



## **The obligation to investigate under Article 2 of the European Convention on Human Rights in Iraq**

A study into the scope and nature of the ECHR-obligation to investigate in armed conflict and an analysis of the mechanism in the Netherlands that was responsible for the investigation of unlawful deaths resulting from conduct of members of the Netherlands armed forces in Iraq.

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## Abstract

When read together, Articles 1 and 2 of the European Convention on Human Rights (ECHR) require the State to conduct an effective investigation into alleged violations of the right to life in all cases of violent death, irrespective of the question whether State agents are involved in those violations. Even though a rich jurisprudence on the obligation to investigate has evolved since the recognition by the European Court of Human Rights (ECtHR) in the case of *McCann v. United Kingdom (1995)*, fundamental questions remain as regards the exact scope and nature of the duty to investigate in situations of armed conflict since armed conflicts are in principle governed by international humanitarian law. Departing from a case currently pending in Strasbourg (*Jaloud v. The Netherlands*) concerning the alleged violation of the duty to investigate the death of an Iraqi civilian caused by members of the Dutch armed forces in Iraq, this thesis seeks to bring clarity on this matter. To assess the obligation to investigate in armed conflict, this thesis considers the normative framework for investigation under IHL and the ECHR and explores how the ECtHR deals with situations that are governed by both bodies of law in order to ascertain the implications for the obligation to investigate in armed conflict. The framework eventually established will be used to assess the military investigation mechanism in the Netherlands.

*Keywords:* right to life, investigation, armed conflict, military justice.

## Preface

After having written so many pages (...and deleted at least as many) the moment is finally there to look back over the whole thesis-writing-process that occupied my mind for the last couple of months. This period is characterized by endless discussions with myself, a desk that looked like the ones in law series on television and moments that I had figured it all out, but wasn't able to hit the right keys on my keyboard. But this was all largely compensated by the 'eureka-feeling' when I tackled one of the legal obstacles I wrote myself into, the inspiration for my research I drew from the classes on military law in Amsterdam and most of all the affirmation that I had chosen the right study program: I am really looking forward to start a career which allows me to combine human rights law and military law.

I would like to take this opportunity to say a word of thanks to my supervisor dr. Nicola Jägers for her guidance, input and believe in a research that goes more deeply into military practice than usually would be the case for a thesis on human rights law. I also want to thank mr. Bas van Hoek, head of the center of expertise of military criminal law at the public prosecutor office, for providing me with a lot of detailed information on the military investigation mechanism in the Netherlands, for his enthusiasm and the interest he showed in my research.

Furthermore, I am very grateful to my mom and dad for giving me the freedom to make my own choices regarding the course of my future, their unconditional support and the many drop-offs and pick-ups at the railway station. Lastly, I want to thank Johnny for listening, understanding and for giving his opinion on matters I already decided in.

Britt van Hout  
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## Abbreviations

AP	Additional Protocol to the Geneva Conventions
CPA	Coalition Provisional Authority
CoE	Council of Europe
ECHR	European Convention on Human Rights
ECTHR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICDC	Iraqi Civil Defense Corps
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
IHL	International humanitarian law
ISAF	International Security Assistance Force
GC	Geneva Conventions
KMar	Koninklijke Marechaussee/Royal Military Constabulary
OM	Openbaar Ministerie/Public prosecution service
SFIR	Stabilization Force Iraq
UN	United Nations
UNSC	United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties
VCP	Vehicle checkpoint

# Chapter 1

## Introduction

It is of continuing concern that members of the armed forces suspected of serious human rights violations are often leniently punished or remain unpunished at all due to the fact that their crimes are being swept under the rug of national security or chain of command.<sup>1</sup> Questions have also been raised as regards the Dutch prosecution policy towards members of the armed forces. Despite of several incidents killing civilians in the course of the operations in Iraq (2003-2005) and Afghanistan (2006-2010), only one soldier has ever been subjected to trial.<sup>2</sup>

One of the causes of leniency or impunity within military justice systems is the organization of these systems in a way incompatible with international human rights standards. In many countries, military justice - the body of laws and procedures governing members of the armed forces - suffers from a lack of independence, impartiality and transparency and does not guarantee due process.<sup>3</sup> As a consequence, members of the armed forces are being removed from the rule of law and the scrutiny of society.<sup>4</sup> Especially in armed conflict where military personnel has clear potential for the involvement in serious human rights violations, the administration of justice compatible with the standards under human rights law is crucial for the observation and protection of human rights in general and observance of the rule of law.

In the concrete this means that military justice must be conceived in the light of the international obligations States have with regard to the administration of justice as well as the obligations which come into play whenever human rights are violated.<sup>5</sup> Among the latter category is the State's legal duty to conduct an effective investigation into human rights violations. The obligation to investigate is an international obligation under human rights law and international humanitarian law (IHL) as well as under customary international law.<sup>6</sup> Although the obligation to investigate is not included in the text of the European Convention on Human Rights (ECHR), it is now recognized that the duty to carry out an effective investigation is implied in the right to life, the so-called 'procedural aspect' of Article 2 ECHR.

### 1.1 *Relevance*

Although a rich jurisprudence on the obligation to investigate unlawful or arbitrary deprivations of life has been developed by the European Court of Human Rights (ECtHR) and other human rights bodies, fundamental questions remain about the exact scope and nature of the duty to investigate in situations of armed conflict as armed conflicts are in principle governed by international humanitarian law. In particular, questions arise as to the extraterritorial applicability of the rights contained in the ECHR during military operations, the relationship between international humanitarian law and human rights law when simultaneously applicable as both bodies of law govern the duty to investigate, and the extent to which human rights principles governing investigations are transposable to the military context.

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<sup>1</sup> UN Special Rapporteur on Extrajudicial Executions Handbook, Center for Human Rights and Global Justice, 2010, p. 122

<sup>2</sup> Case of Eric O. District Court Arnhem, 18 October 2004, *LJN* AR4029 and Court of appeal Arnhem, 4 April 2005, *LJN* AT4988. In Appeal, Eric O. was acquitted from negligent killing.

<sup>3</sup> Federico Andreu-Guzmán, *Military jurisdiction and international law; Military courts and gross human rights violations*, International Commission of Jurists, Geneva, January 2004, p. 10

<sup>4</sup> *Ibid*, p. 10

<sup>5</sup> *Ibid*, p. 18

<sup>6</sup> *Ibid*, p. 33



## 1.2 Purpose and central research question

This thesis seeks to gain insight into the legal framework governing the obligation to investigate violations of the right to life under the ECHR in situations of armed conflict in order to identify the scope and nature of procedural obligation under Article 2 ECHR. As this question is central to a case currently pending in Strasbourg (*Jaloud v. The Netherlands*)<sup>7</sup> involving the alleged violation of the obligation to investigate the death of an Iraqi civilian caused by members of the Dutch armed forces in Iraq, this research will be structured as a case study.

This entails that the meaning and applicability of the obligation to investigate will be considered against the background of the Dutch troop deployment in Iraq between 2003 and 2005. This research will furthermore extend to the military investigation mechanism in the Netherlands dealing with alleged violations of the right to life in situations of armed conflict as was applicable during the operation in Iraq. Throughout this thesis, the case of *Jaloud v. The Netherlands* will be used by way of illustration; this thesis does not aim to give an opinion on the particular events complained of. Rather, the purpose of this observation is to ascertain whether the Dutch military investigation mechanism in general was able to satisfy the procedural obligation under Article 2 ECHR.

Hence, the central research question of this thesis reads as follows:

*‘What is the scope and nature of the obligation to investigate violations of the right to life under the ECHR in situations of armed conflict and was the mechanism in the Netherlands that examined and investigated unlawful deaths resulting from conduct of members of the Netherlands armed forces in Iraq able to satisfy the procedural obligation under Article 2 ECHR?’*

## 1.3 Structure

This thesis is divided into seven chapters, each dealing with a subtopic necessary to provide a complete answer to the central research question. Chapter 2 starts with the identification of the legal regimes that are relevant in the context of the Dutch participation in Iraq and will explain the relationship between these legal regimes. Chapter 3 and 4 thereupon outline the normative framework for the obligation to investigate under IHL and the ECHR, respectively. Since the Conventional framework was never particular designed with armed conflict in mind, chapter 5 will explore how the ECtHR deals with situations that are governed by both IHL and the Convention, in order to ascertain the implications for the obligation to investigate. The framework established will eventually be used in chapter 6 to assess the military investigation mechanism in the Netherlands in general, and to address problems that are inherent to an investigation conducted during military operations abroad. Finally, chapter 7 contains a summary of the research done and presents the conclusions and additionally a recommendation for reform and further research.

## 1.4 Methodology

The normative framework of this research, outlined in chapters 2-5, was primarily determined on the basis of an analysis of legal literature. Sources that have been consulted include, but are not limited to, case law of the ECtHR, textbooks, law journals and reports of research committees established by the Human Rights Council or national governments. In addition to these materials, a military justice expert was consulted to provide insight into the military investigation mechanism in the Netherlands and to gain the necessary situational awareness as regards investigations in mission areas.

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<sup>7</sup> *Jaloud v The Netherlands*, App. No. 47708/08, Statement of Facts and Questions. Lodged on 6 October 2008

## 1.5 Additional research-framing

This introduction concludes with some subsequent framing of the research. Topics that are to be considered here are (1) the right to life; (2) the deployment of Dutch troops in Iraq; and (3) the case of *Jaloud v. The Netherlands*.

### 1.5.1 The right to life

Article 2 ECHR:

1. *Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*
2. *Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:*
  - a. *in defense of any person from unlawful violence;*
  - b. *in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
  - c. *in action lawfully taken for the purpose of quelling a riot or insurrection.*

The right to life in Article 2 ECHR ranks as one of the most fundamental rights in the Convention, which, together with Article 3 (the prohibition of torture) enshrines one of the basic values found in the democratic societies making up the Council of Europe (CoE).<sup>8</sup> The right to life is furthermore characterized as 'the most vital human right of all', since, if one could be arbitrarily deprived of one's right to life, all other rights in the Convention would become illusory.<sup>9</sup> Accordingly, no derogation is permitted from Article 2.<sup>10</sup>

Article 2 seeks to protect individuals from unlawful killing by virtue of two basic elements:<sup>11</sup> first, it entails a negative obligation for the state States to abstain, through its agents, from the intentional and unlawful taking of life and, second, it establishes a positive obligation to take appropriate steps to safeguard the lives of those within its jurisdiction.<sup>12</sup> This positive obligation under Article 2 entails two sub-obligations: the obligation to ensure that the right to life is protected in the domestic legal system and the duty to prevent the unlawful taking of life.

*Protect life by law* - From the requirement to protect life by law flows the primary obligation on the State to put in place an effective legal and administrative framework to deter the commission of violent offences against individuals.<sup>13</sup> This framework refers in the first place to the adoption of criminal laws establishing criminal liability for the taking of life. Since not every taking of life is illegal under the Convention, domestic law should also regulate activities that may pose a risk to life by defining circumstances in which force may be used by law enforcement officials, consistent with Article 2(2) ECHR.<sup>14</sup> In addition, in order to enforce the laws required by Article 2, a law enforcement machinery is needed to prevent, suppress and sanction breaches of the right to

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<sup>8</sup> *McCann and others v. United Kingdom*, App. No. 18984/91, Judgment of 27 September 1995, § 147

<sup>9</sup> Douwe Korff, *The Right to Life, a Guide to the Implementation of Article 2 of the European Convention on Human Rights*, Human Rights Handbooks, no 8, Council of Europe Publishing, Strasbourg, 2006, p. 6

<sup>10</sup> Deaths resulting from lawful acts of war do not constitute violations of the right to life, see Article 15(1) ECHR. Lawful acts of war are nonetheless to be considered as an exception to the general non-derogability of Article 2, rather than as an exception to the right to life itself.

<sup>11</sup> Korff, *supra* note 9, p. 7

<sup>12</sup> *LCB v. United Kingdom*, App. No. 23413/94, Judgment of 9 June 1998, §36

<sup>13</sup> *Osman v. United Kingdom*, App. No. 23452/94, Judgment of 28 October 1998, §115

<sup>14</sup> David Harris, Michael O'Boyle and Colin Warbrick, *Law of the European Convention on Human Rights*, Oxford University Press, Oxford, 2005, p. 40

life.<sup>15</sup> In practice, this entails an obligation to guarantee the efficient and effective investigation of alleged breaches of the right to life and, where this is called for, prosecution of the offender.<sup>16</sup>

*Prevent the unlawful taking of life* - The obligation to take appropriate steps to protect life furthermore demands in certain circumstances to take preventive measures to protect an individual whose life is at risk.<sup>17</sup> The obligation to prevent may arise where the authorities know, or ought to have known of the existence of a real and immediate risk to life of individuals from the criminal acts of a third party.<sup>18</sup> For the obligation to arise, it is not relevant whether the threat to life is caused by public or private activity,<sup>19</sup> neither whether the loss of life was intentional or unintentional.<sup>20</sup> Accordingly, failure to take measures within the scope of the authority's powers which might be expected to avoid the risk constitutes a violation of Article 2. Nonetheless, the obligation to protect people from death from third parties is an obligation of means, not of result.<sup>21</sup>

### 1.5.2 *Deployment of Dutch troops in Iraq*

On 8 November 2002 the United Nations Security Council (UNSC), acting under Chapter VII of the UN Charter, adopted Resolution 1441 that offered Iraq under the Saddam Hussein regime a final opportunity to comply with its disarmament obligations.<sup>22</sup> Although the resolution itself did not grant the authority to use force, a coalition of armed forces under unified command led by the United States nevertheless commenced the invasion of Iraq on 20 March 2003 in order to ensure the complete disarmament of Iraq.<sup>23</sup> By 9 April 2003 the coalition forces controlled most of Iraqi territory and toppled the regime of Saddam Hussein. The Coalition Provisional Authority (CPA) created for the temporary governance of Iraq, transferred full authority to the Iraqi interim government on 30 June 2004, restoring sovereignty.<sup>24</sup>

Although the Dutch government had ventured its political support for the US-UK invasion of Iraq on 17 March 2003, it declined to make any kind of military contribution as a majority in Parliament was lacking. On 6 June 2003, the government nevertheless decided upon a request of the UK to send a battalion of marines together with a mix of supporting units to take part in the US-led Stabilization Force Iraq (SFIR). The legal basis for Dutch deployment was found in UN resolution 1483 (2003) which recognized the US and UK as the occupying authority and authorized their administration of Iraq under Chapter VII of the UN Charter.<sup>25</sup> From 1 August 2003 onwards, Netherlands forces in Iraq carried out several tasks, including offering force protection, maintaining security in the area of deployment and the training of police, army officers, border patrol and coast guards. Other tasks included the support of the civil services, facilitating the operations of humanitarian organizations

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<sup>15</sup> *Öneryildiz v. Turkey*, App. No. 48939/99, Judgment of 30 November 2004, §89 and *Makaratzis v. Greece*, App. No. 50385/99, Judgment of 20 December 2004, §57

<sup>16</sup> *Harris ea*, supra note 14, p. 40

<sup>17</sup> *LCB v. UK*, supra note 12, *Öneryildiz v. Turkey*, supra note 15 and *Osman v. United Kingdom*, supra note 13

<sup>18</sup> *Osman v. UK*, supra note 13, §116

<sup>19</sup> *Öneryildiz v. Turkey*, supra note 15

<sup>20</sup> *LCB v. UK*, supra note 12

<sup>21</sup> Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran, *International Human Rights Law*, Oxford University Press, Oxford, 2010, p. 229

<sup>22</sup> UNSC Resolution 1441, 8 November 2002, §2

<sup>23</sup> Letter of 8 May 2003 from the Permanent Representatives of the UK, Northern Ireland and the US addressed to the President of the UNSC, S/2003/538

<sup>24</sup> UNSC Resolution 1546, 5 June 2004

<sup>25</sup> UNSC Resolution 1483, 22 May 2003

and enabling the supply of essential public utilities and infrastructure necessary for political and economic recovery.<sup>26</sup>

Being a troop contributing country to SFIR, the government claimed, the Netherlands could not be considered belonging to the occupying power. Instead, the Netherlands units would be deployed in the province of Al-Muthanna as part of a division under the command of the British forces. While under operational control<sup>27</sup> of the British division, the Netherlands nonetheless remained full command<sup>28</sup> over Netherlands military personnel at all times.<sup>29</sup> Even though the initial commitment was set to six months, the Netherlands eventually withdrew its military forces from Iraq in March 2005.

### 1.5.3 *Jaloud v. The Netherlands*

Currently pending before the ECtHR, *Jaloud v. The Netherlands* is the first case brought before the Court questioning military actions of the Dutch armed forces abroad. The case is brought by Mr Sabah Jaloud against the Netherlands for the non-prosecution of the Dutch soldier allegedly responsible for the killing of his son, Mr Azhar Sabah Jaloud (hereinafter: Jaloud) in Iraq on 21 April 2004.

The incident took place at a vehicle checkpoint (VCP) that was guarded by members of the Iraqi Civil Defense Corps (ICDC) and monitored by a patrol of six Netherlands soldiers. Shortly after the VCP was fired upon from an unknown car passing the VCP, a second car with Jaloud in the front passenger seat approached at speed, hitting one of the barrels which had been set out in the middle of the road. As the car had continued on its way despite being summoned to stop, shots were fired at the car by Netherlands and Iraqi armed forces, hitting Jaloud in the chest.

