributable to him and not to the territorial State *(Drozd and Janousek,* cited above, *Gentilhomme, Schaff-Benhadji and Zeroukiet v. France,* os 48205/99, 48207/ 99 and 48209/99, May 14, 2002, as well as *X and Y v. Switzerland,* os 7289/75 and 7349/76, Commission decision on admissibility of July 14
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1977, DR 9, p. 57).

136. Furthermore, the Court's jurisprudence shows that, in certain circumstances, the use of force by agents of a State operating outside its territory may bring it under the jurisdiction of that State, within the meaning of Article 1, any person thus finding themselves under their control. This rule has been applied in the case of persons handed over to State agents outside its borders.

Thus, in the *Öcalan v. Turkey* (cited above, § 91), the Court ruled that “as soon as he was handed over by the Kenyan agents to the Turkish agents, [the applicant] effectively found himself under the authority of Turkey and therefore came under the “jurisdiction "of that State for the purposes of Article 1 of the Convention, even if, in the present case, Turkey[had] exercised its authority outside its territory." In the above-mentioned *Issa and Others* judgment, it stated that, if it had been established that Turkish soldiers had arrested the applicants' relatives in northern Iraq before taking them to a nearby cave and executing them, the victims should have been considered

falling under the jurisdiction of Turkey, due to the effect of the authority and control exercised over the victims by the soldiers. In the *Al-Saadoon and Mufdhi v. United Kingdom* ((dec.), no. 61498/08, §§ 86-89, June 30, 2009), it considered that, since the control exercised by the United Kingdom over its military prisons in Iraq and over the persons staying there was absolute and exclusive, there was reason to consider, with regard to two Iraqi nationals imprisoned in one of them, that they fell within the jurisdiction of the United Kingdom. Finally, in the *Medvedyev and Others v. France*

([GC], no. 3394/03, § 67, ECHR 2010), it concluded, in relation to applicants who had been on board a ship intercepted on the high seas by French agents, that having regard to the absolute and exclusive control exercised continuously and uninterrupted by these agents over the ship and its crew from the moment of its interception, they fell within the jurisdiction of France within the meaning of Article 1 of the Convention. The Court considers that, in the above cases, the sole basis for jurisdiction was not the control exercised by the Contracting State over the buildings, aircraft or vessel where the persons concerned were detained. The determining factor in this type of case is the exercise of physical power and control over the persons in question.

(...)

ÿ) Effective control over a territory

138. The principle that the jurisdiction of the Contracting State within the meaning of Article 1 is limited to its own territory has another exception when the State exercises effective control over a located outside its territory. The obligation to ensure result of a military – legal action or not –, area in such an area respect for the rights and freedoms guaranteed by the Convention arises from the fact of this control, whether it is exercised directly, through the armed forces of the State or through of a subordinate local administration *(Loizidou* (preliminary objections), cited above, § 62, *Cyprus v. Turkey* [GC], no. 25781/94, § 76, ECHR 2001-IV, *Bankoviÿ,* aforementioned decision, § 70, *Ilaÿcu,* cited above , §§ 314-316, and *Loizidou* (merits), cited above, § 52).

Once such control over territory is established, it is not necessary to determine whether the Contracting State which holds it exercises precise control over the policies and actions of the local administration subordinate to it. Because it ensures the survival of this administration thanks to its military and other support, this State is responsible for the policies and actions undertaken by it.

Article 1 requires it to recognize in the territory in question all of the material rights set out in the Convention and in the Additional Protocols which it has ratified, and violations of these rights are attributable to it (Cyprus v. Turkey, *cited* above , §§ 76-77).

139. Whether or not a Contracting State exercises effective control over territory outside its borders is a question of fact. In ruling, the Court refers mainly to the number of soldiers deployed by the State in the territory in question *(Loizidou* (merits), cited above, §§ 16 and 56, and *Ilaÿcu,* cited above, § 387). Other elements may also be taken into account, for example the extent to which the military, economic and political support provided by the state to the subordinate local administration gives it influence and control in the region *(Ilaÿcu,* cited above, §§ 388-394). »

(c) Application of the above-mentioned principles to the facts of the case

140. The respondent State relies largely on the argument according to which the disputed events could not be attributed to the Netherlands since the authority was exercised by others: either jointly by the

United States and the United Kingdom, which United Nations Security Council Resolution 1483 would have designated as “occupying powers”, or by the United Kingdom alone as “lead nation” in the south-east of Iraq who would have commanded the Dutch contingent of the SFIR.

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

142. Concerning first of all the international legal context, the Court emphasizes that the status of “occupying power” within the meaning of Article 42 of the Hague Regulations, or the absence of this status, is not in itself determining. If it considered this notion relevant in the cases of *Al-Skeini and others* (cited above, § 143) and *Al-Jedda v. United Kingdom* ([GC], no. 27021/08, § 77, ECHR 2011), it did not need to resort to it to arrive at the finding that Turkey was liable for the events that occurred in northern Cyprus (see, in particular, *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 due to the situation on Moldovan territory located east of the Dniester (see, in particular, *Ilaÿcu and others v. Moldova and Russia* [GC], o 48787/99, ECHR 2004-VII, and *Catan and others v. Republic of Moldova*
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and Russia [GC], nos. 43370/04, 8252/05 and 18454/06, ECHR 2012).

143. Furthermore, the fact for a Contracting State to execute a decision or order emanating from the authority of a foreign State is not sufficient in itself to exempt it from the obligations undertaken by it 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). Therefore, the respondent State is not relieved of its “jurisdiction”, within the meaning of Article 1 of the Convention, simply because it accepted operational control from the Commander of the DMN (SE), who was a British officer. The Court observes that the Netherlands has retained “full command” over its military personnel, as the Ministers of Foreign Affairs and Defense indicated in their letter to Parliament (paragraph 57 above).

144. United Nations Security Council Resolution 1483
demonstrates the presence in Iraq of forces from multiple United Nations member states working under the aegis of an “Authority” (the Coalition Provisional Authority) formed by the United States and the United Kingdom.
While reaffirming the "sovereignty and territorial integrity of Iraq", this resolution called on "all parties concerned", whether or not they had the status of occupying power, to "fully fulfill their obligations under with regard to international law, in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907” (paragraph 93 above).

145. Adopted in the wake of Resolution 1483, United Nations Security Council Resolution 1511 also “underscored” the sovereignty of the Iraqi state. She urged Member States of the
United Nations to contribute to the multinational force for the purpose of restoring stability and security and called on Member States and international and regional organizations to contribute to the training and equipping of Iraqi police and security forces.

146. The multinational force took concrete form through a set of protocols of understanding defining the interactions between the different armed contingents present in Iraq. This is evidenced by the letter that the Ministers of Foreign Affairs and Defense addressed to the Lower House of Parliament on 6 June 2003 (paragraph 57 above) and which indicated that the Dutch government retained “full command” over the Dutch contingent in Iraq. The Court assumes, having regard to the wording of paragraph 5.2 of the DMN (CS) Memorandum of Understanding (paragraph 103 above), that this information was based on the DMN (SE) Memorandum of Understanding.

