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Foreword

A unit is being attacked by insurgents with small-calibre weapons. The soldiers return fire and decide to go back to their patrol base nearby. They report the incident and state that they had not seen any civilians. Three days later the local authorities announce that a child had been killed on the site where the exchange of fire had taken place, allegedly as a result of the unit's fire. Investigating officers of the Royal Marechaussee happen to be present at the patrol base. In consultation with the on scene commander the investigators decide to go to the site at once and to examine the claim, a fact finding investigation….

The investigating officers could be confronted with many challenges in any kind of investigation (fact finding or criminal investigation). One of these challenges is the safety situation outside the patrol base which does not allow the investigating officers to carry out the investigation without protection. They are not able to take care of this itself and must therefore rely on the unit. Experience shows that it takes no less than a platoon to be able to provide the required protection. Considering platoons being scarce means as well, this may affect the freedom of action of the commander and therefore also the course of the operation. The trick is to find a balance between the interests of the investigation and those of the operation. The incident took place three days before the investigators were informed. This may mean that the on-site situation could partly or completely have changed and/or traces have disappeared. The investigators get in contact with witnesses, but direct hearing appears to be impossible. The tribal chief or other persons with a certain status act as spokesmen, instead of the alleged witnesses. The investigating officers are not allowed to hear a child who, according to the tribal chief, was an eye witness. Furthermore, the locally acquired interpreter does not have sufficient command of the English language to interpret at an adequate level. The investigators are not able to establish the identity of the witness and have difficulty in establishing the truthfulness of their statements. It cannot be ruled out that these statements may be coloured as a result of political motives, tribal interests, the possibilities to claim damages from the foreign troops, but also as a result of fear of retaliation by insurgents. Forensic investigation is required, but the body of the alleged victim is already buried. If forensic investigation is possible, it might not meet the quality standards as in the Netherlands. Investigating officers will be confronted with the abovementioned challenges and many more when there are civilian casualties after a fight with a high intensity and sustained character in which soldiers of different nations have taken part.

Military prosecutors will not be spared. If the investigation does not meet the regular standards, this will influence the evidential value of its results. A decision not to investigate the incident any further might be questioned in court by the victim or surviving relatives. If an investigation is carried out into the legitimacy of military use of force, there must be a perception of the powers to use force and related instructions (mandatory or not). Operational orders, after action reports and other documents that give an insight in the context, in which the incident

occurred, are of interest for the investigation and should be studied. These documents, however, have in common that they are all classified. This may also involve internationally classified information. How does one deal with this?

Soldiers who are sent on a mission to conduct a military operation fulfil complex tasks under difficult circumstances. To fulfil their tasks, they are assigned powers to use force, which - depending on the mission - are more or less robust. As the armed forces of the government, soldiers must rely on the fact that they will not be prosecuted if they remain within the limits set, when making use of their powers to use force. On the other hand, use of force must always be justified. This requires that in the military chain of command and/or the judicial line use of force is reported. It goes without saying that in case of doubt of the lawfulness of the use of force, an investigation will be conducted.

There is not any case law in The Netherlands yet which provides insight in the way in which the judiciary deals with such challenges as described above. In military case law there is only one judgment to be found that is relevant in this context. This concerns a judgment of March 2008 of the military chamber of the court of appeal in Arnhem in a complaints case for not prosecuting a Dutch soldier who was involved in a lethal shooting incident in the surroundings of Ar Rumaythah (Iraq) in April 2004. The court established in its first statement of reasons relating to the complaint that the nature of the investigation as compared to what is customary in investigations of violent offences with fatal consequences, had been summary. However, the court immediately added that it realized that the investigation was hampered by on-site circumstances. The court attached no consequences to the fact that the investigation was not up to the mark according to Dutch standards.

What is relevant in this context is the case law in regard to the right to life ex art 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). From this right stems the obligation of the member countries to investigate the use of government force. The ECHR affects therefore the legal scope within which the use of force in military operations must be judged and the investigation that must be conducted by investigation and prosecution authorities in such cases. Obviously this influence will be felt in case the ECHR applies *de jure*. One could argue, however, that this obligation will also be felt in regard to events in mission areas that are not covered by the extra-territorial scope of this Convention. For, it is consistent with a democracy based on the rule of law to observe the greatest possible efficacy, objectivity and energy in carrying out investigations in all cases in which use of force infringes the right to life. As illustrated in the abovementioned incident, the actual circumstances can harm the extent to which the requirements of the ECHR with regard to a criminal investigation in case of government force can be met in "war zones".