An investigation was immediately carried out by the Dutch Royal Military Constabulary (*Koninklijke Marechaussee, KMar*) on the spot. Based on the file, the public prosecutor Arnhem had taken the decision not to prosecute the soldier that had fired at the car since it could not be proved that the accused, Lieutenant A. had caused the death of Jaloud, and, even if such be the case, he could reasonably have believed that he was under attack and needed to defend himself.<sup>30</sup> The request for the Article 12 complaint procedure<sup>31</sup> then lodged by the applicant's representative was dismissed by the Court of Appeal, concluding that under the circumstances, Lieutenant A. could reasonably have believed that he and his colleagues were in actual danger so he

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<sup>26</sup> [http://www.defensie.nl/missies/afgeronde\\_missies/irak](http://www.defensie.nl/missies/afgeronde_missies/irak)

<sup>27</sup> Operational control according to Cathcart: 'The authority delegated to a commander to direct forces assigned so that the commander may accomplish specific missions or tasks which are usually limited by function, time or location'. In Terry Gill and Dieter Fleck, *The Handbook of International law of Military Operations*, Oxford University Press, Oxford, 2010, p. 237

<sup>28</sup> Full command according to Cathcart: 'The military authority and responsibility of a commander to issue orders to subordinates. It covers every aspect of military operations and administration and exists only within national services'. In Gill and Fleck, *supra* note 26, p. 237

<sup>29</sup> Letter of 6 June 2003 from the Minister of Defense and the Minister of Foreign Affairs to the Lower House of Parliament, *Kamerstukken II*, 23432 nr. 116, parliamentary year 2002-2003, 6 June 2003

<sup>30</sup> Court of Appeal Arnhem, 7 April 2008, *LJN* BC9390

<sup>31</sup> Article 12 of the Code of Criminal Procedure reads: 'If the perpetrator of a punishable act is not prosecuted, or if the prosecution is not pursued to a conclusion, then anyone with a direct interest may lodge a written complaint with the Court of Appeal within whose area of jurisdiction the decision has been taken not to prosecute or not to pursue the prosecution to a conclusion'

was entitled to claim self-defense. Moreover, as he had acted within the confines of his instructions on the use of force, the decision not to prosecute him could stand.<sup>32</sup>

The applicant now claims that the death of Jaloud was never investigated well by the Dutch authorities. Even though the ECHR does not recognize a right of the (relatives of the) victim to prosecution of the accused, it does hold the right to an effective investigation into an alleged breach of the right to life. Hence, the question before the European Court of Human Rights is whether the investigation into the shooting incident carried out by the Dutch authorities satisfies the requirements set under Article 2 ECHR. According to the applicant, the investigation constitutes a violation of Article 2 in its procedural aspect as it lacks independence, effectiveness and transparency. During the conclusion of this research (August 2013) the Court has yet to decide.<sup>33</sup>

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<sup>32</sup> Court of Appeal Arnhem, *supra* note 30

<sup>33</sup> The Court will be holding a hearing in this case on 19 February 2014.

## Chapter 2

### Relevant legal regimes

IHL reflects many of the norms that are also recognized as being part of human rights law.<sup>34</sup> The obligation to investigate is such a norm: alongside the ECHR, international humanitarian law imposes an obligation on all parties to an armed conflict to examine and investigate violations of the laws of armed conflict.

Due to the close affiliation between IHL and human rights law and the absence of courts specifically created to decide on IHL violations, international and regional human rights courts have increasingly asserted their authority over violations arising in armed conflicts.<sup>35</sup> Dealing with situations of armed conflict in a human rights court brings however some constraints; for instance, the jurisdiction of a human rights court is limited to cases where the individual concerned is under the jurisdiction of the contracting State. Furthermore, as situations of armed conflict are primarily governed by international humanitarian law, human rights courts dealing with these cases cannot - even though their decisions will in principle be based on the human rights conventions - neglect the laws applicable in armed conflict.

This chapter presents the legal regimes that govern the incident at the VCP killing Jaloud. Although other bodies of law might be relevant to the case as well, this chapter remains limited to a discussion of the two regimes that are most important for the purpose of this thesis. To this end, IHL will be discussed in section 2.1, followed by a brief analysis of human rights law - in particular the EHCR - in section 2.2 in order to establish whether the rules of IHL and the Convention could bind the Netherlands troops in Iraq. This chapter will conclude with some remarks on the relationship between IHL and human rights law in section 2.3.

#### 2.1 *International Humanitarian Law*

The term 'international humanitarian law' refers to all those rules of international law which are designed to regulate the conduct and treatment of individuals - civilian or military - in times of armed conflict. Although the term is frequently linked to the Geneva Conventions (1949) and its two Additional Protocols (1977), it also applies to the rules governing means and methods of warfare and the rules concerned with the government of occupied territory as contained in The Hague Conventions (1907) and in various agreements referring to specific issues of warfare such as the Ottawa Convention on anti-personnel mines (1997) or the Chemical Weapons Convention (1993).<sup>36</sup>

The applicability of IHL is dependent on the existence of an armed conflict. An armed conflict exists whenever there is resort to armed force between two or more States (international armed conflict) or whether there is protracted armed violence between the governmental authority and organized armed groups or between different groups none of which acts on behalf of the government (non-international armed conflict).<sup>37</sup> In addition,

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<sup>34</sup> The Public Commission to Examine the Maritime Incident of 31 May 2010, *'Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law'*, Second Report, The Turkel Commission, February 2013, p. 68 (Hereinafter: Turkel report)

<sup>35</sup> Cohen and Shany, *Beyond the Grave Breaches Regime: The Duty to Investigate Alleged Violations of International Law Governing Armed Conflicts*, Yearbook of International Humanitarian Law, 2011, p. 41

<sup>36</sup> Dieter Fleck, *The Handbook on International Humanitarian Law*, Oxford University Press, Oxford, 2010, p. 11-34

<sup>37</sup> *Ibid*, p.46, 54-55

IHL applies to situations of belligerent occupation where the forces of one State occupy all or part of the territory of another State, even if that occupation meets with no resistance.<sup>38</sup>

As regards Iraq, the conflict is to be qualified as a situation of occupation as defined in Article 42 of The Hague Regulations. The occupation started when the Coalition forces took over the administration of Iraq on 9 April 2003, and formally ended 28 June 2004 with the transfer of political authority to the Iraqi interim government by UNSC resolution 1546.<sup>39</sup> The laws that govern a period of occupation are foremost the IV Hague Convention (1907) and the Fourth Geneva Convention (GC) which contain the most comprehensive legal provisions relating to occupation. In addition, the other three Geneva Conventions shall apply to cases of partial or total occupation, even as the rules of customary international law.

## 2.2 *Human Rights Law: the ECHR*

Drafted in 1950 by the members of the Council of Europe, the European Convention on Human Rights nowadays serves as one of the most important treaties passed by the CoE in order to achieve peace and greater unity between its members founded on respect for human rights and fundamental freedoms.<sup>40</sup> The ECHR is similar in content to other international human rights documents which deal with civil and political rights, in particular to the International Covenant on Civil and Political Rights (ICCPR).<sup>41</sup>

Article 1 ECHR secures the rights contained in the Convention to those within the jurisdiction of a contracting Party. Although a State's jurisdictional competence under Article 1 is primarily territorial, the ECtHR in its case law has recognized two exceptional circumstances giving rise to the exercise of jurisdiction outside a State's own territorial boundaries. First, whenever a State through its agents exercises (physical) control and authority over an individual, the State is under the obligation under Article 1 to secure to that individual the relevant rights and freedoms set out in the Convention.<sup>42</sup> Second, an individual also comes within the jurisdiction of a State when a contracting State, as a consequence of lawful or unlawful military action, exercises effective control of an area outside its national territory.<sup>43</sup>

It is yet for the Court to determine whether the incident killing Jaloud did occur within the jurisdiction of the Netherlands. As answering this question properly will demand further research, jurisdiction will be assumed for the scope of this thesis. This assumption could be justified on the grounds that the Netherlands forces conducted a military operation in the territory of another State<sup>44</sup> where they - even though the Dutch government claims not to belong to the occupying powers – actually functioned as 'an extension of the occupying powers'. Researchers of the Dutch Institute for Military History argue that the separation as laid down in the mandate between the occupying powers and the Dutch forces was 'artificial, impractical and unrealistic'; the Dutch soldiers performed police tasks and assisted in the formation of new governance structures. On paper, these public powers were delegated to the occupying powers. If these assertions hold true, the Netherlands could be

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<sup>38</sup> Common Article 2, Geneva Conventions, Article 42 Hague Regulations. See also: Fleck, *supra* note 36, p.47

<sup>39</sup> Zouhair Al Hassani, *International Humanitarian Law and its Implementation in Iraq*, International Review of the Red Cross, 2008 p. 51-70

<sup>40</sup> Preamble European Convention on Human Rights

<sup>41</sup> Moeckli e.a. *supra* note 21, p. 461

<sup>42</sup> *Bankovic and others v. Belgium and others*, App. No. 52207/99, Judgment of 12 December 2001, §69

<sup>43</sup> *Al-Skeini and Others v. United Kingdom*, App. No. 55721/07, Judgment of 7 July 2011, §138

<sup>44</sup> In *Issa and others v. Turkey*, App. no. 31821/96, Judgment of 30 March 2005 the Court decided that Turkey did not exercise effective control in northern Iraq. Nevertheless, the mere fact of conducting military operations in the territory of another State could be sufficient to bring the affected persons within the extraterritorial jurisdiction of Turkey.

considered an occupying power which, according to the judgment in *Al-Skeini v. United Kingdom (2011)*, extends jurisdiction to Iraq.<sup>45</sup>

Jurisdiction could furthermore be established if the Court would follow the 'functional test' as presented by Judge Bonello in his concurring opinion (*Al-Skeini v. United Kingdom*) holding that a State has jurisdiction whenever it falls within its power to perform, or not to perform, any of the functions<sup>46</sup> of the ECHR.<sup>47</sup> Judge Bonello illustrates the deficit of the current conception of extraterritorial jurisdiction as follows:

'If two civilian Iraqis are together in a street in Basrah, and a United Kingdom soldier kills the first before arrest and the second after arrest, the first dies desolate, deprived of the comforts of United Kingdom jurisdiction, the second delighted that his life was evicted from his body within the jurisdiction of the United Kingdom. Same United Kingdom soldier, same gun, same ammunition, same patch of street - same inept distinctions. I find these pseudo-differentials spurious and designed to promote a culture of law that perverts, rather than fosters, the cause of human rights justice'.<sup>48</sup>

In sum, whether or not the ECHR is formally applicable, it would be at odds with a democratic society to ignore the rights and freedoms in the Convention when deploying military operations abroad, especially because military personnel has clear potential for the involvement in serious human rights violations.

### 2.3 *The relationship between IHL and human rights law*

The applicability of both IHL and the ECHR gives rise to the question which body of law should govern the incident in Iraq subject to this thesis. There is disagreement among international bodies and scholars concerning the relationship between IHL and human rights law in general and as to their applicability in practice in so-called 'mixed situations' where these two bodies of law apply simultaneously.

IHL and human rights law are traditionally two distinct bodies of law. Whereas the first regulates the conduct of parties to an armed conflict, the latter deals with fundamental rights of individuals, regardless of war or peace.<sup>49</sup> Yet, IHL and human rights law are also to be considered as two complementary bodies of law as they share a common idea: both disciplines are concerned with the protection of human life and dignity.<sup>50</sup> Hence, many guarantees are matters of both bodies of law, for instance the prohibition on torture and other inhuman, cruel or degrading treatment or punishment, rights of persons deprived of their liberty and the right to life.<sup>51</sup>

Nowadays it is accepted in legal doctrine that human rights law applies at all times, both in peacetime and in times of both international and non-international armed conflict. Generally, it is assumed that in situations of

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<sup>45</sup> *Al-Skeini and Others v. United Kingdom*, supra note 43, §142, 149

<sup>46</sup> Judge Bonello argues that States ensure the observance of human rights in five primordial ways: first, by not violating (through its agents) human rights; secondly, by having in place systems which prevent breaches of human rights; thirdly, by investigating complaints of human rights abuses; fourthly, by scourging those of their agents who infringe human rights; and finally, by compensating the victims of breaches of human rights. These constitute the basic minimum functions of the Convention. *Al-Skeini and Others v. United Kingdom*, supra note 43, Concurring opinion Judge Bonello, §10

<sup>47</sup> *Ibid*, §11

<sup>48</sup> *Ibid*, §15

<sup>49</sup> Note that most human rights can be derogated from in time of public emergency, which includes situations of armed conflict. Derogation is however only permissible to the extent strictly required by the exigency of the situation. Accordingly, human rights continue to apply in armed conflict, albeit in a modified manner.

<sup>50</sup> Cordula Droege, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, *Israel Law Review*, 2007, p. 312

<sup>51</sup> *Ibid*, p. 336



armed conflict IHL is considered the *lex specialis* of human rights law.<sup>52</sup> The *lex specialis derogat legi generali* principle means that when two norms are simultaneously applicable, the specific provision overcomes the general provision. Koskenniemi identified two ways in which the relationship between the general and the specific rule may be conceived.<sup>53</sup> One is where a special rule is to be considered as an exception to the general rule. In such a case the general rule is modified or overruled by the specific exception. *Lex specialis* may also be applicable in the absence of direct conflict between two provisions. Where both provisions apply rather concurrently, the specific rule can be seen as an application of the general rule in specific circumstances. The specific rule should then be read and understood within the confines or against the background of the general rule, creating a harmonious relationship.<sup>54</sup> Accordingly, even where the more special rule applies, the general norm is not excluded.

The relationship between the general and the specific provision may however often be quite complex or even impossible to establish. This difficulty is illustrated by the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion (1996)<sup>55</sup> where the issue was addressed by the International Court of Justice (ICJ). In this case, the Court acknowledged that the right to life as enshrined in Article 6 ICCPR and the rules of IHL apply parallel in times of armed conflict. Yet, as it was not intended to outlaw military operations, the Court observed that the test of what an arbitrary deprivation of life is, should be determined by the applicable *lex specialis*; the law of armed conflict.<sup>56</sup> Hence, the Court took the position that the application of the *lex specialis* principle does not indicate that IHL as a whole body of law is *lex specialis* vis-à-vis human rights law as a whole body of law in situations of armed conflict. Koskenniemi nonetheless adds:

‘The ICJ observed that human rights law (namely the ICCPR) and the laws of armed conflict both applied “in times of war”. Nevertheless, when it came to determine what was an “arbitrary deprivation of life” under Article 6 (1) of the Covenant, this fell “to be determined by the applicable *lex specialis*, namely the law applicable to armed conflict”. In this respect, the two fields of law applied concurrently, or within each other. From another perspective, however, the law of armed conflict - and in particular its more relaxed standard of killing - is set aside whatever standard might have been provided under the practice of the Covenant’.<sup>57</sup>

In subsequent case law the ICJ endorsed the interaction between IHL and human rights law. In the Advisory Opinion regarding *The Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory* (2004) the Court further developed its approach, expanding the application of the human right to life in armed conflict to human rights in general.<sup>58</sup> In sum, while IHL is generally the governing body of law in times of armed conflict, human rights law continues to apply but its interpretation might be affected by the application of the *lex specialis* rule.<sup>59</sup>

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<sup>52</sup> Heike Krieger, *Conflict of Norms: the Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study*, *Journal of Conflict and Security Law*, 2006, p. 268

<sup>53</sup> Martti Koskenniemi, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission*, 4 April 2006, UN doc A/CN.4/L.682, §56-57

<sup>54</sup> *Ibid*

<sup>55</sup> ICJ *The Legality of the Threat of Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996

<sup>56</sup> *Ibid*, §25

<sup>57</sup> Koskenniemi, *supra* note 53, §96

<sup>58</sup> ICJ *Legal Consequences of the Construction of a Wall in the Occupied Palestine*, Advisory Opinion of 9 July 2004, §10

<sup>59</sup> Roberta Arnold and Noelle Quenivet, *International Humanitarian Law and Human Rights Law: Towards a New Merger in Law*, Martinus Nijhoff Publishers, Leiden, 2008, p. 8

## 2.4 Conclusion

This chapter provided some clarity on the legal regimes that govern the situation subject to this research. The conclusion to be drawn from this observation is that both IHL and the ECHR govern the incident at the VCP. As resolutions passed by the UN Security Council verified that there was a situation of occupation in Iraq<sup>60</sup>, no doubts arise as to the applicability of international humanitarian law. As regards the ECHR, it is less clear-cut whether the Convention did actually bind the Netherlands armed forces in Iraq. Nevertheless, for reasons explained in section 2.2, in this research it will be assumed that the ECHR too governs the incident that killed Jaloud in April 2004.

As regards the relationship between the two bodies of law when simultaneously applicable it was explained by the ICJ in the *Nuclear Weapons* and *The Wall* case that IHL is to be treated as the *lex specialis* of human rights law. This does not mean that human rights law will cease to apply in times of armed conflict, rather it entails that the concepts derived from the law of armed conflict will put a meaning on human rights norms in the concrete circumstances. In the following chapters (3-5) it will be explored what this perception implies for the obligation to investigate in armed conflict.

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<sup>60</sup> UNSC Resolution 1546 (2004) , supra note 24, speaks of ‘the end of occupation’

## Chapter 3

### The obligation to investigate under IHL

‘The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances’. (Common Article 1 Geneva Conventions)

All parties to an armed conflict have the obligation to respect and ensure respect for international humanitarian law in all circumstances. The duty to respect and ensure respect confers a positive legal obligation for States to act proactively and reactively to prevent and end violations of IHL, but also a negative obligation to neither encourage a party to an armed conflict to violate IHL nor to take action that would assist in such violations.<sup>61</sup> Violations of the rules of armed conflict are in principle to be prevented but, if they do occur, States are obliged to hold the perpetrator(s) accountable. To give effect to this obligation, States have a general duty to examine and investigate alleged violations of IHL under the Geneva Conventions.<sup>62</sup>

This chapter outlines the normative framework for the obligation to investigate under international humanitarian law. In order to provide a complete overview, four issues will have to be dealt with; first, section 3.1 will explore the relevant provisions in IHL from which the obligation to investigate arises. Section 3.2 discusses the breadth of the duty to investigate (*what should be investigated*) followed by the grounds that give rise to start an investigation in section 3.3 (*when to investigate*). Section 3.4 concludes with the general standards that govern the investigation (*how to investigate*).