147. It appears from the DMN (CS) memorandum of understanding, but also from the extract from the DMN (SE) memorandum made available to the Court by the Government (paragraph 100 above) , that forces belonging to nations other than the "lead nations" received their current instructions from foreign commanders, but that the definition of the main orientations - in particular, within the limits approved in the form of the rules of engagement annexed to the protocols agreement, the development of distinct rules concerning the use of force – remained the reserved domain of each providing State.

148. It is on this basis that an aide-mémoire intended for SFIR commanders and a soldier's card were distributed by the Government of the Netherlands to Dutch personnel (paragraph 59 above).

149. Although Dutch troops were based in an area of south-eastern Iraq where SFIR forces were under the command of a British officer, the Netherlands nevertheless had responsibility for ensuring security there , to the exclusion of other participating states, and they retained full command over their contingent there.

150. The fact that the checkpoint was formally manned by Iraqi members of the CIDC is also not decisive. The Court observes that, according to Decree No. 28 of the Coalition Provisional Authority (“Establishment of the Iraqi Civil Defense Corps” – paragraph 99 above), the ICDT did not exercise law enforcement functions national in the accomplishment of which he would have been subordinate to the Iraqi authorities; in fact, the CIDC was placed under the supervision and authority of officers of the Coalition Forces (articles 1 § 4 a), 4 § 1 and 7).

151. Therefore, the Court cannot conclude that the Dutch forces were placed “at the disposal” of a foreign power, whether Iraq, the United Kingdom, or any other power. , nor that they were “under the exclusive direction and control” of any other State (see for comparison, *mutatis mutandis,* article 6 of the International Law Commission Articles on State Responsibility, 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, ICJ Reports 2007,* p. 43, § 406, paragraph 97 above -above)).

152. The Court then turns to the circumstances of the death of Mr. Azhar Sabah Jaloud. She observed that he died when the vehicle in which he was traveling was targeted as he passed through a checkpoint manned by personnel placed under the command and direct supervision of an officer of the Royal Dutch Army. The checkpoint had been set up as part of the execution of the SFIR mission provided for by United Nations Security Council Resolution 1483 (paragraph 93 above), with a view to restoring conditions of stability and security conducive to the creation of an effective administration in the country. The Court considers that the respondent State exercised its “jurisdiction” within the limits of its mission within the SFIR and for the purposes of establishing authority and control over the people who passed through this post. Therefore, the Court concludes that the death of Mr Azhar Sabah Jaloud occurred within the “jurisdiction” of the Netherlands, according to the interpretation that should be given to this term for the purposes of Article 1 of the Convention.

153. The Court therefore established the jurisdiction of the Netherlands. It is not called upon to examine whether the United Kingdom, another State party to the Convention, was able to exercise concurrent jurisdiction.

d) Accountability

154. The Court recalls that the criteria making it possible to establish the existence of “jurisdiction” within the meaning of Article 1 of the Convention have never been assimilated to the criteria making it possible to establish the responsibility of a State concerning an internationally wrongful act under general international law *(Catan and others,* cited above, § 115). Furthermore, in *Al-Skeini et al.,* the Court emphasized that “from the moment the State, through its agents, exercises its control and authority over an individual, and consequently its jurisdiction, he is under an obligation under Article 1 to recognize the rights and freedoms defined in Title I of the Convention which concern his case. In this sense, therefore, the rights arising from the Convention can be “divided and adapted” (see, for comparison, the *Bankoviÿ and others decision,* cited above, § 75).”

155. The facts giving rise to the applicant's complaints arise from alleged acts and omissions of military personnel, investigative authorities and judicial bodies of the Netherlands. They are therefore likely to engage the responsibility of the Netherlands with regard to the Convention.

e) The Government's preliminary objection

156. The Court rejects the Government's preliminary objection, which was joined to the merits (paragraph 110 above). It must now examine the merits of the applicant's complaints.

C. On the alleged failure to fulfill the obligation to investigate arising from article 2

157. The applicant criticizes the respondent State for failing to adequately investigate the death of his son with a view to bringing the person responsible to justice. He invokes Article 2 of the Convention, worded as follows:

> “1. The right of everyone to life is protected by law. Death cannot be inflicted on anyone intentionally, except in execution of a death sentence pronounced by a court if the offense is punishable by this punishment by law.
>
> 2. Death shall not be considered to have been inflicted in violation of this article in the case where it results from a use of force made absolutely necessary:
>
> a) to ensure the defense of any person against unlawful violence;
>
> (b) to effect a lawful arrest or to prevent the escape of a person regularly detained;
>
> (c) to suppress, in accordance with the law, a riot or insurrection. »

The respondent government denies that a violation of Article 2 has been committed.

158. The intervening government did not consider the merits of the applicant's complaints.

1. Theses of the parties

a) The applicant

159. The applicant calls into question the independence of the investigation which was carried out into the death of Mr Azhar Sabah Jaloud and the proceedings which followed it.

160. First, he doubts the independence of the Royal Constabulary unit which was stationed in Iraq. He indicates that this unit shared quarters with Dutch SFIR troops and was therefore in close contact with them. He adds that, as the prosecutor to whom it was to report was based in the Netherlands, the Royal Constabulary unit was placed under the day-to-day control of the Dutch battalion commander.

161. He considers that this lack of independence of the said unit also vitiated the decision of the public prosecutor not to prosecute Lieutenant A., which would have been mainly based on the investigation by the royal constabulary. He explains that in his judgment *Ergi v. Turkey* (July 28, 1998, *Reports of judgments and decisions* 1998-IV), the Court concluded that there had been a violation of Article 2 under its procedural aspect on the grounds that the prosecutor who had rendered the decision of incompetence had largely relied on a conclusion appearing in an incident report drawn up by the gendarmerie.

162. The applicant adds that the military chamber of the Arnhem Court of Appeal also relied entirely on the results of the investigation – very limited in his view – carried out by the royal constabulary whereas, in his opinion, she should have ordered the opening of an investigation by an independent judge.

163. Finally, he considers that the presence of an active officer within the military chamber of the Arnhem Court of Appeal requires the conclusion that the decision taken by it could not be independent. He invokes the *Akkoç v. Turkey* (nos. 22947/93 and 22948/93, ECHR 2000-X) and *Incal v. Turkey* (June 9, 1998, *Reports* 1998-IV).

164. The applicant further maintains that the investigation was insufficient.

165. First of all, the statements of the members of the CIDC present at the PCV at the time of the shootings were not included in the internal investigation file. The report from the royal constabulary communicated to the prosecutor and the military chamber of the Arnhem Court of Appeal would have limited itself to indicating that these people had not been able to say anything relevant. However, detailed declarations were collected from the members of the ICDT individually, but they were not communicated either to the applicant or to the military chamber of the Arnhem Court of Appeal and were only produced during the proceedings before the Court.

166. The interrogation of Mr. Dawoud Joad Kathim, a “key witness” in the eyes of the applicant because he was the only civilian witness and the only survivor of the shooting not to have been under the orders of Lieutenant A., would have been extremely superficial. Furthermore, his statement as recorded by investigators from the Royal Constabulary would have differed from that delivered by him to an Iraqi official later the same day.

167. Lieutenant A. only underwent his first interrogation seven hours after the facts in dispute and was not separated from the other witnesses during this time. He would therefore have had plenty of time to talk about the shooting with the other witnesses before being questioned and to adapt his comments accordingly.