Some fundamental questions that are of importance in this context are: when does the European Convention apply in mission areas outside the convention area? How does International Humanitarian Law relate to International Human Rights Law? What causes soldiers to commit (war) crimes during military operations? According to the European Court, what

are the minimum standards in regard to investigating use of government force and how could one meet these standards in mission areas? What responsibility does the commander and the public prosecutor carry when (mis)conduct of soldiers is being investigated and how do these responsibilities relate to one another?

On 16 September 2009 scholars and practitioners of national and international repute elaborated on these questions and gave an insight into the legal challenges with regard to the application of the European Convention in relation to law enforcement in military operations. This conference was organised by the military criminal law branch of the public prosecutor's office Arnhem in close collaboration with the Amsterdam Center for International Law. Representatives of (military) investigation and prosecution authorities from different countries, scholars and officials from the Dutch Ministry of Justice, Defence and Foreign Affairs and various national and international organisations were invited to participate in the discussions. In this edition you find some of the speeches that were given.

To conclude, military operations develop quickly and as a result legal questions will arise that have to be answered and legal deficits have to be tackled. Enforcement of crimes committed during military operations takes place at national level. It is an established fact that investigation and prosecution of criminal offences committed by the military are organized in ways that differ widely among countries. This does not, however, detract from the importance for investigators and prosecutors to think out of the "national" box and learn from experiences of colleagues from other countries. The multinational setting in which investigations take place requires investigators and prosecutors to have an understanding of the military criminal law system of the other participating countries and their view on operational law issues. When investigations have to be coordinated or cooperation is required it is helpful to know the official authorities that are involved.

For that reason the public prosecutor's office has organized an expert meeting on law enforcement in military operations on the day following the conference. Representatives from the United States, United Kingdom, Germany, France, Denmark, Belgium and the Netherlands participated in this meeting and many topics were touched upon and various aspects of the military criminal law system were compared.

This meeting was also the starting point for the International Network for Military Investigators and Prosecutors. This network aims at establishing and strengthening professional contacts with counterparts in other countries as well as exchanging knowledge and experiences on law enforcement in mission areas. With this a pool of knowledge related to the practical application of military criminal law will be generated and by this exchange the speciality in this field of criminal law will be further developed.

De redactie

The Convention abroad
Extra-territorial applicability of the European Convention on Human Rights

BY ROELAND BÖCKER[1]

A recent phenomenon

Extra-territorial operations by States – military or otherwise – are as old as statehood itself and have by no means ceased to occur since the creation of the European Convention on Human Rights ('the Convention'). The extra-territorial applicability of the Convention seems however largely a twenty-first century topic, whereas the Convention itself will soon celebrate its sixtieth birthday.

Focusing on the European Court of Human Rights, all relevant jurisprudential developments, with only a few exceptions, took place after the turn of the millennium. I raise this point mainly to substantiate my strong impression that this issue is still in its infancy and by no means fully crystalised.

The ends of the scale

In determining the extent to which the Convention may be applied to state conduct abroad, in particular to military operations, two extreme positions can be distinguished for argument's sake. One extreme would be the view that states should not be bothered or limited in their military activities abroad by the standards of a regional instrument that is clearly not tailored to the specific circumstances and requirements of warfare or peace-keeping. Even Article 15 of the Convention, which allows for derogation in times of emergency, would appear to be written exclusively for situations threatening the life of the nation, which is an extremely narrowly defined category. Protection in situations of war or peacekeeping should, according to this argument, not be found in human rights law, or *lex generalis*, but in international humanitarian law, or *lex specialis*, and other sources related to the specific situation, such as status of forces agreements. This traditionalist approach obviously does not reflect the official position of any of the states parties to the Convention, since it would not be in conformity with the case law of the European Court. The unrestricted detention of suspected terrorists on Cuban territory, introduced by the previous US administration, would, however, seem to be inspired by the idea that location is the unique decisive factor for the legal regime in force.

[1] Roeland Böcker is the Government Agent of the Netherlands to the European Court of Human Rights. This article reflects his personal views and may not automatically be taken to represent the views of the Government.