#### 3.1 Relevant provisions

The obligation to examine and investigate alleged violations of IHL seeks to ensure compliance with, and the effective implementation of, international humanitarian law through increased deterrence and removal of offenders from the battlefield.<sup>63</sup> To this end, all four Geneva Conventions impose a duty on the State to prevent violations of IHL and to bring the alleged perpetrators of such violation to trial. Article 146 of the Fourth Convention reads:

‘Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article’.<sup>64</sup>

The obligation for States laid down in this provision is twofold, drawing a distinction between the general duty to examine *post factum* whether the laws of armed conflict have been obeyed (second sentence), and the additional obligation to investigate and prosecute war crimes allegedly committed by individuals within their

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<sup>61</sup> International Committee of the Red Cross, *Improving compliance with IHL*, International Humanitarian Law Research Initiative, 2004, p. 3

<sup>62</sup> Turkel report, *supra* note 34, p. 73

<sup>63</sup> Cohen *et al.* *supra* note 35, p. 44

<sup>64</sup> This text is identical to the text in Articles 49 GCI, 50 GCII and 129 GCIII.

jurisdiction (first sentence).<sup>65</sup> This obligation extends to nationals of the State, members of its armed forces, and to individuals committing war crimes on the territory of the State.<sup>66</sup>

The obligation to investigate is further articulated in the notion of command responsibility, building on the duty to investigate set forth in the Convention. Article 87 of Additional Protocol I (API) reads:

(1) The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.

(3) The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

Article 87 API aims to compel the internal command and disciplinary structure of the armed forces to identify and prosecute offenders of violations of IHL.<sup>67</sup> As commanders and other superiors represent the key to implementation, they are required to take active steps to prevent and suppress alleged breaches of IHL by means of identifying, reporting and responding to violations. Command responsibility is of a complementary nature, which implies that the article holds an integral obligation on the State to conduct disciplinary or criminal investigation and, where appropriate, prosecutions.<sup>68</sup>

### 3.2 *What should be investigated?*

Although the text of the Article 146 GCIV may suggest that a State is required to investigate only allegations of grave breaches,<sup>69</sup> it is generally accepted amongst scholars that the obligation to investigate goes beyond situations in which grave breaches have been allegedly committed, extending to any war crime.<sup>70</sup> This view is also supported by the Commentary to the Geneva Conventions which reads that ‘all breaches of the present Convention should be repressed’.<sup>71</sup>

The Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) clarified the notion of ‘war crime’ in the *Tadić* case, holding that:

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<sup>65</sup> Turkel report, supra note 34, p. 73

<sup>66</sup> Michael Schmitt, *Investigating Violations of International Law in Armed Conflict*, Harvard National Security Journal, 2011, p. 38

<sup>67</sup> Ibid, p. 41

<sup>68</sup> Cohen ea. supra note 35, p. 46

<sup>69</sup> What constitutes a grave breach is determined by Article 50 GCI, Article 51 GCII, Article 130 GCIII, Article 147 GCIV, Article 11 API and Article 85 APII. Generally, a grave breach constitutes willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

<sup>70</sup> See Cohen ea. supra note 35, p. 42, Turkel report, supra note 34, p. 76 and Schmitt, supra note 66, p. 37-38

<sup>71</sup> Jean Pictet, *Commentary: Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, International Committee of the Red Cross, Geneva, 1958, p. 367

'Article 3 [of the ITCY Statute] refers to a broad category of offences, namely all 'violations of the laws or customs of war', the enumeration of some of these violations provided in Article 3 was merely illustrative, not exhaustive. (...) We conclude that (...) Article 3 may be taken to cover all violations of international humanitarian law other than the grave breaches of the four Geneva Convention falling under Article 2'.<sup>72</sup>

The Appeals Chamber further elaborated on the definition of a war crime, adding that for a violation of the laws and customs of war to amount to a war crime, the violation must be serious i.e. 'it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim'.<sup>73</sup> A similar definition is also upheld in Article 8 of the Rome Statute.

For those violations of international humanitarian law that do not amount to a war crime and, as a consequence, do not impose an obligation on the State to investigate, the duty to examine the facts constituting the alleged violation will nevertheless remain intact.<sup>74</sup> Such a fact-finding assessment may still lead to a subsequent investigation if the examination should reveal facts that give rise to a reasonable suspicion of the commission of a war crime.

### 3.3 *Trigger for investigation*

As soon as there arises a reasonable suspicion or a credible allegation of the commission of a war crime, an investigation should be instigated by the competent authorities.<sup>75</sup> There is no requirement that the identity of the offender be known, nor are there any limitations as to the source of the allegation: the complaint may come from State authorities, private individuals, non-governmental organizations, other States etc.<sup>76</sup> Furthermore the obligation to investigate can be triggered on the basis of suspicious circumstances, in the absence of any formal complaint or allegation.<sup>77</sup>

Whether an act is a criminal act and may amount to a war crime - the trigger for investigation - is however dependent upon the legal regime that governs the specific operation during an armed conflict.<sup>78</sup> Four situations can be distinguished:

#### 3.3.1 *Hostilities*

In the context of hostilities - the resort to means and methods of warfare between parties to an armed conflict<sup>79</sup> - the incidental death or injury to an individual caused by members of the military does not necessarily constitute (a suspicion of) a war crime. Under IHL, combatants and civilians directly participating in hostilities constitute lawful targets and may be deliberately attacked in the context of an armed conflict. Attacks directed against the civilian population in combat operations are in principle prohibited, but this prohibition applies only to direct attacks. IHL does not prohibit attacks against military objectives that result in the incidental loss of civilian life, injury to civilians or damage to civilian objects as far as this so-called collateral damage is not exces-

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<sup>72</sup> *Prosecutor v. Tadić*, Case No. IT 93-1-AR72, 2 October 1995 §94 (Trial Chamber)

<sup>73</sup> *Prosecutor v. Tadić*, Case No. IT-94-1-T, 7 May 1997 §610-613 (Appeals Chamber)

<sup>74</sup> Turkel report, *supra* note 34, p. 77

<sup>75</sup> Schmitt, *supra* note 66, p. 79

<sup>76</sup> *Ibid*, p. 39

<sup>77</sup> Cohen *ea.* *Supra* note 35, p. 52

<sup>78</sup> Turkel report, *supra* note 34, p. 100

<sup>79</sup> Gill *ea.* *supra* note 28, p. 37

sive in relation to the concrete and direct military advantage anticipated.<sup>80</sup> Hence, not every civilian death in an armed conflict amounts to a war crime that immediately triggers investigation.

### 3.3.2 Law enforcement

The concept of law enforcement refers to 'all territorial and extraterritorial measures taken by a State or other collective entity to maintain or restore public security, law and order or to otherwise exercise its authority or power over individuals, objects or territory'.<sup>81</sup> Outside the context of an armed conflict the law enforcement paradigm is primarily governed by human rights law.<sup>82</sup> As will be further elaborated on in chapter 4, a target killing under this paradigm can only be admissible when three cumulative conditions have been met: (a) the operation is pursued for a legitimate purpose; (b) involving no more force than absolutely necessary for the achievement of this purpose; (c) the operation must be planned and controlled by the authorities so as to minimize, to the greatest extent possible, recourse to lethal force.<sup>83</sup> Whether legitimate or not, the use of lethal force by State agents directed against an individual in the context of law enforcement gives rise in itself to an investigatory obligation.

### 3.3.3 Law enforcement in the context of armed conflict

Law enforcement activity may also occur in the context of an armed conflict, this was the case in for instance South-east Turkey (Kurdish region). In addition to human rights law, the law enforcement paradigm is in times of armed conflict also governed by IHL.<sup>84</sup> Whether the death of, or injury to a civilian will trigger investigation depends on the particular context and facts relating to the incident. Depending on the circumstances, the requirements of necessity, proportionality and precaution may be interpreted restrictive or extensive, but they can in no case be derogated from.<sup>85</sup> Unnecessary use of lethal force, likely to cause disproportional harm or which could have been avoided is under no circumstances permissible.

It is suggested by the Turkel Commission that the targeting of uninvolved civilians during combat operations is - even though occurring within the general context of an armed conflict - governed by the *lex generalis* of human rights law as the use of lethal force against civilians is an act of traditional law enforcement activity. Although the actual commencement of an obligation to investigate is still depending on the concrete context and the facts relating to incident, injury to a civilian in the context of a law enforcement operation during an armed conflict may give rise to greater suspicion of criminality than collateral damage in the context of hostilities.<sup>86</sup>

### 3.3.4 Occupation

Situations of belligerent occupation can be viewed as 'hybrid conflicts', that is, 'a conflict that oscillates between periods of armed conflict and periods of relative calm'.<sup>87</sup> On the occupying power rests the obligation to

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<sup>80</sup> Article 51(5)(b) Additional Protocol 1 and Article 23(1)(g) Hague Regulations

<sup>81</sup> Gill ea. supra note 28, p. 35

<sup>82</sup> Ibid, p. 36

<sup>83</sup> *McCann v. United Kingdom*, supra note 8, § 194

<sup>84</sup> Gill ea. supra note 28, p. 36

<sup>85</sup> Ibid, p. 282

<sup>86</sup> Turkel report, supra note 3,4 p. 105-106

<sup>87</sup> Yuval Shany, Amichai Cohen and Ido Rosenzweig, *Response to the Military Advocate General's Position Paper on the Investigation of Allegations of Violations of International Humanitarian Law*, 10 February 2011, p. 14

restore and maintain public order and safety<sup>88</sup> requiring that the population of the occupied territory be policed by the occupying power. Simultaneously, the occupying power may be engaged in hostilities against organized resistance movements as was the case for Iraq.<sup>89</sup> Hence, the occupying power may be called upon to assume functions of both law enforcement and of the conduct of hostilities, each of which is governed by different legal standards.

Law enforcement activity in occupied territory usually takes the form of military forces carrying out patrols, arrests and searches, man checkpoints and barriers, enforcing curfews and dispersing riots.<sup>90</sup> As these activities are normally to be exercised by the police forces within a State, such actions are subject to human rights norms that permit the use of lethal force only in the circumstances set out in section 3.3.2. Consequently, the death of a civilian in occupied territory caused by agents of the occupying power gives rise in itself to an investigatory obligation.

The conduct of hostilities in occupied territory is more complex. The ideal-type situation is that where the threat is from organized armed groups meeting the legal criteria for combatant status, the conduct of hostility norms governing the use of force will apply and attacks may be directed in accordance with the criteria set in section 3.3.1.<sup>91</sup> However, in *Al-Skeini v. United Kingdom (2011)* the ECtHR ruled that as the United Kingdom, through its soldiers, exercised authority and control over the occupied territory in Iraq, the activities of the British forces were governed by the ECHR.<sup>92</sup> As a result, any death of a civilian caused by agents of the State triggered the obligation to investigate.

### 3.4 Standards of investigation

The standards governing investigation under international humanitarian law are not well elaborated. No IHL treaty explicitly addresses the requirements for a proper investigation into allegations of breaches of the laws of armed conflict. The ICRC Commentary provides some guidance, specifying that the Parties have an active duty to arrest and prosecute the accused 'with all speed' and that necessary police action 'should be taken spontaneously, not merely in pursuance of a request from another State'. Furthermore, the court proceedings should be carried out in a uniform manner: 'nationals, friends, enemies, all should be subject to the same rules of procedure and judged by the same courts'.<sup>93</sup> In contrast, as will be further explored in chapter 4, under the ECHR, detailed standards for investigation have been developed. According to the ECtHR, any investigation must be independent, impartial, effective, prompt and, to a certain degree, transparent.

Even though IHL provides spare detail on the content of investigation, it has been asserted by the fact-finding Committee of independent experts appointed by the Human Rights Council (hereinafter: Tomuschat Committee) that the gap between the standards for investigation under human rights law and IHL is not so significant. According to the Tomuschat Committee:

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<sup>88</sup> Article 43 Hague Regulations

<sup>89</sup> For a detailed analysis on this issue see: Kenneth Watkin, *The Use of force during occupation: law enforcement and conduct of hostilities*, International review of the Red Cross, 2012

<sup>90</sup> Turkel report, supra note 34, p. 108

<sup>91</sup> Watkin, supra note 88, p. 310

<sup>92</sup> *Al-Skeini and Others v. United Kingdom*, supra note 43, §149-150

<sup>93</sup> Pictet, supra note 70, p. 593

‘Several criteria under human rights law can be met within the context of armed conflict. Above all, investigators must be impartial, thorough, effective and prompt; otherwise, an investigation would be no more than a manoeuvre of artful deceit’.<sup>94</sup>

In addition, the committee refers to the growing trend towards requiring comparable standards for investigations under IHL and human rights law.<sup>95</sup> However, as the main overriding objective between the two bodies of law differs, convergence has its limitations. Considering that IHL is concerned with the balancing between military and humanitarian interest, some standards of investigation under the ECHR, such as the involvement of relatives of victims (transparency), may lose its significance under IHL.<sup>96</sup>

Simultaneously, the Committee recognizes that there are constraints during armed conflict that do impede investigations. Accordingly, on a case-by-case basis, a State might utilize less effective measures of investigation in response to concrete constraints.<sup>97</sup> Cohen and Shany interpreted this as to imply that ‘constraints may justify in some cases either no criminal investigation or even of any form of investigation’.<sup>98</sup> I doubt that situations of armed conflict can ever waive the obligation to investigate altogether since constraint is more or less inherent in armed conflict. If constraint could indeed justify a very limited or even absent investigation into deaths, various basic principles of IHL such as the principle of distinction, proportionality and precaution, would become rather symbolic. Instead, while hampering circumstances during armed conflict should be taken into account, investigations into deaths should nonetheless be conducted as effectively as possible.<sup>99</sup>

The conclusion is that, while there are no fundamental differences between the principles that govern investigations under the ECHR and international humanitarian law, the existence of an armed conflict may impede the application of the general principles. The presence of an armed conflict does however not exempt the authorities from conducting an effective investigation all together.

### 3.5 Conclusion

As this chapter revealed, the obligation to investigate is well established in IHL, having its foundation in the Geneva Convention and Additional Protocol I. While IHL holds a general obligation to examine all breaches of humanitarian law, a duty to conduct an investigation in accordance with the principles of independence, effectiveness, promptness and transparency only arises whenever there is a reasonable suspicion or a credible allegation of the commission of a war crime.

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<sup>94</sup> Human Rights Committee ‘*Report of the Committee of independent experts in international humanitarian and human rights laws to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in the light of General Assembly resolution 64/254, including the independence, effectiveness, genuineness of these investigations and their conformity with international standards*’, GA doc. A/HRC/15/50, 23 September 2010 (Hereinafter: Tomuschat report) §30

<sup>95</sup> The committee refers to the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005) imposing the obligation to respect, ensure and implement IHL and HRL by, inter alia, the duty to investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law.

<sup>96</sup> Tomuschat report, supra note 94, §33

<sup>97</sup> Ibid, §32

<sup>98</sup> Cohen ea. supra note 35, p. 50

<sup>99</sup> Tomuschat report, supra note 94, §32



Whether the killing of a civilian qualifies as a war crime is dependent on the paradigm governing the concrete context and the facts relating to the incident. In the case of *Jaloud v. The Netherlands*, the incident occurred at a VCP, guarded by a patrol of Netherlands soldiers. VCPs are constructed to search vehicles as a tactic in the disruption of terrorism, since car bombers and kidnapers have to use the roads to conduct their criminal business.<sup>100</sup> Given that these activities fall within the law enforcement paradigm, the use of lethal force by State agents directed against a civilian will always trigger investigation under IHL. However, had the incident occurred 5 kilometers away, the paradigm governing the situation might have been different with the consequence that investigation is not called for. Thus, the existence of an obligation to investigate under IHL is rather a contextual assessment.

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<sup>100</sup> Bartle Bull, *Checkpoint Iraq: A Tactic That Works*, in: Washington Post, 13 March 2005  
<http://www.washingtonpost.com/wp-dyn/articles/A28924-2005Mar12.html>

## Chapter 4

### The obligation to investigate under the ECHR

'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'. Article 1 ECHR

While firmly-rooted in the case law of the European Court of Human Rights, the obligation to investigate violations of human rights law is not expressed in the text of the Convention itself; rather it is deduced from the State's general obligation laid down in Article 1 ECHR to 'secure to everyone within its jurisdiction the rights and freedoms defined in the Convention'. The duty to investigate breaches of the Convention is of a relative nature however, and is dependent upon the seriousness of the violation and the circumstances under which it has occurred.<sup>101</sup> Hence, duties of investigation have been developed almost exclusively under the most fundamental human rights standards, i.e. the right to life (Article 2); the prohibition against torture (Article 3) and the right to liberty (Article 5).<sup>102</sup> The focus in the present chapter will further be on the obligation to investigate violations of the right to life.

This chapter outlines the normative framework that gives rise to the obligation to conduct an investigation into alleged breaches of the right to life under the ECHR. This chapter is structured analogously to the previous chapter, covering four issues. Section 4.1 explores the origin of, and the rationales behind the obligation to investigate. Section 4.2 addresses the breadth of the duty to investigate (*what should be investigated*) followed by the grounds for carrying out the obligation to investigate in section 4.3 (*when to investigate*). Likewise, section 4.4 will conclude with the standards that govern the investigation as developed in the rich jurisprudence of the ECtHR (*how to investigate*).

#### 4.1 Origin

The obligation to conduct an effective investigation into alleged violations of the right to life was first articulated by the Court in the landmark case *McCann and Others v. United Kingdom (1995)*.<sup>103</sup> The case was concerned with the killing of three unarmed members of the Irish Republican Army whom the special security forces thought were about to detonate a car bomb in Gibraltar.

The Court started its assessment by underscoring the significance of the right to life in a democratic society, and confirmed that the object and purpose of the Convention requires that Article 2 must be interpreted and applied so as to make its safeguards practical and effective. As a consequence of the importance of the protection afforded by Article 2, the Court acknowledged that there is a corresponding interest in effective enforcement of the right to life. The Court explained:

'A general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention" requires by implication that there should be some form of effective

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<sup>101</sup> Cohen *ea. supra* note 35, p. 49

<sup>102</sup> *Ibid*, p. 49-50.