168. The day after the events, Lieutenant A. declared that he had been able to obtain from the deputy commander of the CIDC the list of members of the CIDC who had used their weapons as well as the number of cartridges fired. The applicant considers that the fact that Lieutenant A., the main suspect, was able to obtain this information from a key witness also undermined

the effectiveness of the investigation. Furthermore, despite its potential importance for the case, the list obtained by Lieutenant A. would not have been included in the file.

169. The royal constabulary allegedly disposed of the body of Mr. Azhar Sabah Jaloud for several hours without, however, carrying out an autopsy. The remains were then transferred to an Iraqi civilian hospital, where an autopsy was carried out in the absence of representatives of the royal constabulary. The autopsy report would have been included in the file as is, without being translated.

170. Other scientific and technical evidence was allegedly treated with similar negligence. In particular, the report concerning the bullet fragments removed from the body was allegedly not translated *verbatim.*

171. Finally, the applicant alleges that the close relatives of Mr Azhar Sabah Jaloud were not sufficiently involved in the investigation and informed of its progress. Thus, no one would have ever sought to contact the family of Mr. Azhar Sabah Jaloud, and no one would have taken the trouble to inform the relatives of the decision not to prosecute Lieutenant A.

b) The respondent government

172. The respondent government maintains that there has been no violation of Article 2.

173. He considers that no question of independence arises.

174. The royal constabulary would have its own chain of command and would only depend on the public prosecutor for the conduct of investigations. As for the decision not to prosecute Lieutenant A., it would have been inevitable that it was based on the investigation report of the royal constabulary. In any case, there is nothing to suggest that the military chamber of the Arnhem Court of Appeal lacked independence.

175. Likewise, the investigation would have been sufficiently effective.

176. Members of the Royal Constabulary reportedly examined the scene of the shooting and collected available evidence immediately after their arrival.

177. Lieutenant A., who himself reported the incident, would have immediately assumed full responsibility for the shooting; nothing would reveal any attempt on his part to manipulate the evidence.

178. The members of the ICDT were indeed questioned, but they were not able to report anything of importance. In any event they would not have been suspects.

179. For the Government, the statements of Mr. Dawoud Joad Kathim – that taken by the royal constabulary and that taken by the Iraqi police – are not contradictory, even if the statement of the person concerned, made to the Iraqi police, according to which the interpreter had

asked to say that only members of the ICDT had fired is hardly plausible in his opinion.

180. The need to entrust the body to the Iraqis would have been due to the absence in the Dutch camp of the equipment necessary to carry out an autopsy. The decision to exclude Dutch personnel during the autopsy was reportedly taken by Iraqi authorities.

181. The investigation would in any case have been sufficient to establish that, of all the Dutch soldiers present, only Lieutenant A. had fired at the car, so that the criminal proceedings would have focused on him.

182. Finally, the Government considers that the applicant was sufficiently involved in the proceedings: he would have received information through his lawyer as soon as the latter had requested it, and this information would have been sufficient to enable him to participate fully. effectively to the procedure by which he challenged the decision not to prosecute Lieutenant A.

2. Assessment of the Court

a) Whether shots were fired only by Lieutenant A. or also by members of the CIDC

183. The Court must first examine the applicant's argument that the available evidence – in particular the statements taken from members of the CIDC but not included in the file of the internal proceedings – show that only Lieutenant A. fired.

184. It is true that no member of the CIDC admitted to having shot at the car in which Mr. Azhar Sabah Jaloud was traveling. The Court observes, however, that, according to the investigators of the royal constabulary, the vehicle in question had been hit by bullets of different calibers, some less than 6 mm, others greater (paragraph 32 above). This element appears compatible with the use of at least two types of firearms, which could very well be the Diemaco C7A1 rifle supplied to the Dutch army (which uses 5.56 mm NATO cartridges – paragraph 50 below). above) and the Kalashnikov AK-47 used by the CIDC (which uses 7.62 mm cartridges – paragraph 52 above). In these conditions, the applicant's statements according to which only Lieutenant A. fired are unverifiable.

185. In any event, the Court is only called upon to determine whether the procedural obligations arising from Article 2 of the Convention have been satisfied. Therefore, it is not necessary for it to rule on the point in question.

b) The relevant principles

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

"163. For the general prohibition of arbitrary killings of public officials to prove effective in practice, there must be a procedure for monitoring the legality of the use of deadly force by state authorities .
Combined with the general duty incumbent on the State under Article 1 of the Convention to "recognize to every person within [its] jurisdiction the rights and freedoms defined [in] the (...) Convention ", the obligation to protect the right to life imposed by this provision requires by implication that some form of effective official investigation be carried out when the use of force, particularly by agents of the State, has resulted in death of man *(McCann,* cited above, § 161). It is essentially a question, through such an investigation, of ensuring the effective application of domestic laws which protect the right to life and, in cases where agents or organs of the State are involved, of guaranteeing that they be held accountable for deaths occurring under their responsibility *(Natchova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 110, ECHR 2005-VII). However, the investigation must also be broad enough to allow the authorities responsible for it to take into consideration not only the actions of the state agents who directly used deadly force but also all the circumstances leading to them. surrounded, in particular the preparation of ongoing operations and the control exercised over them, in the event that these elements are necessary to determine whether or not the State has satisfied the obligation imposed on it by Article 2 to protect life (see, by implication, *McCann,* cited above, §§ 150 and 162, *Hugh Jordan v. United Kingdom,* o 24746/94, § 128, ECHR 2001-III, *McKerr,* cited above, §§ 143 and 151, *Shanaghan v. United Kingdom,* no. 37715/97, §§ 100-125, 4 May 2001, *Finucane v. United* n *Kingdom,* o 29178/95, §§ 77-78, ECHR 2003-VIII, *Natchova,* cited above, §§ 114- 115, as well as,
n
mutatis mutandis, Tzekov v. Bulgaria, no. 45500/99, § 71, February 23, 2006).

164. The Court has already held that the procedural obligation arising from Article 2 continues to apply even if security conditions are difficult, including in the context of armed conflict (see, among other examples, *Güleç v. Turkey,* 27 July 1998, § 81, *Reports* 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, 309-320 and 326-330, April 6, 2004, *Issayeva v. Russia,* no. 57950/00, §§ 180 and 210, February 24, 2005, and *Kanlibaÿ v. Turkey,* no. 32444/96, §§ 39-51, December 8, 2005). Obviously, it may be that if the death into which Article 2 requires an investigation occurs in a context of widespread violence, armed conflict or insurgency, investigators will encounter obstacles and, as further observed the UN special rapporteur [...], specific constraints impose the use of less effective investigative measures or delay investigations (see, for example, Bazorkina v. Russia, no . 69481 / 01, § 121, July 27, 2006). It nevertheless remains that the obligation imposed by Article 2 to protect life implies the adoption, even in difficult security conditions, of all reasonable measures, so as to guarantee that an effective investigation and independent investigation be conducted on alleged violations of the right to life (see, among many other examples, *Kaya v. Turkey,* 19 February 1998, §§ 86-92, *Reports* 1998-I, *Ergi,* cited above, §§ 82- 85, *Tanrikulu*

vs. Turkey [GC], no. 23763/94, §§ 101-110, ECHR 1999-IV, *Khachiev and Akaïeva v. Russia,* nos. 57942/00 and 57945/00, §§ 156-166, February 24, 2005, *Issayeva,* cited above, §§ 215-224, and *Moussaïev and others v. Russia,* nos. 57941/00, 58699/00 and 60403/00, §§ 158-165, July 26, 2007).