The other extreme on the scale would be the view that the applicability of the Convention is triggered as soon as any Government official sticks his or her nose across the border, in an official capacity, or as soon as the Government takes a decision affecting the position of individuals abroad. This would include not only military activities in all their forms and manifestations, but also purely diplomatic or consular contacts between states or, for example, decisions to institute commercial or political sanctions against other states or decisions in the area of development cooperation. The sending state would – in such a scenario – be obliged to guarantee the full range of Convention rights to anyone affected by its activities or decisions and, consequently, fulfil all its negative and positive obligations under the Convention. It goes without saying that this holistic or perhaps idealistic approach would lead to totally unworkable situations in which traditional interstate relations would be seriously undermined by perceived Convention obligations of one kind or another.

Striking the balance

The extremes now having been determined and defined as either unlawful or unworkable, it is time to focus on the middle ground, where, as is so often the case, solutions may be found. The quest, in other words, is for a realistic approach which strikes the right balance between the extremes. This realism, this balance, is badly needed in an era when national, regional and universal interests and standards meet, and inevitably clash, more than ever before, leaving us with numerous dilemmas to be solved. This is beautifully exemplified by the cases of *Kadi* and *Al-Barakaat*[2] before the judicial organs of the European Union, concerning the fundamental rights of individuals listed by the UN Security Council as suspected terrorists, whose assets must be frozen by all UN member states, but whose procedural rights in that regard do not yet fully meet our European standards. The Court of First Instance, the advocate-general and the Court of Justice all had differing views on the interrelatedness of the various levels of law.

The European Court of Human Rights, for its part, has been all too aware of the context in which it operates. Time and again, it has expressed the opinion that the principles underlying the Convention cannot be interpreted and applied in a vacuum. The Convention forms part of international law and should therefore be interpreted as far as possible in harmony with other principles of international law. One such principle is the applicability of international humanitarian law to international and non-international armed conflict, which, as lex specialis, prevails over – but does not set aside! – general human rights law. Another crucial principle in this context, and most relevant to the present issue, is the essentially territorial character of the term 'jurisdiction' as it is used in international law, including in Article 1 of the Convention, which outlines the scope *ratione personæ* of the states parties' obligations. In keeping with this essentially territorial notion of jurisdiction, the Court has accepted only in exceptional cases that acts of the states parties that were performed or produced effects outside their territories can constitute an exercise of jurisdiction by them within the meaning of Article 1 of the Convention. Such exceptional cases included, notably:

[2] ECJ, 3 September 2008, joint cases C-402/05P and C-415/05P, LJN (index) BF7850, NJ 2009, 38.

- *Loizidou versus Turkey*[3], where Turkey was considered to exercise effective overall control, and therefore jurisdiction in northern Cyprus due to the presence of large numbers of Turkish troops there;
- *Ilascu and Others versus Moldova and the Russian Federation*[4], where the same conclusion was drawn with respect to the Russian military presence in the Moldovan region of Transdnjestria, although in this case jurisdiction was equally attributed to Moldova itself;
- *Isaak versus Turkey*[5], where the effective control by Turkey of northern Cyprus was – in the context of the case at hand – deemed to extend to the neutral UN buffer zone on Cyprus; the case concerned the Turkish involvement in the killing of a civilian demonstrator within that territory;
- *Georgia Andreou versus Turkey*[6], where the applicant – while attending a demonstration at the occasion of the funeral of Isaak, mentioned above – was shot by Turkish-Cypriot forces from Turkish-Cypriot territory; the fact that the applicant herself remained in Greek-Cypriot territory did not stand in the way of assuming Turkish jurisdiction for the acts complained of;
- *Öcalan versus Turkey*[7], where the abduction of the applicant in Kenya by Turkish security forces brought him within the jurisdiction of Turkey;
- *Issa and Others versus Turkey*[8], where the alleged arrest and killing of Iraqi shepherds by Turkish forces in northern Iraq brought the applicants under Turkish jurisdiction;
- *Xhavara and Others versus Italy and Albania*[9], where the attack on a ship transporting Albanian refugees by an Italian war vessel in international waters off the coast of Italy sufficed to bring the victims under the Italian jurisdiction, and most recently
- *Al Saadoon and Mufdhi versus the United Kingdom*[10], where the applicants, two detainees in a British detention facility in Iraq were under British jurisdiction before being transferred to the Iraqi authorities. The merits of this case remain to be examined by the Court. The complaint involves Articles 2 and 3 of the Convention, which do not allow for any margin of appreciation or other form of discretion by the state party. It will therefore be extremely interesting to learn the Court's assessment of the UK Government's argument that it was obliged under international law to surrender the applicants to the Iraqi authorities, on whose behalf – and on whose territory! – the applicants were detained in the first place.