<sup>103</sup> *McCann and Others v. United Kingdom*, *supra* note 8

official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State'.<sup>104</sup>

The justification for the creation of an implied positive obligation under Article 2 was found in the desire to ensure that the limitations on the use of lethal force by State agents are not theoretical or illusory but practical and effective.<sup>105</sup> In addition, by obliging States to conduct investigations into all lethal incidents wherever its agents were involved in, the Court pursued to ensure that State agents would not abuse their powers since such incidents often occur in circumstances - for instance during arrests or detention - where there are few, if any, independent witnesses to testify as to what occurred.<sup>106</sup> A further justification for the duty to investigate was pronounced by the Court in the judgment of *Kelly and Others v. United Kingdom (2001)* enunciating that investigation must 'secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, must ensure their accountability for deaths occurring under their responsibility'.<sup>107</sup>

#### 4.2 *What should be investigated?*

Any deprivation of life, resulting from the unintentional or intentional use of force must be subjected to careful scrutiny, taking into consideration not only the actions of the State agents who administered the force, but also the surrounding circumstances including the planning and control of the actions under examination.<sup>108</sup> The purpose of this investigation is to ensure that the causes and circumstances of an individual's death are being scrutinized by the authorities in order to identify and punish those responsible.<sup>109</sup>

#### 4.3 *The trigger for investigation*

In *McCann* the Court held that 'there should be some form of effective official investigation when individuals have been killed as a result of the use of force by *agents of the State* [emphasis added].<sup>110</sup> With reference to the purpose of an official investigation and the particular weight attached to Article 2 of the Convention, the Court has in subsequent cases gradually expanded the circumstances where the obligation to investigate arises to all cases of violent death. For the purpose of illustrating the diversity of situations where the obligation to investigate comes into play, the three stages of this expansion that can be distinguished in case law are explained here.

##### 4.3.1 *Cases involving the alleged use of lethal force by agents of the State*

In the *McCann* decision, the duty to investigate was limited to cases where an individual's death was directly caused by the alleged use of lethal force by either agents of the State or by private parties with their collusion. Even though the recognition of a legal obligation to investigate significantly expanded the protection offered by

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<sup>104</sup> *McCann and Others v. United Kingdom*, supra note 8, §161

<sup>105</sup> Alastair Mowbray, *The Development of Positive Obligations under the ECHR by the European Court of Human Rights*, Hart Publishing, Oxford, 2004, p. 29

<sup>106</sup> *Ibid*, p. 29

<sup>107</sup> *Kelly and Others v. UK*, App. No. 30054/96 Judgment of 4 May 2001, §94

<sup>108</sup> *McCann and Others v. United Kingdom*, supra note 8, §150

<sup>109</sup> Jean-Francois Akandji-Kombe, 'Positive Obligation under the European Convention on Human Rights', Human Rights Handbooks, no. 7, Council of Europe Publishing, Strasbourg, 2007, p. 33

<sup>110</sup> *McCann and Others v. United Kingdom*, supra note 8, §161

Article 2 since a lack of an effective investigation was directly linked with a violation of Article 2 itself,<sup>111</sup> its effect was rather relative since it merely imposed such procedural obligation on the State whenever death occurred at the hands of State agents.

An example of this narrow approach is the case of *Kurt v. Turkey (1998)* where the Court was unwilling to find Turkey in violation of Article 2 despite of the complete absence of an investigation into the alleged death of the applicant's son. The Court reasoned that for the obligation to investigate to come into play:

'[It] must [be] carefully scrutinized whether there does in fact exist concrete evidence which would lead to conclusion that [the applicant's] son was, beyond reasonable doubt, killed by the authorities. [The Court] also notes in this respect that in those cases where it has found that a Contracting State had a positive obligation under Article 2 to conduct an effective investigation into the circumstances surrounding an alleged unlawful killing by the agents of that State, there existed concrete evidence of a fatal shooting which could bring that obligation into play'.<sup>112</sup>

Since the applicant's son disappeared while he was detained and it could not be established that he in fact met his death in custody, the Court ruled that Article 2 could not impose a positive duty on the State to investigate the circumstances of the case.

These limitations upon the trigger for an investigation to be conducted have been abandoned in later cases. The leading view in Strasbourg's jurisprudence is now that the absence of any direct State responsibility for the death of an individual does not exclude the applicability of the procedural aspect of Article 2. This view was first accepted in *Ergi v. Turkey (1998)* where the Court examined the accidental killing of the applicant's sister in a planned armed ambush in the vicinity of the deceased's village. Due to the fact that the victim was killed in the course of clashes between PKK members and the State's security forces, the Court was not able to determine beyond reasonable doubt whether the death was a result of the use of force by an agent of the State. Therefore, the government asserted, the principles as recognized in the *McCann* judgment could not be applied to the present case. The Court however rebutted this presumption, noting that:

'...the obligation [to investigate] is not confined to cases where it has been established that the killing was caused by an agent of the State. Nor is it decisive whether members of the deceased's family or others have lodged a formal complaint about the killing with the relevant investigatory authority. In the case under consideration, the mere knowledge of the killing on the part of the authorities gave rise *ipso facto* to an obligation under Article 2 of the Convention to carry out an effective investigation into the circumstances surrounding the death'.<sup>113</sup>

In addition, the obligation to investigate can exist in situations where it has not been conclusively established that a person has been unlawfully killed. In *Cyprus v. Turkey (2001)* the Court held that the duty to investigate also arises 'upon proof of an arguable claim that an individual, who was last seen in the custody of agents of the State, subsequently disappeared in a context which may be considered life-threatening'.<sup>114</sup>

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<sup>111</sup> Fionnuala Ni Aolain, *Truth Telling, Accountability and the Right to Life in Northern Ireland*, European Human Rights Law Review, 2002, p. 578

<sup>112</sup> *Kurt v Turkey*, App. No. 24276/94, Judgment of 25 May 1998, §107

<sup>113</sup> *Ergi v. Turkey*, App. No. 23818/94, Judgment of 28 July 1998, §82

<sup>114</sup> *Cyprus v. Turkey*, App. No. 25781/94, Judgment of 10 May 2001

#### 4.3.2 Cases involving the alleged breach of the obligation to prevent

Even though the direct involvement of a State agent was abandoned, a certain link between the authorities and the concerning event still needed to be established for bringing the obligation to investigate into play. In the jurisprudence this link was frequently assumed wherever the authorities were under the obligation to prevent threats to the right to life from materializing. This duty may arise either by knowledge of the imminent threat to life or may flow from the factual circumstances.

*Knowledge* - Since not every claimed risk to life can require the authorities to prevent and suppress such offences, the Court held in *Osman v. United Kingdom (1998)* that a violation of the obligation to prevent can only be found when the authorities knew or ought to have known that an individual's life was at risk and they failed to take reasonable measures available to them to prevent that risk.<sup>115</sup>

This standard to take preventive operational measures was infringed in the case of *Oneryildiz v. Turkey (2004)* concerning the explosion at the municipal refuse tip killing thirty-nine people. The Court observed that the authorities had allowed the tip to operate, despite an expert report concluded earlier that the rubbish tip did not comply with the relevant health and environmental regulations and created a serious risk of an explosion.<sup>116</sup> The Court ruled that the failure of the authorities to take preventive measures gives rise in itself to an investigatory obligation. This investigation must be capable of ascertaining the circumstances in which the incident took place and any shortcomings in the operation of the regulatory system, and should identify the State authorities involved in whatever capacity in the chain of events in issue.<sup>117</sup>

*Factual Circumstances* - The obligation to take preventive measures may furthermore be imposed by the factual circumstances as was recognized in *Paul and Audrey Edwards v. United Kingdom (2002)*. The case was concerned with the death of the applicant's son, who was killed while detained on remand by a mentally ill prisoner placed in the same cell. Notwithstanding the fact that not every risk of life does require the authorities to take measures to prevent that risk from materializing, the Court ruled that in the context of prisoners, the authorities are under the obligation to protect the detainees under their responsibility from threats posed by others, since prisoners are in a particular vulnerable position.<sup>118</sup> As the victim was under the responsibility of the authorities when he died from acts of violence of another prisoner, the State was under the subsequent obligation to initiate and carry out an investigation, irrespective of whether the State agents were involved in acts or omissions in the events leading to his death.<sup>119</sup> In sum, the obligation to investigate the failure to prevent was founded on the fact that the authorities have assumed responsibility for the deceased's welfare, rather than on actual knowledge of any threat.

#### 4.3.3 Cases involving death in suspicious circumstances

The Court further expanded the scope of the duty to investigate to encompass situations where there is reason to believe that an individual has died in suspicious circumstances, caused by a private individual.<sup>120</sup> In the case

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<sup>115</sup> *Osman v. United Kingdom*, supra note 13, §116

<sup>116</sup> *Oneryildiz v. Turkey*, supra note 15, §101

<sup>117</sup> *Ibid*, §93, 94

<sup>118</sup> *Paul and Audrey Edwards v. United Kingdom*, App. No. 46477/99, Judgment of 14 March 2002, §57

<sup>119</sup> *Ibid*, §74

<sup>120</sup> *Menson and Others v. United Kingdom*, App. No. 47916/99, Judgment of 6 May 2003, See also: *Rod v. Croatia*, App. No. 47024/06, Judgment of 18 September 2008

of *Menson and Others v. United Kingdom (2003)* the Court examined the death of a black man who has been set on fire by four white youths. Even though the State had in no way caused the death, nor did they know of ought to have known that the victim was at risk of violence at the hands of third parties and failed to take appropriate measures to safeguard him against that risk, a duty to investigate had arisen. The Court argued that where there is reason to believe that an individual has died in suspicious circumstances, the obligation on States to secure the right to life requires by implication that there should be some form of effective official investigation capable of establishing the cause of the injuries and the identification of those responsible with a view to their punishment. Where death results, as in the *Menson* case, the investigation assumes even greater importance, having regard to the fact that the essential purpose of such an investigation is to secure the effective implementation of the domestic laws which protect the right to life.<sup>121</sup>

#### 4.4 Standards for investigation

The Court has never specified in any detail the procedures which the authorities should adopt in order to scrutinize the circumstances of an individual's death. Nonetheless, it follows from *Kelly and Others v. United Kingdom (2001)* that an effective investigation aims to:

'... secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility'.<sup>122</sup>

An 'effective investigation' is one that is capable of identifying those responsible and committing them to justice; what form of investigation will achieve this purpose may vary in different circumstances.<sup>123</sup> Furthermore, the obligation to investigate alleged breaches of the right to life is an obligation of means, not of result.<sup>124</sup> This means that the authorities must have taken the reasonable steps available to them to secure the evidence concerning the death. A lacuna or deficiency in an investigation will give rise to a breach of the procedural obligation only if it is such as to undermine its capability of establishing the facts surrounding the killing or the liability of the persons responsible.<sup>125</sup>

As case law has grown, it has become possible to ascertain five general principles that govern an effective investigation: (1) independency; (2) impartiality; (3) adequacy; (4) promptness; and (5) transparency. Adherence to these five principles qualifies as an 'effective investigation', meeting the standard required under Article 2 of the Convention. The Court does however not consider itself in a position to adopt one unified procedure satisfying all requirements available, therefore all five principles are open to interpretation.<sup>126</sup>

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<sup>121</sup> *Menson v. United Kingdom*, supra note 119, §6 at 'the law'

<sup>122</sup> *Kelly and Others v. United Kingdom*, supra note 107, §94

<sup>123</sup> *Ibid*, §94

<sup>124</sup> See for example *Shanaghmay v. United Kingdom*, App. No. 37715/97, Judgment of 4 May 2001, §90

<sup>125</sup> Joint partly dissenting opinion of Judges Costa, Bratza, Lorenzen and Thomassen, *Ramsahai and Others v. The Netherlands*, App. No. 52391/99, judgment of 15 May 2007, §3

<sup>126</sup> Juliet Chevalier-Watts, *Effective Investigations under Article 2 of the European Convention on Human Rights: Securing the Right to Life or an Onerous Burden on a State?*, *European Journal of International Law*, 2010, p. 711

#### 4.4.1 Independence

For an investigation to be effective it is necessary for the persons who are responsible for and carry out the investigation to be independent from those subject to investigation, especially when the persons implicated belong to State agencies or bodies such as the police.<sup>127</sup> What independence exactly means in the concrete context depends on the body, the institution, or the official by whom the investigation is conducted.

As regards independence the Court expressed in *Kelly and Others v. United Kingdom* that:

‘For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for carrying out the investigation to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence’.<sup>128</sup>

A lack of institutional independence was found in *Ramsahai and Others v. The Netherlands (2007)* where the essential parts of the investigation of a shooting incident involving two police officers was conducted by the Amsterdam/Amstelland police force to which the officers under investigation belonged.<sup>129</sup> The Court ruled that although other investigations had been undertaken by the police force at the behest of the State Criminal Investigation Department, supervision by an independent body was not sufficient to ensure full independence of the investigation.<sup>130</sup> Such strict separation of investigators from the State agents whose acts are under scrutiny is necessary in order to safeguard the objective independence of the investigation and the public’s acceptance of its legitimacy.<sup>131</sup>

Furthermore, independence demands the absence of a hierarchical connection between the decision making authorities (such as whether to bring a prosecution) and the State agents involved in the incident. In a number of Turkish cases the Court disputed the role played by the Turkish Provincial Administrative Councils in deciding not to refer the case against gendarmes to the criminal courts.<sup>132</sup> An example is *Oğur v. Turkey (1999)* where the ECtHR decided that the investigations could not be regarded as independent since the administrative council whose responsibility it was to decide whether proceedings should be instituted against the security forces concerned, was made up of civil servants who were subordinate to the governor. As the governor was also responsible for the security forces whose conduct was subject to investigation, independence was lacking due to a hierarchical connection.<sup>133</sup>

Institutional and hierarchical independence is supplemented by the need for practical independence or self-reliance in the conduct of investigations, seeking to ensure that investigators do not automatically accept the veracity and accuracy of reports or statements by State agents without conducting further relevant inquiries.<sup>134</sup>

In the case of *Ergi v. Turkey* the Court ruled that the authorities failed to demonstrate a sufficient level of prac-

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<sup>127</sup> *Hugh Jordan v. UK*, App. No. 24746/94, judgment of 4 May 2001, §106

<sup>128</sup> *Kelly and Others v. United Kingdom*, supra note 122, §95

<sup>129</sup> *Ramsahai and Others v. The Netherlands*, supra note 125

<sup>130</sup> *Ibid*, §194-196

<sup>131</sup> Alastair Mowbray, *Duties of Investigation under the European Convention on Human Rights*, International and Comparative Law Quarterly, 2002, p. 440

<sup>132</sup> See for example *Güleç v. Turkey*, App. No. 21593/93, Judgment of 27 July 1998, *Oğur v. Turkey*, App. No. 21594/93 judgment of 20 May 1999, *Taş v. Turkey*, App. No. 24396/94, judgment of 14 November 2000

<sup>133</sup> *Oğur v. Turkey*, supra note 132, §33

<sup>134</sup> Mowbray, supra note 105, p. 33

tical independence because the prosecutor who was responsible for the investigation totally relied on the evidence of the gendarmerie incident report, without having taken statements from relatives of the victim, villagers or any military personal present during the operation.<sup>135</sup> Consequently, the Court requires those involved in the investigation, both the police and prosecutors, to exercise a critical professional assessment of evidence, obtained from all sources.<sup>136</sup>

#### 4.4.2 Impartiality

Impartiality may sometimes overlap with practical independence as they can both involve a personal aspect. However, distinct from the principle of independence, impartiality focuses on the function of the investigator, including the perception of his or her function.<sup>137</sup> The principle of impartiality intends to ensure that the investigation is conducted in a neutral and objective fashion. It thereto requires the absence of an interest in the results of the investigation and an objective opinion towards the parties involved, and additionally, the requirement for a perception of impartiality on the part of the authorities conducting the investigation as well as the evidence relied on in conducting the investigation.<sup>138</sup> Though the European Court did not identify impartiality as one of the general principles in the Northern Irish joint decisions (2001), it has expressed the need for investigations to be conducted impartially in later cases. For example in *Kolevi v. Bulgaria* (2009) the Court held that ‘the involvement in the investigation of persons against whom the victim had made serious complaints is incompatible with the principle of impartiality and independence required under the procedural limb of Article 2 of the Convention’.<sup>139</sup> Also in *Girgvlani v. Georgia* (2011) the Court found that the investigation manifestly lacked impartiality because:

‘... the authorities turned a blind eye to the applicants’ credible allegation of complicity between some of the persons from the Interior Minister’s wife’s group in the café and the direct perpetrators of the crime. Such a selective approach by the domestic authorities is unacceptable for the Court because, in order for an investigation to be effective, its conclusions must always be based on thorough, objective and impartial analysis of all relevant elements’.<sup>140</sup>

#### 4.4.3 Adequacy

The third element of an effective investigation is the principle of adequacy. Adequacy relates to the procedures and mechanisms involved in carrying out an investigation and requires that an investigation is conducted in a manner that ensures that all aspects of the killing are fully explored. What procedures the authorities must adopt to ensure a proper examination of the killing will vary depending on the circumstances of the incident and the types of evidence found at the scene, but includes at a minimum the taking of eye witness testimonies from all primary witnesses (*Güleç v. Turkey*); the utilization of well recognized forensic science methodology (*Kaya v. Turkey*); and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings including the cause of the death (*Kaya v. Turkey*).<sup>141</sup>

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<sup>135</sup> *Ergi v. Turkey*, supra note 113, §83

<sup>136</sup> Mowbray supra note 105, p. 33

<sup>137</sup> Turkel report, supra note 34, p. 125

<sup>138</sup> Ibid, p. 126

<sup>139</sup> *Kolevi v. Bulgaria*, App. No. 1108/02, Judgment of 5 November 2009, §211