165. As to what form of investigation is likely to achieve the objectives pursued by Article 2, this may vary depending on the circumstances. However, whatever the modalities chosen, the authorities must act ex officio, as soon as the matter is brought to their attention. They cannot leave the initiative of filing a formal complaint or the responsibility of initiating an investigation procedure to the relatives of the deceased (*Ahmet Özkan and others,* cited above, § 310, and *Issaïeva,* cited above, § 210). The civil procedure, which is opened at the initiative of relatives and not of the authorities and does not allow the alleged perpetrator of an offense to be identified or punished, cannot be taken into account in the assessment of respect by the State of its procedural obligations arising from Article 2 (see, for example, *Hugh Jordan,* cited above, § 141).

Furthermore, these obligations cannot be satisfied by the sole award of damages *(McKerr,* cited above, § 121, and *Bazorkina,* cited above, § 117).

166. As stated above, the investigation must be effective in the sense that it must make it possible to determine whether or not the use of force was justified in the circumstances and to identify and punish the perpetrators. responsible. This is an obligation not of result but of means. The authorities must have taken reasonable steps available to them to secure evidence relating to the incident in question, including, inter alia, eyewitness testimony, forensic examinations and, where appropriate, a proper autopsy. to provide a complete and accurate account of injuries as well as an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation weakening its ability to establish the circumstances of the case and/or responsibilities risks leading to the conclusion that it does not meet the required standard of effectiveness *(Ahmet Özkan and others,* cited above, § 312, and *Issayeva,* cited above, § 212, as well as the cases cited therein).

167. Generally speaking, it can be considered that for an investigation into an unlawful homicide alleged to have been committed by agents of the State to be considered effective, the persons responsible for it must be independent of the persons responsible. involved. This presupposes not only the absence of a hierarchical or institutional link, but also concrete independence (see, for example, *Shanaghan,* cited above, § 104). A requirement for promptness and due diligence is implicit in this context. It must be recognized that there may be obstacles or difficulties preventing the investigation from progressing in a particular situation. However, a prompt response by authorities when investigating the use of deadly force can generally be considered essential to preserve public confidence in the principle of legality and to avoid any appearance of complicity or of tolerance regarding illegal acts. For the same reasons, the public must have sufficient right of scrutiny over the investigation or its conclusions, so that there can be questioning of responsibility both in practice and in theory. The required degree of public control may vary from situation to situation. In all cases, however, the victim's relatives must be involved in the proceedings to the fullest extent necessary to protect their legitimate interests *(Ahmet Özkan and Others,* cited above, §§ 311-314, and *Issayeva,* cited above, § § 211-214, as well as the cases cited therein). »

c) On the independence of the investigation

i. The Royal Constabulary unit present in Iraq

187. The applicant questions the independence of the unit of the royal constabulary which began the investigation, arguing that its members were installed in the immediate vicinity of the personnel of the royal army

to which he blames the death of his son. As for the Government, it maintains that the royal constabulary was sufficiently independent.

188. The Court notes that the independence and, consequently, the effectiveness of an investigation into a supposedly unlawful homicide may be called into question if the investigators and the persons targeted by the investigation maintain close relationships (see , for comparison, *Ramsahai and Others v. Netherlands* [GC], no. 52391/99, § 337, ECHR 2007-II).

189. The Government does not dispute that at the material time the unit of the royal constabulary shared its quarters with the troops of the royal army. That being said, no element has been put forward or appeared which would be likely to lead the Court to conclude that this circumstance in itself undermined the independence of the unit of the royal constabulary to the point of altering the quality of its investigation.

190. The Court does not find it established that due to the geographical distance between the unit of the Royal Constabulary stationed in Iraq and the prosecutor in charge of the investigation – who was based in Arnhem – the unit of the Royal Constabulary found itself subordinate to the command of the battalion of the royal army for current matters. The applicant has not presented any evidence capable of supporting his thesis in this regard.

ii. Faith added to the reports of the royal constabulary

191. The applicant considers that the public prosecutor relied excessively on the reports of the royal constabulary. The Government disputes this point.

192. Prosecutors inevitably rely on the police for information and assistance. This in itself is not sufficient to justify the conclusion that they lack independence from the police (see, *mutatis mutandis, Ramsahai and others* [GC], cited above, § 344).

193. Furthermore, the Royal Constabulary unit was present in Iraq precisely to carry out police work like that in question here. That the prosecutor relied on the reports established by her therefore does not raise, in itself, any question.

194. For the Court, the essence of this complaint amounts to saying that the investigation was not effective and that the reports to which it gave rise were unreliable. It will separately address below the applicant's concerns regarding the quality of the investigation carried out by the Royal Constabulary.

iii. The military member of the military chamber of the Arnhem Court of Appeal

195. The applicant sees in the presence of an active officer within the military chamber of the Arnhem Court of Appeal a lack of independence of the latter. The Government maintains that the independence of the military chamber of the Arnhem Court of Appeal is certain.

196. In the present case, the Court examined the composition of the military chamber as a whole. It sits in a formation of three members, namely two civilian members of the Arnhem Court of Appeal and one military member. The latter is a senior officer with the qualifications required to be a magistrate; he is promoted on an honorary basis to the required rank in the navy, army or air force if he does not already actually hold that rank (paragraph 64 above). As part of his judicial function, he is not subject to military authority and discipline; the same rules of functional independence and impartiality apply to him and to civil judges (paragraph 65 above). In these circumstances, the Court is prepared to accept that the military chamber offers sufficient guarantees for the purposes of Article 2 of the Convention.

d) On the effectiveness of the investigation

i. Testimonies of CIDC members

197. In his application, the applicant alleged that the royal constabulary had not taken statements from the CIDC members who were guarding the checkpoint at the time of the shooting. The report submitted to the military chamber of the Arnhem Court of Appeal indicated only that these people had “not [provided] relevant information” (paragraph 25 above).

198. Following the relinquishment of the Chamber in favor of the Grand Chamber, the Government submitted an official report of the interrogation of members of the CIDC by officers of the Royal Constabulary (paragraph 38 above). It appears that this document contains information which could possibly have been useful to the military chamber of the Arnhem Court of Appeal, in particular details on the number of shots fired by each soldier and the quantity of ammunition remaining, as well as than a much more detailed restitution of the testimony given by the interpreter, Mr. Walied Abd Al Hussain Madjied.

199. As the Court has said on numerous occasions, the use of the terms “absolutely necessary” in Article 2 § 2 indicates that it is necessary to apply a stricter and more compelling criterion of necessity than that normally used to determine whether state intervention is “necessary in a democratic society” under paragraph 2 of Articles 8 to 11 of the Convention. The force used must in particular be strictly proportionate to the aims mentioned in paragraph 2 (a), (b) and (c) of Article 2 (see, among many others, McCann and Others v. United Kingdom, 27 September *1995 ,* § 149, Series A no. 324, *Kelly and Others v. United Kingdom,* no. 30054/96, § 93, May 4, 2001, and *Issayeva v. Russia,* no. 57950/00, § 173, February 24, 2005). It follows that no internal investigation can satisfy the requirements of Article 2 of the Convention if it does not allow

to verify that the deadly force used by state agents did not go beyond what was required by the circumstances *(Kaya v. Turkey,* 19 February 1998, § 87, *Reports* 1998-I).