<sup>140</sup> *Enukidze and Girgvlani v. Georgia*, App. No. 25091/07, Judgment of 26 April 2011, §266

<sup>141</sup> *Hugh Jordan v. United Kingdom*, supra note 127, §107



The requirement of adequacy was illustrated in *Ramsahai v. The Netherlands*, which was concerned with the shooting of an armed suspected robber by the police. Following an investigation, the prosecutor decided not to prosecute the policeman because he had legitimately acted in self-defense. Although the Court agreed as to the use of lethal force being no more than absolutely necessary, it held that the investigation had not been adequate because several forensic examinations which one would normally expect in a case involving gunshot deaths had not been carried out. Deficiencies which the Court conceived as 'impairing the adequacy of the investigation' included the failure to test the hands of the police officers involved, a lack of evidence of any examination of the used service weapon and ammunition, there was no adequate photograph of the injuries suffered, the lack of a reconstruction of the incident and the fact that both police officers had not been questioned until nearly three days later during which period they had not been kept separate.<sup>142</sup> The dissenting judges however considered that while the first two kind of forensic examination will often be an indispensable feature of an effective investigation, 'in the particular circumstances of the present case, the lack of any such examinations did not undermine the adequacy of the investigation into the death'.<sup>143</sup>

Other features that have been found to undermine the adequacy of an investigation are the failure to exercise due control over the scene of the incident (*Hugh Jordan v. United Kingdom*) and a culture within which police officers enjoy a sort of immunity from investigation into their conduct (*Bilgin v. Turkey*).<sup>144</sup>

#### 4.4.4 Promptness and reasonable expedition

The principle of promptness and reasonable expedition requires that an investigation is started as soon as practically possible after the incident and that unreasonable delays to inquest and investigation procedures should be avoided. Time is a major factor that affects the ability to collect and preserve evidence since evidence may get lost due to changes to the crime scene, witnesses might get untraceable and memories will fade. A prompt response in collecting evidence can thus be considered complementary to the principle of adequacy.<sup>145</sup> In addition, concluding an investigation within a reasonable timeframe is required to maintain public confidence in the authorities' adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.<sup>146</sup>

A failure to meet the principle of promptness was found *Taş v. Turkey (2000)* where the investigation was not commenced by the authorities for two years after the applicant had expressed his fears that his son had been killed while in detention.<sup>147</sup> For the authorities it is however not sufficient to merely begin an investigation expeditiously, they must also pursue their inquiries with determination and avoid undue delays.<sup>148</sup> Similarly, in *Yasa v. Turkey (1998)* the Court ruled that even though a police investigation into an armed attack on the applicant and his uncle who had been killed started the same day, it did not meet the requirement of promptness

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<sup>142</sup> *Ramsahai v. The Netherlands*, supra note 125, §326-332

<sup>143</sup> Joint partly dissenting opinion of Judges Costa, Bratza, Lorenzen and Thomassen, *Ramsahai v. The Netherlands*, supra note 125, §7

<sup>144</sup> *Bilgin v. Turkey*, App. No. 25659/94, Judgment of 17 July 2001, §144

<sup>145</sup> Turkel report, supra note 34, p. 132

<sup>146</sup> *Hugh Jordan v. United Kingdom*, supra note 127, §108

<sup>147</sup> *Taş v. Turkey*, supra note 132, §70

<sup>148</sup> MowBray, supra note 130, p. 442

and reasonable expedition since the investigations appeared to have ceased after respectively two and seven days without finding those responsible for the attack, or even to identify them.<sup>149</sup>

These cases have in common that they both are decided against the backdrop of the Kurdish-Turkish conflict. Nonetheless the Court did not accept pleas of overwork as an excuse for the failure to determine a case within a reasonable time. In *Mahmut Kaya v. Turkey (2000)* Judge Major Bulut explained that he had 500 other investigations under his responsibility. The ECtHR ruled that it is incumbent on the authorities to respond actively and with reasonable expedition where there are serious allegations of misconduct and infliction of unlawful harm implicating State security officers.<sup>150</sup> In order to ensure a prompt and thorough inquiry, States may be expected to increase or re-direct investigative resources.<sup>151</sup>

The principle of promptness is however not absolute as delays might be justified by the circumstances of the case. In *Paul and Audrey Edwards* it appeared that the decision to hold an inquiry was taken eight months after the death of the victim, and proceedings opened approximately ten months thereafter. The report was finally presented some two years after the inquiry opened and three and a half years after the death occurred. Nonetheless, the Court found that the authorities may be regarded as having acted with sufficient promptness and preceded with reasonable expedition since the inquiry was complex, involved a high number of witnesses and covered numerous public services.<sup>152</sup>

#### 4.4.5 Transparency

The final element of an effective investigation is the principle of transparency, which stresses the need for openness, communication and accountability in the investigation process. Transparency should be pursued in order to ensure public confidence in the legal system and the rule of law, and to secure accountability in practice as well in theory.<sup>153</sup>

The principle of transparency is composed of two aspects: first there is a duty to involve the next-of-kin of the victim in the investigation process.<sup>154</sup> In *Güleç v. Turkey (1998)* the Court criticized the investigation into the applicant's son because the applicant was not given the opportunity to participate in the process and was not informed about important decisions concerning the examination of the case.<sup>155</sup> The nature and degree of involvement necessary to satisfy the principle of transparency will however depend on the circumstances of each particular case. At the very least relatives must be involved in the procedure to the extent necessary to safeguard their legitimate interests.<sup>156</sup> According to the Court, participation includes, but is not limited to, a right to get informed on substantive developments in the investigation, allowing family members to testify as witnesses and access to certain parts of the proceedings and to the relevant documents.<sup>157</sup> The latter element is inter-

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<sup>149</sup> *Yasa v. Turkey*, App. No. 22495/93 judgment of 2 September 1998, §101-102

<sup>150</sup> *Mahmut Kaya v. Turkey*, App. No. 22535/93, Judgment of 28 March 2000, §107

<sup>151</sup> Mowbray, *supra* note 105, p. 38

<sup>152</sup> *Paul and Audrey Edwards v. United Kingdom*, *supra* note 118, §85-86

<sup>153</sup> Harris *et al.*, *supra* note 14, p. 51

<sup>154</sup> *Hugh Jordan v. United Kingdom*, *supra* note 127, §109

<sup>155</sup> *Güleç v. Turkey*, *supra* note 132, §82

<sup>156</sup> *Hugh Jordan v. United Kingdom*, *supra* note 127, §109

<sup>157</sup> Jim Murdoch, *The Right to Life under the European Convention on Human Rights*, Interights Manual for Lawyers, 2011 p. 49

preted by the Court in more narrow fashion, holding that it must be applied in the light of achieving an effective investigation.<sup>158</sup> Hence, openness may not seriously impair the effectiveness of the investigation.

The second aspect involves the element of public scrutiny of the investigation and its findings to guarantee credibility and public confidence in the investigative mechanism. This element of public scrutiny has its limits; in *Shanaghan v. United Kingdom (2001)* the Court ruled that disclosure or publication of police reports and investigative materials may not involve sensitive issues with possible prejudicial effects to private individuals or other investigations. Therefore, access of the public cannot be regarded as an automatic requirement under Article 2, but may be provided for in other stages of the procedure.<sup>159</sup>

#### 4.5 Conclusion

In summary, an explicit obligation to investigate cannot be found in the Convention, but the ECtHR has interpreted among others Article 2 ECHR to include, when read in conjunction with Article 1 ECHR, a comprehensive obligation to investigate to ensure that the right guaranteed is not theoretical, but real and effective. The obligation to investigate alleged violations of the right to life arises in all cases of violent death, irrespective of the question whether State officials are involved in those violations. However, if an arguable claim is made that State agents are responsible, specific importance is attached to the test of whether the persons who are expected to carry out the investigation, are independent from the agents implicated in the events under investigation.<sup>160</sup> Other principles that guide an effective investigation are impartiality, adequacy, promptness and transparency.

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<sup>158</sup> Turkel report, supra note 34, p. 137

<sup>159</sup> *Shanaghan v. United Kingdom*, supra note 124, §105

<sup>160</sup> Harmen van der Wilt, *Procedural Obligations Under the European Convention on Human Rights: Useful Guidelines for the Assessment of 'Unwillingness' and 'Inability' in the Context of the Complementarity Principle*, *International Criminal Law Review*, 2009, p. 51

## Chapter 5

### The approach of the ECtHR and the consequences for the obligation to investigate

It follows from the previous chapters that the obligation to investigate under international humanitarian law does not significantly differ from the obligation under the ECHR: both obligations stem from the objective to ensure respect for, and to prevent violations of the respective body of law, by identifying and punishing those responsible for past violations. Additionally, the gap between the standards for investigation is asserted to be not significant due to the growing trend towards requiring comparable standards for investigations under IHL and the ECHR.

Three important differences nonetheless remain. First, the IHL obligation to investigate is limited to war crimes. The scope of the obligation under international humanitarian law is therefore much narrower than the obligations under the Convention since the ECHR demands investigation into any alleged breach of the right to life. Second, in order for the obligation to investigate breaches of IHL to arise, the threshold of a credible accusation or a reasonable suspicion of the commission of a war crime should be reached first. In contrast, under the Convention investigation is triggered as soon as the authorities become aware that a person had been killed or are confronted with an arguable claim that a detainee has disappeared in life threatening circumstances. Third, as convergence of the standards for investigation between IHL and the ECHR has its limitations due to different fields of interest and the constraints that may be present during armed conflict, some standards of investigation may lose its significance under IHL. This holds especially true for the principle of transparency, which is not recognized under IHL at all.<sup>161</sup>

As concluded in chapter 2, the incident subject to this thesis is governed by both international humanitarian law and the ECHR. While it is generally accepted that in situations of armed conflict IHL is conceived the *lex specialis* of human rights law, it is of greater importance for the purpose of this thesis to consider the approach towards the relationship between IHL and the Convention as taken by the ECtHR.

This chapter aims to complete the normative framework that governs the obligation to investigate in times of armed conflict, in particular in the case of Jaloud. For this purpose, section 5.1 discusses the legal bases for the Court to take into account the relevant rules and principles of IHL as *lex specialis* when interpreting the Convention. As will appear, these grounds have never been applied in practice, therefore section 5.2 will explore how the ECtHR has dealt with the relation between IHL and the Convention in previous cases arising out of an armed conflict. The conclusions that can be drawn from this section will be used to ascertain the implications of the Court's approach for the obligation to investigate alleged breaches of the right to life in armed conflict in section 5.3.

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<sup>161</sup> The Tomuschat report (supra note 94), the Turkel report (supra note 34) nor Schmitt (supra note 66) consider the principle of transparency to be one of the relevant principles for conducting an investigation under international humanitarian law. A similar conclusion can be drawn from the Goldstone report, Human Rights Council, Human Rights in Palestine and Other Occupied Arab Territories, Report of the United Nations Fact-Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48, 25 September 2009, §121

## 5.1 *The approach of the European Court of Human Rights: theory*

The European Court of Human Rights has dealt with the conduct of hostilities in multiple cases, both in situations of non-international armed conflict and in situations of occupation in international armed conflicts.<sup>162</sup> What follows from these cases is that the protection offered by the Convention does not cease in times of armed conflict and that it may even govern military operations outside the territory of a State party, so long as the area is under the effective control of a State party.<sup>163</sup> Even though such situations are primarily governed by IHL - which in principle falls outside the authority of the ECtHR - the Court has in theory two legal bases to incorporate the laws of armed conflict into the Convention accordingly.

### 5.1.1 *Derogation in times of war*

As regards the *lex specialis* approach, the Convention takes an extraordinary position compared to other human rights instruments due to the unique characteristics of the ECHR's derogation regime.<sup>164</sup> The right to life is recognized by the major human rights treaties as a core right from which no derogation is permitted, not even during times of public emergency: see for example Article 4(2) ICCPR. This does not imply that the authors of the Covenant at the time intended to prohibit the killing of human beings during armed conflict, rather they believed that human rights were inapplicable.<sup>165</sup> Nowadays this position is negated by the ICJ as was explained in section 2.3

A singular approach is upheld in the ECHR. Under the Convention, the prohibition on derogation from the right to life is moderated by Article 15(2) ECHR creating an exception regarding deaths resulting from lawful acts of war:

(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

(2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision

Derogation is only permitted in situations of war and requires some formal and public act of derogation. Where no such act has been proclaimed, the Convention is fully applicable to the situation concerned.<sup>166</sup> In addition, the term 'acts of war' suggest that, even in situations of armed conflict, derogation is possible only with regard

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<sup>162</sup> Non-international armed conflicts: *Ergi v. Turkey*, supra note 113, *Özkan v. Turkey*, App. no. 21689/93, Judgment of 6 April 2004 (Turkish-Kurdish conflict) and *Isayeva, Yusupova and Bazayeva v. Russia*, App. Nos. 57947/00, 57948/00 and 57949/00, Judgment of 24 February 2005 (Chechen conflict). International conflicts: *Cyprus v. Turkey*, supra note 113, *Al-Skeini v. United Kingdom*, supra note 43 and *Al Jedda v. UK*, App. No. 27021/08, Judgment of 7 July 2011

<sup>163</sup> *Al-Skeini v. United Kingdom*, supra note 43, §131-133

<sup>164</sup> William Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, *The European Journal of International Law*, 2005, p. 745

<sup>165</sup> Christian Tomuschat, *Human Rights and International Humanitarian Law*, *The European Journal of International Law*, 2010, p. 16

<sup>166</sup> Richard Burchill, Nigel D. White, Justin Morris and Hilaire McCoubrey, *International Conflict and Security Law: Essays in Memory of Hilaire McCoubrey*, Cambridge University Press, Cambridge, 2005, p. 186

to deaths resulting from conduct in hostilities: the use of force in law enforcement situations remains subject to Article 2.

The ECHR's derogation regime can be conceived in two ways. Draper on the one hand considers the regime under Article 15 of the Convention as an expression of the relationship between international humanitarian law and (European) human rights law. He asserts that Article 15 ECHR reflects that the system of human rights is the normal ordering of society, while it approaches war as the exceptional situation, derogating from the full application of the human rights system. Accordingly, the two systems are essentially complementary.<sup>167</sup> In this respect, complementarity means that the ECHR and IHL do not contradict each other, rather they should be interpreted in the light of each other.

Another view, upheld by Abresch and supported by the derogation regime under the ICCPR, is that the drafters of the Convention envisioned that States involved in armed conflicts would derogate from the right to life to the rules of IHL, 'effectively incorporating humanitarian law as a *lex specialis* regulating the conduct of hostilities'.<sup>168</sup> This position is consistent with and supported by the requirement under Article 15(1) of the Convention, stating that derogation may be made 'provided that such measures are not inconsistent with its other obligations under international law'.

Nonetheless, none of these approaches has proven valid yet since no derogation from Article 2 in respect of deaths resulting from lawful acts of war has ever been made.<sup>169</sup> Instead, States tend to rely on Article 2(2) of the Convention to justify the use of force and its consequences. Consequently, the *lex specialis* character of IHL is not reflected through the ECHR's derogation regime.

### 5.1.2 Interpretation in harmony with other principles of international law

In the absence of a formal derogation, the principles of IHL nonetheless integrate into the Convention by means of the harmonization clause laid down in the Vienna Convention on the Law of Treaties (VCLT). In *Bankovic and Others v. Belgium and Others (2001)* the Court made some remarks as to the authority of IHL in situations of international armed conflict. In considering whether the applicants and their deceased relatives were capable of falling within the jurisdiction of the respondent States the Court affirmed that:

'...the Convention must be interpreted in the light of the rules set out in the Vienna Convention 1969 (...) Moreover, Article 31 § 3 (c) [of the Vienna Convention 1969] indicates that account is to be taken of "any relevant rules of international law applicable in the relations between the parties". More generally, the Court recalls that the principles underlying the Convention cannot be interpreted and applied in a vacuum. The Court must also take into account any relevant rules of international law when examining questions concerning its jurisdiction and, consequently, determine State responsibility in conformity with the governing principles of international law'.<sup>170</sup>

The 'relevant rules of international law' the Court is referring to, obviously include the norms and principles of international humanitarian law. This statement is therefore understood by Chevalier-Watts as reflecting the

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<sup>167</sup> Draper, *Human Rights and the Law of War*, Virginia Journal of International Law, 1972, p. 37-38

<sup>168</sup> Abresch, *supra* note 164, p. 745

<sup>169</sup> *Ibid*, p. 745

<sup>170</sup> *Bankovic and Others v. Belgium and Others*, *supra* note 42, §55-57

Court's duty to be bound by IHL in situations of armed conflict.<sup>171</sup> While the Convention should be interpreted in harmony with other principles of international law - including IHL - of which it forms part, the Court emphasized that 'it must remain mindful of the Convention's special character as a human rights treaty'.<sup>172</sup> While this comment seems to suggest that humanitarian law integrates into the Convention when the Court deals with a situation of armed conflict, it has never been interpreted in this manner.<sup>173</sup> In sum, even though Article 31(3)(c) VCLT provides a clear legal basis for taking IHL as *lex specialis* into account in the interpretation of the ECHR, it proves to be merely theoretical.

## 5.2 The approach of the European Court of Human Rights: practice

If States decline to derogate from Article 2 ECHR and the Court does not interpret Article 31(3)(c) VCLT in a manner as to invite the ECtHR to apply IHL as *lex specialis* when dealing with cases arising out of an armed conflict, the question is how the relationship between IHL and the Convention was conceived in previous cases.