200. Whether the investigation must be effective in the sense that it must make it possible to identify and, where appropriate, punish those responsible (see in particular *Hugh Jordan v. United Kingdom,* no. 24746/94, § 107, ECHR 2001-III, *McKerr v. United Kingdom,* no. 28883/95, § 113, ECHR 2001-III, *Finucane v. United Kingdom,* no . o 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 also emphasizes that a sufficient investigation to support a judicial finding as to whether or not the force used was justified in the circumstances is crucial to the exercise, by a State agent prosecuted in subsequent criminal proceedings, of the rights of the defense (see in particular, *mutatis mutandis, Edwards v. United Kingdom,* 16 December 1992, § 36, series A no 247-B, *Rowe and Davis v. United Kingdom* [GC], o 28901/95, § 60, ECHR 2000-II, *IJL and others v. United Kingdom,* os 29522/95, 30056/96 and 30574/ 96, § 112, ECHR 2000-IX, and *Dowsett*

vs. United *Kingdom,*o 39482/98, § 41, CEDH 2003-VII).

201. The military chamber of the Arnhem Court of Appeal was called upon to investigate whether Lieutenant A. had acted in accordance with the instructions he had received from the competent authority (article 38 of the military penal code – paragraph 66 below). above). Those which concerned the use of force, as formulated in the soldier's card (paragraph 59 above) under the heading "Minimum force", indicated in paragraph 14:

> “If you have to open fire, you must:
>
> – carry out only targeted shots;
>
> – avoid firing more shots than necessary; And
>
> – cease fire as soon as the situation allows. »

202. The military chamber of the court of appeal limited itself to ruling that it had been established that Lieutenant A. had reacted by mistake to friendly fire coming from the other side of the road and to consider that he could therefore invoke self-defense (paragraph 48 above). It did not consider aspects concerning whether he had acted within the limits of the instructions he had received regarding the proportionality of the use of force.
Singularly, it did not issue conclusions on the questions of whether more shots had been fired than necessary and whether the shooting had stopped as soon as the situation permitted.

203. The Court considers that in order to be able to carry out an assessment meeting the requirements indicated above, the military chamber of the Arnhem Court of Appeal should have had access to the minutes of the hearings of the members of the CIDC carried out by the officers of the royal constabulary

(paragraph 38 above). Thus, the absence of this document in the Court of Appeal's file seriously undermined the effectiveness of the examination carried out by it.

ii. The interrogation of Mr. Dawoud Joad Kathim

204. The applicant maintains that the brevity of the statement of the driver of the car, Mr. Dawoud Joad Kathim, as taken by an investigator from the royal constabulary (paragraph 23 above), is also an element to be taken into account for judge the quality of the investigation. He adds that there were, moreover, discrepancies between this statement and that provided by the driver later in the day to an Iraqi agent (paragraph 37 above). The Government considers, however, that the differences that may exist between the two statements are not enough to cast doubt on the effectiveness of the investigation.

205. The Court considers that no conclusion can be drawn from the very brevity of the first testimony of Mr. Dawoud Joad Kathim. The inconsistencies between this and the second deposition may justify doubts as to the reliability of either of these depositions as recorded, but this alone cannot lead the Court to conclude that the investigation was inadequate.

iii. The delay in questioning Lieutenant A.

206. The applicant draws the Court's attention to the delay in questioning Lieutenant A. after the shooting, a period of time during which he was not separated from the other witnesses. The Government asserts that Lieutenant A. did nothing to pervert the course of the investigation.

207. The Court notes that Lieutenant A. was not questioned until more than six hours after the arrival of the Royal Constabulary personnel at the scene of the shooting (paragraph 28 above). Even if, as the Government rightly points out, there is no evidence to suggest that Lieutenant A. (or another Dutch soldier) engaged in the slightest manipulation, he would have had complete leisure during this period of time to to collude with other people to distort the truth if he had intended to do so. No precautions appear to have been taken to prevent this from happening.

208. As in the *Ramsahai and others* [GC] case (cited above), the Court considers that the simple fact that appropriate measures were not taken to reduce the risk of such collusion amounts to a shortcoming capable of harming to the adequacy of the investigation *(idem,* § 330).

iv. The list of CIDC members who fired their weapons

209. According to the applicant, Lieutenant A. was given by the deputy commander of the CIDC a list indicating the names of the CIDC members who had fired their weapons as well as the corresponding number of cartridges fired (paragraph 31 below). above).

210. For the Court, the fact that Lieutenant A. was able to obtain this list does not raise any questions in itself. Until the arrival of the company commander, Lieutenant A. was the highest-ranking Coalition officer on site and was additionally responsible not only for the Dutch patrol but also for the CIDC members present. It was therefore incumbent on him to take measures to facilitate the investigation.

211. On the other hand, once available, this list should have been included in the file. The information it contained could have proved useful, in particular for a comparison with the statements provided by the members of the CIDC themselves. The Court considers that the investigation failed in this regard.

v. The autopsy

212. The applicant complains about the conditions in which the autopsy was carried out as well as the report to which it gave rise. For the Government, the autopsy was as effective as it could be in the circumstances of the case.

213. The Court notes that the autopsy appears to have been carried out in the absence of any qualified Dutch official. Furthermore, we know nothing about the qualifications of the Iraqi doctor who performed it.

214. Furthermore, the doctor's report presents serious shortcomings. Extremely brief, it lacks details and does not even include photographs.

215. More generally, no other option seems to have been considered for the autopsy. It is not impossible, for example, that one or both of the occupying powers, or another Coalition power, would have adequate facilities and qualified personnel.

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

vi. Bullet fragments

217. The applicant complains about the absence of a detailed report on the examination of the bullet fragments that may have been carried out. The Government, for its part, considers that the investigation was nonetheless adequate.

218. The Court notes that metal fragments identified as bullet fragments were extracted from the body of Mr. Azhar Sabah Jaloud. However, the Dutch investigators seem to have since lost all trace of these documents (paragraph 36 above).

219. Whether or not the bullet fragments were capable of providing useful information, the Court finds it unacceptable that they were not preserved and examined in good conditions, in the Netherlands if necessary.

220. It concludes that on this point also the investigation was inadequate.

e) The allegation that the applicant was not involved in the investigation

221. The applicant states that nothing was done to contact the deceased's relatives.

222. The Government replied that investigators from the Royal Netherlands Constabulary spoke to the applicant and other relatives during the autopsy but left at a time when it seemed to them that the family was preparing to take them hostage.

223. The applicant contests the Government's version, which is unverifiable remains according to him, no relevant written report having been produced.

224. Regardless of the veracity of either version, the Court considers it established that at his request the applicant was granted access to the investigation file, that he was in fact able to submit to the Court. This access to the file was also sufficient to allow the person concerned to initiate, on the basis of Article 12 of the Code of Criminal Procedure, a procedure within the framework of which he was able to very effectively challenge the decision not to not initiate proceedings against Lieutenant A.

225. Consequently, the Court sees no evidence indicating that the procedure was defective on this point *(Ramsahai and others* [GC], cited above, §§ 349-350).

f) Conclusion

226. The Court is prepared to take reasonable account of the relatively difficult conditions in which the Dutch military and investigators had to work. It must be recognized in particular that they were mobilized in a foreign country which remained to be reconstructed in the aftermath of the hostilities, of which they knew neither the language nor the culture and whose population clearly included hostile armed elements (as evidenced by the first shooting of the April 21, 2004 – paragraph 10 above).

227. That being said, the Court must conclude that the investigation into the circumstances of the death of Mr Azhar Sabah Jaloud did not meet the requirements arising from Article 2 of the Convention, for the following reasons : firstly, certain documents containing important information were not communicated to the judicial authorities and to the applicant (the official report of the statements taken from the members of the CIDC and the list, obtained by Lieutenant A., indicating which members of the CIDC had fired their weapons and the number of cartridges fired by each of them); secondly, no precautions were taken to prevent, before Lieutenant A.'s hearing, any collusion between him and other witnesses to the facts; thirdly, nothing was done to ensure that the autopsy could be carried out under conditions worthy of an investigation into the possible criminal responsibility of a state agent, the autopsy report having moreover been insufficient; fourth, important material elements – the bullet fragments extracted from the remains – were lost in unclear circumstances. Even at

having regard to the particularly difficult conditions which prevailed in Iraq at the material time, the Court cannot conclude that these failures were inevitable.

228. The above-mentioned shortcomings lead the Court to note that the procedural obligations arising from Article 2 of the Convention have not been met.

II. ON THE APPLICATION OF ARTICLE 41 OF THE CONVENTION

229. Under article 41 of the Convention,

> "If the Court declares that there has been a violation of the Convention or its Protocols, and if the domestic law of the High Contracting Party only imperfectly allows the consequences of this violation to be erased, the Court grants the party injured party, if applicable, just satisfaction. »

230. The applicant submitted claims for moral damage and for costs and expenses.

231. The intervening government did not provide comments on the requests made by the applicant for just satisfaction.

A. Too bad

232. The applicant requests the Court to order the Government “to remedy the violations of Article 2 which have occurred, by carrying out, as far as possible, a new – in-depth – investigation into the death of [his] son, prosecute those involved and keep the applicant fully informed of the investigation and the prosecution, if any.”
In addition, he claims 25,000 euros (EUR) for moral damage.

233. The respondent government considers that an injunction such as that requested by the applicant would be inappropriate. He leaves it to the Court to determine the amount of possible compensation to be awarded to the person concerned, while indicating that the sums awarded in *Al-Skeini and others* were lower than that requested in the present case.

234. With regard to the applicant's request for an effective investigation followed by prosecution, the Court recalls the general principle according to which the respondent State remains free to choose the means of discharging its legal obligation at the with regard to Article 46 of the Convention, provided that these means are compatible with the conclusions contained in the Court's judgment; it also recalls that only exceptional circumstances can lead it to indicate what measures to take (see, for example, *Assanidzé v. Georgia* [GC], o 71503/01, §§ 202-203, ECHR 2004-II, and *Hutten-Czapska v. Poland* [GC], n no. 35014/97, §§ 238-239, ECHR 2006-VIII). Consequently, it considers that it is up to the Committee of Ministers of the Council of Europe to

is, under Article 46 of the Convention, to decide what measures, if any, are concretely required in the context of the execution of the judgment delivered by it (see, among many others, *Al -Skeini and others,* cited above, § 181).

235. Concerning the financial claims, the Court observes that in *Al-Skeini and others* – which also concerned a violation of Article 2 under its procedural aspect – it awarded the applicants the sums they had requested *(ibidem,* § 182). In the present case, it considers it fair to award the applicant the amount claimed by him, namely EUR 25,000.

B. Fees and expenses

236. The applicant requests a total sum of EUR 13,200 corresponding to 120 hours of work carried out by his lawyers. He declares, however, that he has requested domestic legal assistance and that he will not maintain his claims if this is granted.

237. The applicant submitted a supplementary statement indicating the travel and subsistence expenses incurred by his two counsel during their participation in the hearing, as well as the postal costs incurred by the case. The total of these expenses, supported by supporting documents, amounts to EUR 1,372.06.

238. The respondent government maintains that no question arises as the sums claimed are covered by domestic legal aid, and it refuses to comment on the additional amount.

239. The applicant did not inform the Court that domestic legal assistance had been refused in respect of the sum referred to in paragraph 236 above. The Court cannot therefore establish that it concerns costs “actually incurred”. No amount can therefore be allocated under this heading.

240. The Court accepts in its entirety the additional request set out in paragraph 237.

C. Default interest

241. The Court considers it appropriate to model the rate of default interest on the interest rate of the marginal lending facility of the European Central Bank increased by three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

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

2. *Declares* the request admissible;

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

4. *Holds* that there has been a violation of Article 2 of the Convention under its aspect procedural;

5. *This*

(a) which the respondent State must pay to the applicant, within three months, 25,000 EUR (twenty-five thousand euros), plus any amount that may be due as tax on this sum, for non-pecuniary damage;
(b) that the respondent State must pay to the applicant, within three months, 1,372.06 EUR (one thousand three hundred and seventy-two euros and six cents), plus any amount that may be owed by the interested party as tax on this sum, for costs and expenses;
(c) that from the expiry of the said period until payment, these amounts will be subject to simple interest at a rate equal to that of the marginal lending facility of the European Central Bank applicable during this period, increased by three percentage points;

6. *Rejects* the request for just satisfaction for the remainder.

Done in French and English, then delivered in public hearing at Human Rights Palace, in Strasbourg, November 20, 2014.

Michael O'Boyle
Clerk

Dean Spielman
President

Attached to this judgment, in accordance with Articles 45 § 2 of the Convention and 74 § 2 of the Rules, is the statement of the following separate opinions:

– concurring opinion of Judge Spielmann, joined by Judge Raimondi;

– joint concurring opinion to Justices Casadevall, Berro-Lefèvre, Šikuta, Hirvelä, López Guerra, Sajó and Silvis;
- concordant opinion from judge Motoc.

D.S.
M.O'B.

CONCURRING OPINION OF JUDGE SPIELMANN, AT WHICH JUDGE RAIMONDI SIDES WITH

1. It is without difficulty that I voted for the conclusion that the death of Mr Azhar Sabah Jaloud occurred within the framework of the "jurisdiction" of the Netherlands, according to the interpretation that should be given to this term for the purposes of Article 1 of the Convention.

2. This conclusion is stated in paragraph 152 of the judgment and did not require any additional development relating to the concept of attribution.

3. Indeed, the notion of "attribution" is to be distinguished from the notion of "jurisdiction", as the latter is interpreted in the Court's case-law (see, recently, Hassan v. United Kingdom [GC] , no. 29750/09, § 74, September 16, 2014, which essentially repeats the developments in the *Al-Skeini* judgment *(Al-Skeini and Others v. United Kingdom* [GC], no. 55721/07, §§ 130-141, CEDH 2011). The notion of "jurisdiction" essentially refers to the principle of territoriality, the authority and control of a state agent, effective control over a territory and the legal space of the Convention.