For a long time no explicit reference to the Hague Regulations nor to the Geneva Conventions and its Protocols has been made by the Court or the Commission. Nonetheless, it has been possible to argue that the Court applied certain rules and principles of IHL implying that it is using humanitarian law as *lex specialis* to define the scope of the right to life in armed conflict. Such an approach was taken for example in the Kurdish cases<sup>174</sup> where the Court assessed whether the planning and conduct of the operation of the government was consistent with Article 2 of the Convention:

'(...) the responsibility of the State is not confined to circumstances where there is significant evidence that misdirected fire from agents of the State has killed a civilian. It may also be engaged where they fail to take all feasible precautions in *the choice of means and methods* of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimizing, *incidental loss of civilian life*' [emphasis added].<sup>175</sup>

The reference to terms like '*choice of means and methods*' and minimization of '*incidental loss of civilian life*' reflects almost identically the wording of Article 57(2)(a)(ii) of API, suggesting that the Court applied the principle of distinction - one of the core principles in humanitarian law - to assess the legality of the attack under human rights law.<sup>176</sup> The use of such vocabulary has been taken by some commentators as evidence that the Court applies humanitarian law as *lex specialis*.<sup>177</sup>

Leaving aside the discussion whether this is a valid assumption or not, the case of *Al-Jedda v. United Kingdom (2011)* demonstrates that ECtHR does certainly not undermine the authority of IHL as a body of law with regard

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<sup>171</sup> Juliette Chevalier-Watts, *Has Human Rights Law Become Lex Specialis for the European Court of Human Rights in Right to Life Cases Arising from Internal Armed Conflicts?*, International Journal of Human Rights, 2010, p. 593

<sup>172</sup> *Bankovic v. Belgium*, supra note 42, §57

<sup>173</sup> Byron points to the fact that *Bankovic* was an admissibility decision and thereto did not call for the application of substantive law in any case. Christine Byron, *A Blurring of Boundaries: The Application of International Humanitarian Law by Human Rights Bodies*, Virginia Journal of International Law, 2007, p. 852

<sup>174</sup> Another Kurdish case with a same approach towards the application of IHL: *Gülec v. Turkey*, supra note 132

<sup>175</sup> *Ergi v. Turkey*, supra note 112, §79

<sup>176</sup> Francesco Bruscoli, *The Rights of Individuals in Times of Armed Conflict*, The International Journal of Human Rights, 2002, p. 51. See also Article 57(2)(a)(ii) API which contains the same language.

<sup>177</sup> Hans-Joachim Heine, *The Relationship Between Human Rights Law Protection and International Humanitarian Law*, International Review of the Red Cross, 2004, p. 810 and Francesco Bruscoli supra note 176, p. 51

to international armed conflicts, but conceives the relationship between the general and the specific rule in a manner different from the ICJ as explained in section 2.3.

### 5.2.1 *Al-Jedda v. United Kingdom*

*Al-Jedda v. United Kingdom* involves the 3-year internment of an Iraqi national by the British forces during the occupation in Iraq. He was not detained under a criminal charge, but on the basis that his internment was necessary for ‘imperative reasons of security in Iraq’ as he was suspected of recruiting terrorists. The UK forces based this authority on UNSC resolution 1546 which gave them the power ‘to take all necessary measures to contribute to the maintenance of security and stability in Iraq’. In contrast, the list of grounds of permissible detention in Article 5 ECHR does not allow for preventive detention for security reasons where there is no intention to bring criminal charges within a reasonable time.<sup>178</sup> However, as the government asserted, there could be no violation of the Convention because internment was carried out pursuant to resolution 1546 which, according to Article 103 of the UN Charter, overrode the obligations under the Convention.<sup>179</sup> The Court disagreed, arguing that the Security Council did not intend to impose any obligation on the State to use measures of indefinite interment in breach of fundamental human rights. The fact that the resolution leaves internment as just one of a number of options that the States concerned could use, could not displace the obligations under the ECHR because the resolution also expressly referred to the promotion of the protection of human rights.<sup>180</sup>

Additionally, the Court searched for an alternative legal basis for detention that could displace the obligation under the Convention. For the first time the Court directly interpreted the relevant rules under IHL in its judgment. Referring to GC IV on the protection of civilians in times of war, the Court found that ‘under international humanitarian law internment is to be viewed not as an obligation on the Occupying Power but as a measure of last resort’.<sup>181</sup>

Indeed, the Geneva Convention does not *oblige*, but *authorizes* a State to intern civilians whose activity constitutes a threat to security, their forces or to the security of others, such as civilians.<sup>182</sup> As Pejic explains, ‘it would be not only legally incorrect but also operationally counter-productive if IHL were read to oblige States to intern in military operations, rather than to authorize them to do so as parties to an armed conflict are also free not to intern a person based on consideration inherent to succeeding in an armed conflict’.<sup>183</sup> Nor is the assertion tenable that GC IV cannot displace Article 5 ECHR because ‘internment is a measure of last resort’ since the Geneva Convention only indicates that interment is ‘the most severe measure of control’ which does not necessarily imply sequence (i.e. that other options must be exhausted first).<sup>184</sup> In addition, even if interment was a measure of last resort under the rules of IHL, the Court did not assess whether Al-Jedda’s internment could indeed have been justified as a measure of last resort.

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<sup>178</sup> *Al-Jedda*, supra note 162, §100

<sup>179</sup> *Ibid*, §100

<sup>180</sup> *Ibid*, §106

<sup>181</sup> *Ibid*, §107

<sup>182</sup> Jelena Pejic, *The European Court of Human Rights’ Al-Jedda judgment: the oversight of International humanitarian law*, International Review of the Red Cross, 2011, p. 847

<sup>183</sup> *Ibid*, p. 847

<sup>184</sup> *Ibid*, p. 849



### 5.2.2 Conclusions on the approach of the ECtHR

The *Al-Jedda* ruling indicates that merely an *authorization* in international humanitarian law cannot displace the relevant provisions of the Convention in armed conflict, only an actual *obligation* to act otherwise may set the Convention aside. The ECtHR does not so much deny the doctrine that in situations of armed conflict, IHL is considered the *lex specialis* of (European) human rights law, rather it conceives the relationship between the general and the specific rule different from the ICJ in two respects:

1. The ECtHR does not ignore the relevant rules of IHL whenever human rights violations occur against the backdrop of an armed conflict. However, these rules can only affect the outcome of the case when the source contains an expressed binding *obligation* to behave contrary to the norm contained in the Convention. The distinction the Court made between *obligations* and *authorizations* was not present in the reasoning of the ICJ in the Advisory Opinions regarding *Nuclear Weapons* and *The Wall*. According to the ICJ, in armed conflict the concrete interpretation of the human rights norm is influenced by the application of the IHL rule, regardless of whether this rule holds an obligation or authorization.
2. The ECtHR repeatedly speaks of '*displacing*' and '*disapplying*' the provisions of Article 5 ECHR in case of a binding obligation to intern civilians under IHL.<sup>185</sup> The Court seems to suggest that wherever the Convention and an obligation under IHL apply simultaneously, the *lex specialis* of IHL displaces the *lex generalis* in the Convention. This, in contrast to the ruling of the ICJ, that explicitly stated that human rights do not cease in times of armed conflict, but, being the *generalis*, should be interpreted in the light of the specific rule contained in IHL.

### 5.3 Implications for the obligation to investigate in armed conflict

The question is thus whether IHL *obliges* the authorities to conduct an investigation that conflicts with the rules and principles governing an investigation under the Convention as outlined in chapter 4. This should be answered in the negative: even though there are some important differences as identified in the beginning of this chapter, nowhere does IHL *oblige* a State to withhold from conducting an investigation into violations that do not constitute a war crime; nor does IHL prohibit the investigating agency to inform the relatives of the victim on substantive developments in the investigation if the circumstances of the case permit so. As IHL contains no such *obligation*, the normative framework under the ECHR is fully applicable in times of armed conflict. This means that the obligation to investigate arises in respect of any taking of life which is protected by law, as soon as the authorities become aware that an individual has been deprived of his life.

This conclusion was also reflected in *Al-Skeini v. United Kingdom (2011)*.<sup>186</sup> The case was concerned with the investigation conducted into the lethal shooting of six Iraqi civilians by British soldiers in the course of a patrol operation. The government argued that it had satisfied the procedural obligation under Article 2 of the Convention since witnesses had been interviewed and material was collected from the scene of the shooting. The Brigade Commander could however not conclude from the fact-finding mission that there was reason to suspect that a war crime had been committed, so the examination was terminated. The Court nonetheless found a violation of Article 2's procedural aspect as it deemed the investigation rather incomplete due to the lack of specific actions that were necessary to determine whether the force used could be justified and to identify and

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<sup>185</sup> *Al-Jedda*, supra note 162, §107, 109, 110

<sup>186</sup> *Al-Skeini v. United Kingdom*, supra note 43

punish those responsible. While under the given circumstances the investigating authorities could have confined with an IHL oriented fact-finding mission, full investigation under the ECHR was already triggered from the moment the civilians were shot by the British forces.

This does however not suggest that the Court disregards the existence of an armed conflict. As regards the obligation to investigate, the Court has recognized that the implementation of the general principles governing investigation depends upon the circumstances of the case. In this respect the Tomuschat Committee suggested that the standard of effectiveness under human rights law should be less demanding in situations of armed conflict:

'(...) there are constraints during armed conflict that do impede investigations. For example, not every death during an armed conflict can be effectively investigated. (...) The nature of hostilities might obstruct on-site investigation or make prompt medical examination impossible. The conflict might have led to destruction of evidence, and witnesses might be hard to locate or be engaged in conflict elsewhere'.<sup>187</sup>

These limitations were also recognized by the ECtHR in the *Al-Skeini* case. The Court observed that it is clear that where the death to be investigated under Article 2 ECHR occurs in the context of an armed conflict, 'obstacles may be placed in the way of the investigators' and 'concrete constraints may compel the use of less effective measures of investigation or may cause an investigation to be delayed'.<sup>188</sup> Notwithstanding the observation that the existence of an armed conflict may restrict the application of the general principles, the Court stressed that the obligation under Article 2 entails that, even in difficult security conditions, all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life.<sup>189</sup> The sections below will consider how the general principles are translated into practices applicable in situations of armed conflict.

### 5.3.1 Independence and impartiality

The principle of independence and impartiality is frequently challenged in cases involving investigations in armed conflicts outside the territory of a State party. The reason is that the military in such areas exercises a dual role as potential law-breaker and law-enforcer. An example where the Court addressed independence and impartiality in a military context was *Al-Skeini v. United Kingdom*. The investigation into the lethal shooting of civilians was carried out by the Special Investigation Branch of the Royal Military Police. Although the Special Investigation Branch had a separate chain of command from the soldiers on combat duty whom it was required to investigate (*institutional and hierarchical independence*) the Court observed that:

'The Special Investigation Branch was not, during the relevant period, operationally independent from the military chain of command. It was generally for the Commanding Officer of the unit involved in the incident to decide whether the Special Investigation Branch should be called in ... The fact that the Special Investigation Branch was not 'free to decide for itself when to start and cease an investigation' and did not report in the first instance to the Army Prosecution Authority rather than to the military chain of command, meant

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<sup>187</sup> Tomuschat report, supra note 94, p. 10

<sup>188</sup> *Al-Skeini v. United Kingdom*, supra note 43, §164

<sup>189</sup> *Ibid*, §146

that it could not be seen as sufficiently independent from the soldier implicated in the events to satisfy the requirements of Article 2'.<sup>190</sup>

Hence, also in armed conflict, the investigating entity should be totally separated from the chain of command of the soldiers subject to investigation to ensure that it has no potential involvement in the events under consideration and therefore is able to assess the incident without possible partiality or perception of bias.<sup>191</sup>

### 5.3.2 Adequacy

The existence of an armed conflict, especially outside the territory of the investigating State, may seriously affect the modalities or particulars of the investigation. Hence, the three minimum requirements of what constitutes an adequate investigation into all aspects of the killing - the taking of testimonies from all primary witnesses, the utilization of well recognized forensic science methodology and autopsy - may generally be ill-suited to the realities of conducting an investigation in the middle of an armed conflict. For example in *Al-Skeini v. United Kingdom*, the investigations in Iraq were seriously hampered by a number of difficulties such as security problems, lack of interpreters, cultural considerations, the lack of pathologists and post-mortem facilities, the lack of records, problems with logistics, the climate and general working conditions.<sup>192</sup> The duty to investigate under IHL is, by contrast, assumed to be more sensitive to such factors because it was developed with the specific circumstances of armed conflict in mind.

The fact that human rights law was not specifically designed for armed conflict does not imply that the principle of adequacy does not fit situations of armed conflict: the principle of adequacy is highly contextual. Nonetheless, even though the level of adequacy of the investigation during hostilities may not translate to the same standards as during peace time on the State party's own territory, the standards must still be high enough to ensure that all aspects of the killing are fully explored. The presence of an armed conflict may not waive the obligation to investigate, but it might mitigate the procedures and mechanisms that would normally be required to carry out an investigation. After all, the obligation is one of means, not of result. In sum, the manner in which the investigation must be conducted necessarily varies according to the circumstances of the case and does not place any impossible or disproportionate burden on a State party involved in armed conflict.

### 5.3.3 Promptness

The principle of promptness is also an important component of investigation under IHL. Like the other principles, a prompt investigation may encounter serious difficulties during armed conflict itself. Therefore, the reasonableness of a delay must be assessed according to the surrounding circumstances and according to the scope and scale of violence.<sup>193</sup> The Court observed in *Al-Skeini v. United Kingdom*:

'While there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as

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<sup>190</sup> Ibid, §172

<sup>191</sup> Turkel Report, supra note 34, p. 141

<sup>192</sup> *Al-Skeini v. United Kingdom*, supra note 43, §30

<sup>193</sup> Turkel Report, supra note 34, p. 143

essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts'.<sup>194</sup>

In *Al-Skeini* this led to the judgment that the delay between the death and the start of the court-martial (two years) undermined the effectiveness of the investigation because some of the soldiers accused of involvement were by then untraceable.<sup>195</sup> As the government could not provide an explanation in respect of the long delays, the Court found the UK in violation of Article 2 of the Convention.

#### 5.3.4 Transparency

As explained in the beginning of this chapter, the principle of transparency is not considered to be one of the relevant principles for conducting an investigation under IHL. The Tomuschat Report indicates that 'the level of transparency expected of human rights investigations is not always achievable in situations of armed conflict, particularly as questions of national security often arise'.<sup>196</sup>

Transparency is nonetheless deemed desirable - also in an IHL context - to enhance public scrutiny and to ensure a culture of accountability. Therefore the ECtHR treats transparency as a very flexible principle, able to adapt itself to a situation of armed conflict as can be deduced from expressions like 'the degree of public scrutiny required may well vary from case to case',<sup>197</sup> and 'openness may not seriously undermine the efficiency of the investigation'.<sup>198</sup> Moreover, as regards sensitive information that may arise questions of national security, it is very assumable that such information is exempted from disclosure. In *Shanaghan v. United Kingdom (2001)* the Court already held that disclosure or publication of police reports and investigative materials may not involve sensitive issues with possible prejudicial effects to private individuals or other investigations.

#### 5.4 Conclusion

This chapter brought together all previous chapters in order to complete the normative framework for the obligation to investigate in armed conflict. The approach of the ECtHR in *Al-Jedda* towards the application of IHL reveals that - as there exists no binding *obligation* under IHL to act contrary to the Convention - the framework under the ECHR, including its five elaborated principles, is fully applicable in times of armed conflict. Even though these principles were not specifically designed for investigations to be conducted during armed conflict, the inherent contextuality of the principles should nonetheless enable the State to transpose the ECHR-principles to the military context, as the jurisprudence reveals. So, although the precise manner of application of the standards may vary according to the circumstances, States must at a minimum secure that the facts surrounding the incident are established and that those responsible are committed to justice.

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<sup>194</sup> *Al-Skeini v. United Kingdom*, supra note 43, §167

<sup>195</sup> *Ibid*, §174

<sup>196</sup> Tomuschat Report, p. 10

<sup>197</sup> *Hugh Jordan*, para. 109

<sup>198</sup> *Finogenov and Others v. Russia*, App. No. 18299/03, Judgment of 20 December 2011, para. 270

## Chapter 6

### Military investigation mechanism in the Netherlands

Having set the applicable framework in chapter 5, this chapter assesses whether the military investigation mechanism in the Netherlands as was applicable in Iraq was able to satisfy the procedural obligation under Article 2 of the Convention. As this is a highly contextual assessment, dependent upon many unknown factors concerning the circumstances on site, the main focus of this chapter will be on addressing difficulties that are inherent to any investigation conducted during military operations abroad.

To obtain a full picture of the applicable investigation mechanism, this chapter will start in section 6.1 with an introduction into the organization of military criminal procedures in the Netherlands. Thereupon, section 6.2 provides an overview of the relevant actors in the investigation process, followed by the grounds that give rise to, and the purpose of, an investigation in section 6.3. Despite the high level of contextuality of the standards governing an investigation, the issue of independence and impartiality demands special attention in the context of military operations and is therefore further considered in section 6.4. This chapter shall conclude with some additional considerations on the investigation procedure in section 6.5.

#### 6.1 *Organization of military criminal procedures in the Netherlands*

Prior to 1991, investigation and prosecution of alleged criminal acts committed by a member of the Netherlands armed forces were handled within a separate military justice system. This system was characterized by two pillars. First, the armed forces itself, in the capacity of the commanding general, determined whether a matter required investigation and whether or not to bring the suspected soldier to trial. Even though the commanding general was obliged to consult the public prosecutor on the matter, the public prosecutor could only provide the commanding general with non-binding advice as the instigation of investigation and prosecution lay within the discretionary powers of the commanding general.<sup>199</sup> Second, should the commanding general choose to proceed to trial, jurisdiction over members of the armed forces was exercised by the court-martial, consisting for most part, and under some conditions even completely, of military officers belonging to the same branch of military service as to which the accused belonged.<sup>200</sup>

With the coming into force of the Military Justice Administration Act 1991 (*Wet Militaire Strafrechtspraak*) the military justice system was integrated into the civilian criminal justice system. All military courts were abolished and the powers of the commanding general were allocated to the public prosecution service (*Openbaar Ministerie, OM*) which is the responsible organ for the investigation and prosecution of all criminal offences under Dutch criminal law. As a consequence, the political authority on investigation and prosecution transferred from the Ministry of Defense to the Ministry of Security and Justice.

The military justice system in the Netherlands is somehow best described what Gill and Van Hoek call a 'hybrid civilian/military system'.<sup>201</sup> While the system is predominantly civilian in nature,<sup>202</sup> military justice can be dis-

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<sup>199</sup> Guido Coolen and Gert Walgemoed, *Militair Strafrecht (Military Criminal Law)*, Kluwer, Deventer, 2008, p. 144

<sup>200</sup> *Ibid*, p. 146

<sup>201</sup> Terry Gill and Bas van Hoek, *Netherlands: Investigation and Prosecution of Alleged Violations of the Law of Armed Conflict*, questionnaire part of the Turkel report, *supra* note 34, August 2011, p. 917

tinguished from classic civilian justice in several respects. For instance, the exclusive authority over all offences committed by members of the armed forces in the Netherlands and abroad comes to the Military Chamber of the District Court in Arnhem. The Military Chamber consists of two civilian judges, one of whom shall preside, and one serving army officer not belonging to the judiciary, drawn from the legal service of the same branch of military service of whom the accused is a member.<sup>203</sup> Furthermore, in matters involving members of the armed forces, the chief prosecutor is assisted by the Royal Military Constabulary (*Koninklijke Marechaussee, KMar*) in the capacity of military police charged with the investigation of all offences under military law.<sup>204</sup>

## 6.2 *Relevant actors in the investigation process*

### 6.2.1 *Koninklijke Marechaussee*

The Royal Military Constabulary is a branch of the armed forces charged with the police investigation in all matters involving members of the armed forces. The KMar is based wherever there are barracks, on or near military air bases and naval ports. Where units of the Dutch armed forces are serving abroad, a detachment of KMar investigation officers is sent along to perform full-time the military police task with respect to criminal offences committed by members of the Netherlands armed forces engaged in a military mission.<sup>205</sup> Additionally, assistant public prosecutors of the KMar are sent along with the KMar detachment who can be considered the intermediary between the ordinary investigating officers and the public prosecutor in Arnhem.<sup>206</sup> In the capacity of military police, the KMar investigators and assistant public prosecutors possess the same legal competencies as their civilian counterparts.<sup>207</sup>

### 6.2.2 *Openbaar Ministerie*

The investigation of criminal offences by the KMar is carried out under the exclusive authority and general direction of the OM, specifically the district prosecutor in Arnhem.<sup>208</sup> The OM has the discretionary power to order the initiation of an investigation (factual or criminal) by the KMar and decides upon further action in the course of the inquiry. The OM is an autonomous and independent body within the Ministry of Security and Justice, acting independent from the Ministry of Defense or any other body concerned.

### 6.2.3 *Military authorities*

The military authorities and the commanders do not have any control over the criminal investigation by the KMar and are not in the position to give directions or instructions to either the KMar police officers or the OM. The Ministry of Defense may however provide advice to the OM on matters relating to prosecutorial policy or where the military authorities feel that the interest of the armed forces have been disregarded in the context

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<sup>202</sup> The chief prosecutor, his staff of assistant prosecutors and support staff are all civilians. Gill ea. supra note 201, p. 889

<sup>203</sup> Ibid, p. 889

<sup>204</sup> Ibid, p. 888

<sup>205</sup> Harry Borghouts, Ruud Daverschot and Gerard Gillissen, *Evaluatie toepassing militair strafprocesrecht bij uitzendingen (Evaluation of the application of military criminal procedure law in military operations)*, Haarlem, 31 August 2006, p. 17 (hereinafter: Borghouts committee), p. 19

<sup>206</sup> *OM en Marechaussee hebben voldoende militaire expertise (Sufficient military expertise present within the public prosecution service and royal military constabulary)*, 31 March 2004, [http://www.om.nl/algemene\\_onderdelen/uitgebreid\\_zoeken/@126980/om\\_en\\_marechaussee/](http://www.om.nl/algemene_onderdelen/uitgebreid_zoeken/@126980/om_en_marechaussee/)

<sup>207</sup> Article 141(c) of the Code of Criminal Procedures (*Wetboek van Strafvordering*)

<sup>208</sup> Gill ea. supra note 201, p. 917

of a criminal investigation.<sup>209</sup> Advice can be of either a general or more specific nature, but in all cases it is up to the OM to determine to what extent, if any, it intends to follow such advice.<sup>210</sup> Advice will therefore in no way affect the independence of the OM in pursuing an investigation or determining the prosecutorial policy.<sup>211</sup>

### 6.3 *Trigger for investigation*

All members of the armed forces are at all times obliged to report any knowledge of assumed criminal offences to the KMar. In addition, the troop commander is during military operations abroad required to report every use of force - whether a discharge of a warning shot or full-scale combat - to the KMar for reasons of ensuring legal oversight and accountability for military conduct.<sup>212</sup> During the mission in Iraq, every reported use of force which did not (yet) raise a credible accusation or reasonable suspicion of the commission of a criminal offence led to a factual investigation conducted by the KMar.<sup>213</sup> In addition, a factual investigation is instigated in every instance in which a civilian is killed or seriously injured by the Netherlands troops regardless of whether the situation has been formally deemed to be one of armed conflict or merely a stabilization or law enforcement operation.<sup>214</sup> When and how to conduct a factual investigation is not regulated by law, rather it is a matter of policy. The purpose of this inquiry is to obtain a full picture of the facts surrounding the incident, through questioning of the author of the force and other witnesses, searching for traces and obtaining advice from experts.<sup>215</sup> The findings of the fact-finding mission are communicated to the OM which decides upon further action.

Alongside the factual investigation conducted by the KMar, the commander or the Ministry of Defense may issue an internal examination into the incident. Should the OM reach from the factual investigation the conclusion that there is reasonable suspicion of the commission of a criminal offence, the factual investigation and internal examination, if any, must be terminated and a criminal investigation must be initiated immediately by the KMar. Criminal investigations into the conduct of soldiers on duty are conducted within the regular framework under the Code of Criminal Procedures (*Wetboek van Strafvordering*) which applies equally to the investigation of all criminal offences.<sup>216</sup>

As a matter of policy, both the factual and criminal investigation are conducted in accordance with the framework for investigation developed under the ECHR (chapter 4). Although the *de jure* applicability of the Convention outside the territory of a contracting State is limited to the situations explained in section 2.2, the Netherlands nonetheless applies the Convention as a matter of policy in all situations where the armed forces

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<sup>209</sup> Ibid, p. 918

<sup>210</sup> Ibid, p. 918

<sup>211</sup> Ibid, p. 922

<sup>212</sup> Ibid, p. 913-915

<sup>213</sup> Ibid, p. 936

As of 2006, the commander is required to account for every use of force in an After Action Report which forms part of the operational information (operational de-briefing) provided to the Defense Chief (*Commandant der Strijdkrachten*). Operational de-briefings are not carried out with the intention of initiating criminal prosecution, rather they are military tools for assessing the quality of operational activity and for lesson learning. A copy of this report is submitted to the OM which determines on the basis of this report whether further factual or criminal investigation is demanded.

<sup>214</sup> Ibid, p. 929

<sup>215</sup> Borghouts committee, supra note 204, p. 39

<sup>216</sup> Gill ea. supra note 201, p. 913

are deployed on a mission abroad, irrespective of whether or not the ECHR is *de jure* applicable.<sup>217</sup> Applying the Convention at all times, especially in the context of military operations, is considered necessary by the OM, 'to ensure accountability and a responsible approach to the use of force'.<sup>218</sup>

#### 6.4 *The issue of independence and impartiality*

As discussed in section 5.3, the application of the standard of independence as set by the ECtHR to investigations in armed conflicts outside the territory of a State is fraught with difficulties, for instance due to the autonomy afforded to military investigation systems and the dual role of the military investigator as potential law-breaker and law-enforcer. Furthermore, impartiality may be threatened due to a sense of fraternity amongst soldiers in a mission area. This section starts with a general explanation of the Dutch approach towards independence and impartiality. In addition, three relevant issues inherent to any investigation in mission areas abroad, disputing independence and/or impartiality, are discussed and, where feasible, illustrated by *Jaloud v. The Netherlands*.

##### 6.4.1 *Separation of authority*

In the Netherlands the issue of independence is addressed by separating the authority over the investigating officers of the KMar. As indicated earlier, the investigation into offences by members of the military is in the hands of the KMar, also a branch of the armed forces. However, in all matters they act under the authority and direction of the district prosecutor in Arnhem. This means that even though the KMar remains under the administration of the Ministry of Defense, direction, control and authority is exercised by the Ministry of Security and Justice. In this respect, KMar officers charged with the military police task are - despite their military status - referred to as 'blue' rather than 'green' officers. The Ministry of Defense nor commanders in the field have any authority to give directions or instruction to blue KMar officers on the investigation of criminal offences.<sup>219</sup> The relationship between the KMar and the military authorities is as regards the military police task, merely of an administrative nature.

##### 6.4.2 *The balancing of interest and military expertise*

Despite the separation of authority, there might nonetheless be a certain degree of dependence between the KMar detachment and the armed forces in two ways. First, investigation in the context of a military operation aboard will always involve the balancing of interests. On the one hand there is the interest of the KMar and OM to guarantee the effective prosecution of criminal offences by members of the armed forces; on the other hand, the operational commander has an interest in the continuation of the operation. As a consequence, the KMar will not always have access to separate communications, logistical facilities and support, and must rely on the operational commander to make these available.<sup>220</sup> Second, the KMar might also be dependent upon the commander to provide a complete situational picture, or upon military expertise in certain areas such as mine and explosive clearance and armorers.<sup>221</sup>

Dependency through the balancing of interests can be illustrated by investigations conducted in the context of the operation in Afghanistan where the Netherlands participated in Operation Enduring Freedom and in the

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<sup>217</sup> *Ibid*, p. 896

<sup>218</sup> *Ibid*, p. 930

<sup>219</sup> *Ibid*, p. 922

<sup>220</sup> *Ibid*, p. 922

<sup>221</sup> *Ibid*, p. 922



International Security Assistance Force (ISAF). Being deployed in the province of Uruzgan - labeled as 'one of the most isolated and dangerous provinces of Afghanistan'<sup>222</sup> - the armed forces were frequently confronted with gun battles, improvised explosive devices and other violent acts. The consequence was that the KMar, when leaving the compound for investigation, needed to be accompanied by a platoon for security reasons. The platoon, however, must be made available by the operational commander: If the operational commander cannot (or: does not) place a platoon at the disposal of the KMar duty group, the investigators will not be able to leave the compound and investigation cannot take place.

While the role of the operational commander may seriously impede the operational independence of the KMar when deployed in an area like Uruzgan (by way of comparison: the province of al-Muthanna in Iraq was to such an extent safe that the KMar officers could move independently, without the assistance of a platoon) it will only be of relevance for the effectivity of the investigation when the operational commander misuses his authority i.e. when he does not make a platoon available in order to shield a member of the armed forces or to prevent that a criminal offence comes to light. In all other cases, the dependence between the KMar and the operational commander should be considered as a 'concrete constraint that may impede the investigation'.<sup>223</sup> The obligation to take all reasonable steps available to ensure that an effective investigation is conducted remains however unaffected.

As regards the second point, the question is whether the principle of independence opposes to cooperation with, and utilization of the expertise within the military. Based on considerations of adequacy i.e. to provide the OM with a complete and adequate picture of the incident so the decision as to whether or not to bring the matter to trial can be founded on a solid basis, involvement of the military is desirable, maybe even inevitable.

The jurisprudence concerning the involvement of a biased expert - assuming that a commander or military expert is necessarily prejudiced - in the investigation does not preclude cooperation with and utilization of military expertise per se. For instance, in *Giuliani and Gaggio v. Italy (2011)* the Court ruled that the presence of an expert who had previously openly defended his view concerning the matter under consideration, 'was not capable, in itself, of compromising the impartiality of the domestic investigation'.<sup>224</sup> This view was justified as the expert had been appointed by the prosecuting authorities and was therefore 'not acting as a neutral and impartial auxiliary of the judge'. Furthermore, the expert was 'just one member of a four-member expert team' and the tests he was required to carry out 'were of an essentially objective and technical nature'.<sup>225</sup>

Thus, even if the military expert should have preconceived ideas on the matter subject to investigation at all, the observance of their statements - in particular expert reports concerning merely technical issues - does not affect the impartiality of the investigation. Even for less objective matters such as the providence of a situational picture, the KMar could to a certain extent choose to cooperate with the military without putting the impartiality of the investigation on the line. However, in order to prevent possible allegations of partiality, it is to be recommended to implement additional procedural guarantees, for example through consultation of multiple experts where possible.

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<sup>222</sup> Edo Sturm, *VS Rapport: Uruzgan 'extreem gevaarlijk'*, (*US Report: Uruzgan 'extremely dangerous'*) Trouw, 30 January 2006,

<http://www.trouw.nl/tr/nl/4324/Nieuws/article/detail/1472679/2006/01/30/VS-rapport-Uruzgan-rsquo-extreem-gevaarlijk-rsquo.dhtml>

<sup>223</sup> *Al-Skeini v. United Kingdom*, supra note 43, §164

<sup>224</sup> *Giuliani and Gaggio v. Italy*, App. No. 23458/02, Judgment of 24 March 2011

<sup>225</sup> *Ibid*, §323

### 6.4.3 Shared living quarters

Another issue that possibly affects independence and impartiality is the fact that the KMar detachment is based on the same compound as the regular troops who might become subject to investigation. Also in *Jaloud v. The Netherlands* it has been argued by Mr Sabah Jaloud's representative that the investigation in the subsequent case was insufficiently independent on the ground that the KMar detachment in Iraq was 'under the sole command of the Netherlands battalion commander'. As the members of the KMar shared the living quarters of the regular troops, the distance between them and the individuals they might be called upon to investigate was deemed insufficient.<sup>226</sup>

Two principles of investigation are disputed here. First, it is asserted that the KMar lacks hierarchical independence because it is under the same chain of command as the soldiers on combat duty whom the KMar possibly has to investigate. When the KMar is sent along with the armed forces, the detachment is - merely on paper - placed under the contingent commando for administrative issues such as shipment of food and other materials. The chain of command is however not affected: in all matters concerning the investigation of criminal offences the KMar still acts under the exclusive authority of the minister of Security and Justice. The contingent commander has no operational tasks, nor does he direct the forces or the KMar detachment: he merely functions as an observer of the Defense Chief (*Commandant der Strijdkrachten*) abroad. Hence, as regards organizational matters, the KMar detachment is totally independent from the contingent commander; he cannot decide when the KMar should start or cease an investigation, nor whether a case should be referred to the prosecuting authority. The KMar officers are therefore not subject to the same chain of command as regular troops, so there is no hierarchical connection between the investigators and the soldiers under scrutiny.

Despite the separation of chain of command of the investigation officers from the soldiers on combat duty, a lack of independence may still be found if it turns out that the KMar was not operationally independent from the military chain of command i.e. that the contingent commander gave directions and/or instructions to the KMar as regards the investigation, acting outside the scope of his authority.<sup>227</sup> This should however be determined on a case by case basis and is not inherent to the organization of the military investigation mechanism.

Second, the sharing of living quarters-statement contests the impartiality of the investigators as the personal distance between the KMar police officers and the regular troops is deemed insufficiently to maintain an objective attitude towards individuals they might be called upon to investigate. As was indicated in section 4.4.2 the principle of impartiality requires the investigators not only to be actually impartial, they must be seen to be impartial too: the perception of impartiality. By way of illustration, in *Jaloud v. The Netherlands* there are some indications that might contradict the appearance of impartiality. For instance; the absence of statements in the investigation report taken from members of the ICDC that witnessed the incident, the alleged extreme cursory questioning of the driver of the car Jaloud was sitting in, and the statement taken by the Iraqi investigating officers of this driver that he had been told by the interpreter assisting the KMar to say that all shots had been fired by the ICDC, whereas in fact he had not seen any shots fired by ICDC personnel.<sup>228</sup>

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<sup>226</sup> *Jaloud v. The Netherlands*, supra note 7, §62(a)

<sup>227</sup> For instance, in *Al-Skeini v. United Kingdom* the Court found that even though the royal military police had a separate chain of command, the investigation was not independent due to the fact that it was generally for the commanding officer of the unit involved in the incident to decide whether the investigation officers should be called in. *Al-Skeini v. United Kingdom*, supra note 43, §172

<sup>228</sup> *Jaloud v. The Netherlands*, supra note 7, §30

A conflict between the investigator's personal and his public interest might affect his impartiality in decision-making or the speedy and objective discharge of his tasks. The combat soldier the KMar officer is chatting with over dinner, or who he now and then meets at the gym on the compound may be the beneficiary of a decision made in a conflict of interest situation. However, as follows from the Article 6 ECHR jurisprudence concerning impartiality of the judiciary;

'It does not necessarily follow from the fact that a member of a tribunal has some personal knowledge of one of the witnesses in a case that he will be prejudiced in favor of that person's testimony. In each individual case it must be decided whether the familiarity in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal'.<sup>229</sup>

As for the impartiality of the KMar investigators this means that the sharing of living quarters with the regular troops they might be called upon to investigate is in itself not sufficient to conclude that the investigation necessarily lacks (the perception of) impartiality. For the concrete shortcomings in the investigation to indicate a lack of impartiality on the part of the investigators, it will always be necessary to further scrutinize the nature and degree of the familiarity between the investigator and the individuals involved in the matter under consideration. However, even though the principle of impartiality does not demand the absence of any contact on the compound between the KMar investigators and the regular troops, both must at all times be fully aware of, and respect each other's position and responsibilities in order to avoid a relationship that might hamper the impartial position of the investigator. Especially when considering that a substitute - should the investigator get too close to the person under consideration - might not always be available in a mission area.