4. On the other hand, the notion of "attribution" essentially concerns the delicate question of the "attributability" of internationally wrongful acts. The Salmon dictionary indicates under the term "attribution" the following:

> "With regard to international responsibility, the connection with a subject of international law of the actions or omissions of individuals or bodies under its effective authority and acting on its behalf."

(Dictionary of public international law, under the direction of Jean Salmon, preface by Gilbert Guillaume, Brussels, Bruylant, 2001).

5. The "codicil" of paragraphs 154 and 155, combined with unnecessary references to the jurisprudence of the International Court of Justice (paragraphs 95-97) and the International Law Commission Articles on State Responsibility in part of the judgment devoted to international law, is ambiguous, excessive and incomprehensible.

– Ambiguous, because the majority reasoning takes care to recall that the criteria making it possible to establish the existence of a "jurisdiction" within the meaning of Article 1 of the Convention have never been assimilated to the criteria making it possible to establish the responsibility of a State for an internationally wrongful act .

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1. Referring, rightly, to the *Catan and Others v. Republic of Moldova and Russia,* paragraph 115 of which must be quoted *in full :*
"115. The Russian Government maintains that the Court can only conclude that Russia exercises effective control if it considers that the "government" of the "RMT" can be regarded as an organ of the Russian State, following the approach adopted by the International Court

– Superabundant, because from the moment the Court reaches the conclusion that the criteria establishing the jurisdiction of the Netherlands are met (paragraph 152), it is no longer necessary, in order to reject the Government's preliminary objection, to once again examine the facts underlying the applicant's grievances which arose from the acts and omissions of military personnel, investigative authorities and judicial bodies of the Netherlands.

– Incomprehensible, because the majority reasoning only develops in paragraph 155 the reasoning relating to the establishment of “jurisdiction”.

6. It was in paragraph 152 that the Court resolved this question by considering that the respondent State exercised its “jurisdiction” within the limits of its mission within the SFIR and for the purposes of establishing authority and control over the people who passed through the checkpoint.

7. There was therefore no need to examine the false problem of “attribution”, totally foreign to the question of “jurisdiction”. More fundamentally, the Court must in any event be careful not to combine the notion of jurisdiction within the meaning of Article 1 and the notion of State responsibility arising from general international law. Attempting to clarify the former by reference to the latter is conceptually dubious and risks increasing confusion in an area of law that is already complex.

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of justice in *the case relating to the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (...). The Court recalls that in this case the International Court of Justice had to determine when a State could be attributed the behavior of a person or a group of people, so that it could be held responsible with regard to international law of the conduct in question. However, in the present case the Court is called upon to hear a different question, that of knowing whether the facts incriminated by an applicant fell within the jurisdiction of a respondent State within the meaning of Article 1 of the Convention. As the brief account of the Court's case-law given above shows, the criteria enabling the existence of "jurisdiction" within the meaning of Article 1 of the Convention have never been assimilated to the criteria enabling to establish the responsibility of a State for an internationally wrongful act under international law. »

JOINT CONCURRING OPINION OF THE JUDGES CASADEVALL, BERRO-LEFÈVRE, ŠIKUTA, HIRVELÄ, LÓPEZ GUERRA, SAJÓ ET SILVIS

(Translation)

1. This judgment establishes that a Contracting State may, under the Convention, exercise its own jurisdiction over military operations carried out abroad as part of a stabilization force, in cooperation with another State enjoying genuine status. of occupying power. Like the United States of America, the United Kingdom was in 2004 an occupying power in Iraq, within the meaning of United Nations Security Council Resolution 1483, while the Dutch forces were only assisting the United Kingdom in this occupation. However, the Dutch authorities retained full command over their army in the Iraqi province of Al-Muthanna and exercised full power and responsibility for establishing security in this region.

Thus, Iraqi citizens who passed through a vehicle checkpoint between Ar-Rumaythah and Hamsa, manned by members of the CIDC (Iraqi army) operating under exclusive Dutch command, fell under the jurisdiction of the Netherlands, according to the definition which emerges from the Court's interpretation of Article 1 of the Convention. We subscribe to this part of the judgment, which follows and, logically, extends the Court's previous jurisprudence on jurisdiction, particularly the case of *Al-Skeini and others v. United Kingdom* ([GC], no. 55721/07, ECHR 2011). It follows that there was a procedural obligation for the Netherlands to investigate the tragic shooting which resulted in the death of the applicant's son, and to do so effectively and diligently (Natchova and Others v. *Bulgaria* [GC], nos. 43577/98 and 43579/98, §§ 110 and 112-113, ECHR 2005-VII, and *Ramsahai and Others v. Netherlands* [GC], no. 52391/99, §§ 321, 322, ECHR 2007-II). We agree that this procedural obligation on the Netherlands arose from the Convention.

However, we cannot agree with part of the reasoning underlying the finding of a procedural violation committed by the Netherlands.

2. It is important to fully understand the context in which the tragic event occurred. On the night of 21 April 2004, the applicant's son was shot dead in Iraq, at a vehicle checkpoint under Dutch command. Before this tragedy, at 2:10 a.m. the same night, the PCV had come under fire from a car and the Iraqi soldiers present at the post had responded, apparently without there being any injuries on either side. Dutch soldiers were called to the PCV to investigate this shooting. Their investigation began at 2:30 a.m. Fifteen minutes later, the car in which Mr. Jaloud was sitting next to the driver approached the PCV at high speed. The driver, who had been drinking

a few beers, later indicated that he had not even seen the checkpoint. His car hit barrels placed along the road, causing a loud crash. The car continued on its way at high speed; there were shouts for her to stop, followed immediately by gunshots, after which the vehicle stopped. It turned out that Mr. Jaloud was mortally wounded.
Contrary to what some of the soldiers present – including Lieutenant A. – had thought, it turned out that no shots had been fired from the car.

3. The Dutch Royal Constabulary, which was present in the region, was tasked with launching an investigation into the death of Mr. Jaloud, which it did at 4:50 a.m. The Royal Constabulary is empowered to carry out such investigations, independently of the military command, with regard to the Dutch troops. Later, relying on a report relating to the investigation by the constabulary in Iraq, various other documents and a hearing, the Arnhem Court of Appeal rejected an application by the applicant for the initiation of proceedings against Dutch Lieutenant A ., who admitted to having shot at the car as it passed. The Dutch Court of Appeal found that the lieutenant had acted within the limits of military instructions on (putative) self-defense.

4. Clearly, as the Court has stated on several occasions, it may be that, if the death into which Article 2 of the Convention requires an investigation occurs in a context of armed conflict or in a region that is unstable for other reasons, investigators encounter obstacles and specific constraints dictate the use of less effective investigative measures. The crucial question is therefore whether the investigation into the shooting was carried out in a sufficiently effective and diligent manner, in the sense that it would have made it possible to identify and punish those responsible. It is not an obligation of result, but of means. Having regard to the criteria just mentioned, the procedural obligations arising from Article 2 also relate to the procedure during which it is decided whether a suspected person should be held responsible for the incident under investigation, although it is not in itself a decision on a criminal charge and Article 6 of the Convention does not apply *(Ramsahai and Others v. Netherlands* [GC], no. 52391/99, §§ 359-360, ECHR 2007-II).

5. What is not in dispute is that the royal constabulary intervened quickly once the matter was brought to its attention. It also appears that the investigation was effective, since it allowed a) to determine the cause of death and b) to identify the Dutch officer likely to have caused the death by shooting. The crucial question for the Dutch appeals court was whether the officer should be prosecuted, which depended on whether he acted in compliance with instructions on the use of force. . In view of the procedural obligation arising from Article 2 of the Convention, it is crucial that an authority

judicial, to be able to determine whether a soldier faces new charges or whether he acted in a justified manner within the limits of the instructions on the use of force, has the right information. The Arnhem Court of Appeal should have had at its disposal all of the testimony collected after the events; however it appears that only a rather selective summary of these depositions appeared in the legal file. Certainly, it cannot be speculated whether the Court of Appeal would have reached a different conclusion if it had been able to read all the testimony; the fact remains that this is a serious failure in the quality of the investigation. So far, we agree with the position adopted by the majority of the Grand Chamber. However, we can only deplore the fact that the Grand Chamber also saw fit to examine the investigation carried out in Iraq with such meticulousness that one could have doubts about the role and competence of our Court. We will limit ourselves to two examples taken from the judgment.

6. The Court criticizes the autopsy. Of course, compared to a “state of the art” forensic examination, as it would be in a national procedure, the autopsy carried out in Iraq was inadequate and this can easily be admitted; However, in concluding on this basis that this part of the investigation carried out in Iraq violated the Netherlands' procedural obligations under Article 2, the majority of the Court takes a very big step. Whether the royal constabulary could have claimed full legal control over the remains and the circumstances of the autopsy is highly doubtful. The Court did not indicate any legal basis for this. Should the royal constabulary have used force to impose their presence during the autopsy? In fact, she kept the body of Mr. Azhar Sabah Jaloud for a few hours and she had to act quickly. As the facilities needed to carry out an autopsy were not available at the Dutch camp, the body had to be handed over to the Iraqis. He was then transported to an Iraqi civilian hospital, where an autopsy was carried out in the absence of members of the Royal Constabulary. According to the Government, it was the Iraqi authorities who took the decision to exclude Dutch personnel from the autopsy. No legal reason prevented them from doing so. Furthermore, according to the Government, the situation was beginning to be very tense: seeking confrontation could have led to an escalation; the Dutch staff who were present at the hospital indicated that they were afraid of being taken hostage, and left the premises for this reason.
Is this not an example of specific constraints which can impose the use of less effective investigative measures?

7. Another area of concern is the Court's criticism of the Netherlands for the fact that the royal constabulary did not separate the witnesses before questioning the "primary suspect" of the shooting, six hours after their arrival at the PCV. This raises questions. Setting such precise standards for investigations, in a situation as unstable as the one that

reigned in Iraq, does it really fall within the jurisdiction of our Court? This would be a highly dangerous exercise. It is evident that safety concerns at PCV continued to exist while the investigation was ongoing.
The witnesses to the facts were also responsible for this security. Separating all the witnesses on site could have constituted interference in this mission. Likewise, it seems rather dangerous to separate, brutally and in such an unstable environment, people in a commanding position and their military personnel. Obviously, beyond the investigation there were other dimensions to take into account, and it is not easy to imagine them all.

8. To conclude, we consider that the Court has rightly emphasized that in a context such as that of the facts examined here there could be obstacles to the implementation of what may seem to be the most effective investigation. However, this starting point hardly reconciles with all aspects of the meticulous analysis later undertaken by the Court. Furthermore, the lieutenant, who himself reported the incident, immediately took full responsibility for the shooting, and there is no evidence of any attempt on his part to manipulate the evidence.

CONCURRING OPINION FROM JUDGE MOTOC

1. The path to awareness of a human being is similar to the path of Sisyphus. The work of Albert Camus remarkably illustrates the history of philosophy in this regard. But can we expect such awareness from a court on subjects as difficult as the one addressed in this judgment? Wouldn't a court be condemned to remaining "foreign to itself"? In the language of the philosophy of law, that of the integrity of the law as interpreted by Ronald Dworkin, it seems that a court can never explicitly admit the different interpretative approaches to *stare decisis.*

2. It is well known that Article 1 of the Convention remains one of the most difficult from the point of view of application and that there are several contradictions in the interpretation given by the Court (see, for example example, *Bankoviÿ and Others v. Belgium and Others* (dec.) [GC], no. 52207/99, § 75, ECHR 2001-XII, and *Al-Skeini and Others v. United Kingdom* [GC], no. 55721/07 , §§ 136-137, ECHR 2011). If the latter has made remarkable efforts at clarification in the *Jaloud judgment,* it seems to us that this progress only goes in the direction of general international law and international humanitarian law.

3. Let's start with general international law. First, at the pre-interpretative stage the Court very clearly took a position on the Articles of the International Law Commission on State Responsibility (paragraph 98 of the judgment) and the jurisprudence of the International Court of Justice (paragraphs 95-97). But above all, in this case, the Court affirms for the first time to rule on the imputability which results from the application of the relevant articles of the International Law Commission on State responsibility. It thus specifies from the angle of responsibility under international law that "the alleged omissions of military personnel, investigative authorities and judicial bodies of the Netherlands" are of a nature "to engage the responsibility of the Netherlands with regard to of the Convention". Accountability was necessary to complete in all its consequences the legal logic arising from general international law, in particular from the responsibility of States (see in particular M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy,* Oxford University Press , 2011).

4. Similar remarks can be made about humanitarian law.
Still at the pre-interpretative stage, the judgment cites 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. One problem, however, remains unresolved: that of the place of human rights. If the *Jaloud* judgment cites the *Catan and others v. Republic of Moldova and Russia* ([GC], nos. 43370/04, 8252/05 and 18454/06, ECHR 2012), in particular paragraph 115, to recall that the criteria allowing

to establish the existence of “jurisdiction” within the meaning of Article 1 of the Convention are not assimilated to the criteria for establishing the responsibility of a State for an internationally wrongful act under general international law, he doesn't go any further. Once the Court has ruled for the first time on "accountability" and thus moved in the direction of general international law, it remains to elaborate on the differences between State responsibility under international law general and according to the Convention, in particular in this case Article 1.

6. Several questions remain to be generally resolved regarding the relationship between human rights standards when human rights are applied within the territory of a State and outside the territory, under the extraterritoriality which results 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).
If in this case the Court's task was made easier by the shortcomings of the Arnhem Court of Appeal, the general question remains open. Can we talk about different human rights standards that should be applied by the same state and, if so, according to what criteria?

7. One final note: the UK's argument regarding the "real risk" of States being reluctant to respond to appeals
of the United Nations Security Council with a view to intervention under its mandate (paragraph 126 of the judgment), appears to us to be inconsistent from a legal point of view. Soldiers who find themselves in peacekeeping operations or in multinational forces cannot benefit from impunity simply because of the participation of their State in such operations.

8. In conclusion, if the *Jaloud* judgment makes progress in the area of the applicability of general international law, the questions linked to the relationship between general international law and the human rights provided for in Article 1 still remain to be clarified , as well as the different conflicts of standards which may arise during the application of article 1.