#### 6.4.4 *Military member*

Since the reform of the military justice system in 1991, criminal cases involving members of the armed forces are decided by the military chamber of the district court in Arnhem consisting of two civilian judges, and one military member. Several cases before the ECtHR have called into question the independence and impartiality of an army officer on the court because the military member is a serviceman who still belongs to the army and remains subject to military discipline.<sup>230</sup> Also in *Jaloud v. The Netherlands* it has been alleged by the applicant that for these reasons, the military chamber placed full reliance on the results of the very limited investigation by the KMar which indicates that the investigation was insufficiently independent.<sup>231</sup>

Apart from the discussion whether or not a military member necessarily lacks independence or impartiality due to his dual status, this statement gives rise to another problem: does the obligation to conduct an effective investigation even extend beyond the investigation to the trial stage? In *Öneryildiz v. Turkey* the Court ruled that the choice of law by the domestic court - to evaluate the conduct of two mayors only under a provision concerned with negligence in the performance of duty and not as a life-endangering act - did not secure the full accountability of State officials, in breach of the right to life.<sup>232</sup> Earlier in this judgment the Court explained:

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<sup>229</sup> *Pullar v. United Kingdom*, App. No. 22399/93, Judgment of 20 June 1996, §38

<sup>230</sup> *Incal v. Turkey*, App. No. 22678/93, Judgment of 9 June 1998, §68

<sup>231</sup> *Jaloud v. The Netherlands*, supra note 7, §62(c)

<sup>232</sup> *Öneryildiz v. Turkey*, supra note 15, §117

'The requirements of Article 2 go beyond the stage of the official investigation, where this has led to the institution of proceedings in the national courts: the proceedings as a whole, including the trial stage, must satisfy the requirements of the positive obligation to protect lives through the law'.<sup>233</sup>

This indicates that the ECtHR is increasingly seeking that not only alleged violations of Article 2 are investigated, but also that justice is actually done.<sup>234</sup> A distinction should however be made between the positive obligation to protect the right to life by law - the duty for the State to ensure an adequate response so that the legislative and administrative framework set up to protect the right to life is properly implemented -, and the obligation to investigate unlawful deaths, which is part of the former duty (see section 1.4.1). In sum, while the obligation to protect the right to life by law extends to the administration of justice, the principle to conduct an investigation independently does not. Rather, the principle of independence is concerned with the bodies primarily involved in the investigation such as the police, the prosecutor and the public prosecuting service. The question whether the obligation to conduct an effective investigation extends to the trial stage should therefore be answered in the negative.

This means that if the military member was biased or not independent due to its status at all, it does not affect the independence and impartiality of the KMar investigation. Instead, the status of the army officer should be considered under Article 6 ECHR; the right to a fair trial.

## 6.5 *Additional considerations*

As explained at the beginning of this chapter, it is impossible to give a well-founded opinion on whether a concrete investigation conducted in a mission area satisfies the requirements under Article 2 ECHR. Due to the high contextuality, this holds true especially as regards the principles of adequacy and transparency. This section will therefore pay notice to the absence of a legal framework governing the factual investigation, and how this might affect the effectivity of an investigation. Additionally, the safeguard provided for in the Code of Criminal Procedures will be discussed here.

### 6.5.1 *Non-regulation of factual investigations: adequacy*

As explained in section 6.3, in contrast to criminal investigations, factual investigations are not conducted within the framework under the Code of Criminal Procedures or any other legal framework. As a consequence, investigative powers and coercive measures as provided for in the Code of Criminal Procedures are not applicable to the factual investigation. Concrete, this means that the KMar, when conducting a factual investigation, is for instance not authorized to seize vehicles, weapons or other objects, or to involve a magistrate who can decide on matters such as the interception of telephone lines and the searching of homes (in the context of military operations: the searching of sleeping compartments).

These investigative powers and coercive measures become available as soon as there is a reasonable suspicion of the commission of a criminal offence. However, also in matters where there is no such suspicion (yet), it is not without significance that the truth surrounding an incident is being established. Members of the military are entitled to use force and may in the performance of their duties lawfully breach the right to life, provided

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<sup>233</sup> *Öneryıldız v. Turkey*, supra note 15, §95

<sup>234</sup> Anja Seibert-Fohr, *Prosecuting Serious Human Rights Violations*, Oxford University Press, Oxford, 2009, p.

they respect the rules of IHL. The use of force by agents of the State must at all times be accounted for: giving account for the use of force is part of our constitutional democracy and respects the interests of the victim and next-of-kin.<sup>235</sup> One can however not properly account for the use of force without having established a full picture of the facts surrounding an incident. In addition, an adequate and complete picture of the facts is required in order to ensure that the OM can found its decision as to whether or not to initiate a criminal investigation on a solid basis.

Sometimes, however, the means and methods at the disposal of the KMar in the context of a factual investigation are inadequate to obtain this full picture, and additional powers and measures will be necessary to establish the truth. Hence, under certain circumstances there may arise a lacuna between on the one hand the aspiration to obtain a complete factual picture regarding an incident to ensure legal oversight and accountability, i.e. to conduct an effective investigation, and on the other hand the lack of relevant competences to fully achieve this object. As a result, a factual investigation may be found to undermine the adequacy of an investigation more easily than would be the case for an investigation conducted within the framework of the Code of Criminal Procedures.

#### 6.5.2 *Non-regulation of factual investigations: transparency*

The absence of a legal framework governing the factual investigation may furthermore have implications for the involvement of the next-of-kin of the victim within the investigation process. In the Netherlands, the (relative of the) victim has a separate and independent position within criminal proceedings. Under the Victim's status act (*Wet versterking positie slachtoffers, 2011*), implemented in the Code of Criminal Procedures, victims have the right to information about the onset and progress of the proceedings, have access to the dossier and may add information to it which they deem relevant, both with the permission of the OM.<sup>236</sup> Previously, these rights were applied as a matter of policy, rather than on the basis of law.<sup>237</sup>

The guarantees in the Victim's status act apply in principle equally to criminal investigations conducted by the KMar. Factual investigations (and currently: the After Action Reports<sup>238</sup>) however are not conducted within the regular framework under the Code of Criminal Procedures so the provisions as regards the position of victims are not applicable. Instead, the KMar and OM maintain as a starting point the standards formulated by the ECtHR as regards the principle of transparency (section 4.4.5).

From a theoretical point of view it is desirable to bring the factual investigation also within the Code of Criminal Procedures as to ensure that the rights of relatives or victims are respected. From a practical point of view however it is rather doubtful whether the formal application of the Victim's status act will lead to the actual strengthening of the next-of-kin's position within the investigation since the guarantees contained in the Code of Criminal Procedures and the ECtHR principle of transparency are dependent on the concrete circumstances of the case. In every single case the OM needs to assess whether, and what information can and should be

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<sup>235</sup> Menno Dolman, Paul Ducheine, Terry Gill and Gert Walgemoed, *Functioneel geweldgebruik in internationale operaties: een spiegel van rechtspraak en praktijk, (Functional use of force in international operations: a mirror of jurisdiction and practice)* Militair Rechtelijk Tijdschrift, 2005, p. 411

<sup>236</sup> Slachtofferhulp Nederland, *De positie van het slachtoffer in het strafproces (The position of the victim within criminal proceedings)* <http://www.slachtofferhulp.nl/Algemeen/Slachtofferzorg/Positie-van-het-slachtoffer-in-het-strafproces/>

<sup>237</sup> Gill ea. supra note 201, p. 900

<sup>238</sup> See note 213

communicated to the next-of-kin and to what extent they can and should be involved in a running investigation process. Additionally, the victims are not always known, so their relatives cannot be traced either. This is illustrated by for instance the Battle of Chora (Afghanistan, 2007) which resulted in the death of approximately 100 people including soldiers, civilians and an unknown number of Taliban.<sup>239</sup> However, when the next-of-kin are known to the authorities, they must at a minimum be informed on the final judgment as regards the legitimacy of the use of force in order to safeguard their legitimate interests.

### 6.6.3 Article 12 complaint procedure

Where the KMar investigation is alleged to have been inadequate and, as a result, the public prosecuting service decides not to pursue a criminal investigation or to bring the matter to trial, anyone with a direct interest may lodge a complaint with the Court of Appeal in Arnhem under Article 12 of the Code of Criminal Procedure. The Court of Appeal, which also consists of two civilian judges and a military member, has the authority to review the investigation and may order that the investigation must be reopened or that the matter must be brought before trial. The Article 12 complaint procedure is open to anyone with a direct interest (e.g. the victim or his next-of-kin), regardless of nationality or domicile and may be submitted as long as prosecution of the particular offence is not precluded by the lapse of time. As regards war crimes, no temporal limitations are applicable however.<sup>240</sup> Offering a counterbalance to the principle of discretionary powers and the prosecutorial authority of the public prosecuting service, the Article 12 complaint procedure can be considered an additional safeguard in guaranteeing the effective investigation into alleged offences involving members of the armed forces.

The matter of Jaloud was the first case calling for the prosecution of a member of the Netherlands armed forces deployed abroad. Even though it did not lead to the prosecution of the soldier concerned in the particular case, it may nonetheless set a precedent for the relatives of the war victims in Afghanistan (ISAF) or future military operations. However, due to the distance between the Court of Appeal and the mission area, deficient means of communication, and the lack of knowledge and means to start an Article 12 complaint procedure, the practical relevance of this additional safeguard for an effective investigation could be called into question.

## 6.7 Conclusion

The military investigation mechanism in the Netherlands can be summarized as a hybrid IHL/ECHR mechanism, containing elements derived from both the framework under international humanitarian law and the Convention. For instance, the trigger for investigation tends towards the ECHR since investigation - whether factual or criminal - is not limited to war crimes, but extends to every matter involving the use of force. The distinction made between the general obligation to conduct a factual investigation to examine whether the soldier acted within the confines of the instructions, and the additional obligation to investigate and prosecute criminal offences, is on the other hand derived from IHL. Yet, as the ECHR is applied by OM as a matter of policy whenever Netherlands armed forces are deployed abroad, the framework under the Convention might be considered predominantly.

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<sup>239</sup> *Over 100 die in Southern Afghan Battle*, USA Today, 18 June 2007  
[http://usatoday30.usatoday.com/news/world/2007-06-18-afghanistanairstrike\\_N.htm?hiddenMacValue=0&hiddenMacPrintValue=0](http://usatoday30.usatoday.com/news/world/2007-06-18-afghanistanairstrike_N.htm?hiddenMacValue=0&hiddenMacPrintValue=0)

<sup>240</sup> Article 13 International Crimes Act

Despite that, as this chapter revealed, maintaining the principles governing an investigation under the ECHR is fraught with difficulties, inherent to armed conflict in general and the fact that the investigation is conducted outside the territory of the State. In this respect, the issue of independence and impartiality has been further discussed. Furthermore, the difficulties attached to the absence of a legal framework governing the factual investigation have been identified. What follows is that none of the matters considered affect the effectivity of an investigation per se, so the military investigation mechanism as such does not breach Article 2 of the Convention. However, depending on the circumstances of the particular case, the matters considered remain particular points of interest because what is at stake here is nothing less than the public confidence in the State's monopoly on the use force. For this reason the next and last chapter of this thesis will conclude with a recommendation to further prevent allegations of investigations in breach of Article 2 ECHR.

## Chapter 7

### Summary, conclusions and recommendation

As this research revealed, there is no quick and easy answer as how to apply the obligations under the European Convention on Human Rights exactly to armed conflicts, a situation that is in principle governed by IHL. The obligation to investigate alleged breaches of the right to life under Article 2 ECHR does not constitute an exception either; on the one hand there is the aspiration as adhered to by the ECtHR to ensure that the limitations on the use of lethal force by agents of the State are not illusory or theoretical, but practical and effective. On the other hand however, there is the reality of current armed conflicts, involving the continuous threat of force, the interest of continuation of combat operations and the limited resources available in mission areas abroad. In this final chapter the results of this research are presented in section 7.1, concluding with a recommendation and a call for further research in section 7.2.

#### 7.1 *Research results*

*What is the scope and nature of the obligation to investigate violations of the right to life under the ECHR in situations of armed conflict?*

An analysis of these two bodies of law led to the conclusion that the obligation to investigate is well established in both IHL and the ECHR. Even though both obligations do not significantly differ from each other, some important distinctions remain, essentially stemming from the fact that the obligation to investigate in IHL is already sensitive to considerations of military and humanitarian interest because it was developed with the specific circumstances of armed conflict in mind. In contrast, the ECHR maintains a standard that is primarily designed to uphold the rule of law in situations of peace.

Notwithstanding these considerations, it was deduced from the approach of the ECtHR that, where both IHL and the ECHR are applicable in an armed conflict situation, the Convention applies in full force to the extent that there is no obligation (*not: authorization*) under IHL that explicitly requires to act contrary to the Convention. Since none of the Geneva Conventions nor its Additional Protocols contain such provision as regards the obligation to investigate, it follows that investigations into deaths resulting from actions of the armed forces engaged in armed conflict are fully governed by the framework developed under the ECHR.

As a consequence, any investigation conducted in a military context where no derogation is made will be tested against the ECHR-principles of independence, impartiality, adequacy, promptness and transparency. Even though these principles were not specifically designed for investigations to be conducted in an armed conflict situation, it is important that the authorities make any reasonable effort to obey the standards because otherwise, an investigation would be no more than a 'manoeuvre of artful deceit'.<sup>241</sup> Furthermore, as the armed forces have the methods and means at their disposal to do serious harm, upholding the principles is necessary to ensure accountability and a responsible approach to the use of force.<sup>242</sup>

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<sup>241</sup> Tomuschat Committee, *supra* note 94, §30

<sup>242</sup> Statement of the public prosecution service in Gill *ea.* *supra* note 201, p. 930



*Was the mechanism in the Netherlands that examined and investigated unlawful deaths resulting from conduct of members of the Netherlands armed forces in Iraq able to satisfy the procedural requirements under Article 2 ECHR?*

The downside however of upholding the ECHR-standards in armed conflict situations was illustrated by the examination of the military investigation mechanism in the Netherlands. This observation revealed that maintaining the principles governing an investigation under the ECHR is fraught with difficulties inherent to combat missions abroad in general. However, several constraints were already addressed within the mechanism for investigation, which leads to the following conclusions.

Several measures have been taken to ensure that the investigation is conducted outside the chain of command in a manner consistent with the requirement for independence. In this respect, investigations - whether factual or criminal - into the military are conducted within the civilian justice system by the KMar military police, under the exclusive authority and direction of the OM, a body within the Ministry of Security and Justice. The separation of chain of command is further strengthened by the fact that the military authorities do not have any control over the investigation by the KMar and are not in the position to give directions or instructions to either the KMar or the OM.

Multiple difficulties challenging independence have been identified, including the balancing of interests, the placement of the KMar under the contingent commando, the military member of the court and the cooperation with the commander and military experts. As was argued, none of these matters affect the separation of authority or independence of the investigators per se. Nonetheless, as regards the latter concern, it should be made clear that involvement of the military in the investigation - even though desirable with a view to the decision to be made by the OM - has its limitations. In order to prevent allegations of partiality, the KMar and OM should take extra care of the persons to be consulted and the subject they are consulted on.

Just as independence, a lack of impartiality can only be found on a case-by-case basis and is not inherent to the military investigation mechanism as such. In this respect the 'dual hat' of the KMar officers, i.e. the blue military, and the sharing of living quarters with individuals they might be called upon to investigate were discussed. A strict separation of the investigation officers and the regular troops on the compound neither is achievable nor demanded by the principle of impartiality. However, it is of great importance that both actors must at all times be fully aware of, and respect each other's position and responsibilities in order to avoid a relationship that might hamper the impartial position of the investigator. To foster this awakening, commanders could for example provide for additional education.

In addition, some comments have been made on the absence of a legal framework governing the factual investigation. As was demonstrated, the fact that the factual investigation is not conducted within the framework under the Code of Criminal Procedures influences the adequacy and the transparency of the investigation.

Especially as regards the principle of adequacy this is rather worrisome because bringing the factual investigation within a legal framework would probably have an immediate effect on the adequacy of the investigation in practice. Overcoming the gap between the objective to conduct an effective investigation and the means at the disposal of the KMar to achieve this goal is essential because without the whole truth, the military cannot properly account for the use of force and the OM would not be able to base its decision as to whether to initiate a criminal investigation on a solid basis.

As to the principle of transparency, the effect of bringing the factual investigation within the framework under the Code of Criminal Procedures seems rather theoretical as involvement of the next-of-kin is dependent upon the circumstances of each concrete case. However, it might nonetheless be useful because the authorities will have a framework at their disposal that will guide them through the investigation process and, when the concrete circumstances would not allow for the participation of the next-of-kin, will force the KMar and OM to give account for their decisions. Thus, while it will probably not have a significant effect on the participation of the relatives in practice, it may at least increase awareness as to the position of the next-of-kin in the investigation process.

In sum, the military investigation mechanism in the Netherlands that examined and investigated unlawful deaths resulting from conduct of members of the Netherlands armed forces in Iraq is as such able to satisfy the procedural obligations under Article 2 ECHR. However, the matters discussed in chapter 6 remain particular points of interest: the right to life ranks as one of the most fundamental rights of the Convention, so the authorities must make any reasonable effort to prevent a culture in which criminal offences by members of the armed forces are investigated only marginally. To prevent future allegations of investigations in breach of Article 2 ECHR, this thesis shall conclude with a recommendation.

## *7.2 Recommendation*

For the reasons explained above, both the adequacy and transparency of the factual investigation would benefit from bringing the factual investigation within a legal framework. Therefore it is to be recommended that the government explores the options to place the factual investigation within the framework of the Code of Criminal Procedures. It is however important to note that far-reaching investigative powers and coercive measures become available in a situation where a reasonable suspicion of the commission of a crime has not arisen yet and, as a consequence, are going to be exercised vis-à-vis persons who do not have the capacity and rights of an accused. It will thus be necessary to create a separate regime as regards the means that will become at the disposal of the KMar or to provide for some additional safeguard for the soldiers involved. How this could be realized is however a question for further research.

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