What these cases have in common is the fact that the respondent state was actually exercising a certain level of *de facto* control over the applicants, if not *de jure* as well. This aspect of the Court's case law, at least, would appear to have been sufficiently developed by now. For example, in the case of *Medvedyev and Others versus France*[11], currently still pending before the Grand Chamber of the Court, France did not even raise the jurisdiction issue in a situation of

[3] ECHR judgment (preliminary objections), 23 March 1995, Appl. No. 15318/89.
[4] ECHR decision (admissibility), 4 July 2001, Appl. No. 48787/99.
[5] ECHR decision (admissibility), 28 September 2006, Appl. No. 44587/98.
[6] ECHR decision (admissibility), 3 June 2008, Appl. No. 45653/99.
[7] ECHR decision (admissibility), 14 December 2000, Appl. No. 46221/99.
[8] ECHR decision (admissibility), 30 May 2000, Appl. No. 31821/96.
[9] ECHR decision (admissibility), 11 January 2001, Appl. No. 39473/98.
[10] ECHR decision (admissibility), 30 June 2009, Appl. No. 61498/08.
[11] ECHR judgment (merits and just satisfaction), 10 July 2008, Appl. No. 3394/03.

interception by a French frigate of a merchant ship allegedly involved in drugs trafficking in the international waters.

The Dutch record

This does not mean that each and every activity by states outside their own borders implies the existence of *de facto* control and therefore of jurisdiction within the meaning of the Convention. This brings me to the Dutch record, which up until now has not seen any instances of extra-territorial jurisdiction in proceedings before the Court. In the famous – some would probably say infamous – case of *Bankovic and Others versus seventeen NATO member states* (including the Netherlands) [12], an air strike on the Serbian radio- and television station in Belgrade was *not* considered to imply effective control and thereby jurisdiction by the respondent states. This decision by the Grand Chamber has been severely criticised. Although the respondent governments were obviously satisfied with the Court's decision in this case, I do not consider it my task to defend the Court's judgments against criticism. The Court can speak for itself. Moreover, the decision in Bankovic is now almost eight years old. All I can say is that – whatever the other arguments entertained by the Court – it is understandable that the difference between the factual situation in Bankovic and the factual situation in the other cases I just mentioned led the Court to conclude that the *de facto* control over the applicants that was essential to the other cases was lacking in Bankovic.

The only other case concerning extra-territorial jurisdiction in which the Netherlands has been asked to respond, besides Bankovic, is the case of *Artemi & Gregory versus Cyprus and twenty-one other member states of the European Union* (including the Netherlands)[13], which is currently pending before the First Section of the Court. The applicants are Cypriot nationals living in the United Kingdom, who complain that their right to freedom of movement under Article 2 of Protocol No. 4 to the Convention is violated since they are not free to enter their village of origin in northern Cyprus. Turkey would, in keeping with the Court's *Loizidou* judgment[14], normally be considered responsible for this, but it is not a party to Protocol No. 4. Therefore, the applicants now turn to the EU member states claiming that the formal suspension of the EU *acquis* in northern Cyprus upon the accession of Cyprus to the EU is the true cause of their misery, since this suspension allegedly legitimized the partition of the island. The respondent states, represented by the EU Presidency, have argued that the applicants can in no way be considered to fall under their jurisdiction since there is no level of control whatsoever. Even the most generous interpretation of the Court's case law could not lead to a different conclusion. Slightly more ambiguous, perhaps, is the position of Cyprus, which has submitted separate observations, pointing at its inability to exercise any *de facto* control in the northern part of the island. The Court's decision on admissibility of the application is currently awaited.

[12] ECHR decision (admissibility), 12 December 2001, Appl. No. 52207/99.
[13] *Artemi & Gregory versus Cyprus, Austria, Belgium, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia and Sweden*, Appl. No. 35524/06.
[14] See footnote 3.

The UK experience; rights of members of the armed forces

I am well aware of the fact that an analysis of Strasbourg case law offers only limited guidance to Defence and Justice authorities confronted with incidents during military operations. It will not come as a surprise that it is particularly the United Kingdom national experience which may be of help here, since among all states parties to the Convention the UK has been most actively involved in international military operations in recent years. In the case of *Al Skeini and Others versus the Secretary of State for Defence*[15] five Iraqi victims who were killed by British troops during armed incidents in Iraq were not considered to be under British jurisdiction in the sense of Article 1 of the Convention. The sixth victim, however, who was first taken to a British military base and then died, allegedly as a result of torture, did come under British jurisdiction. In my view, a fairly clear and logical line would seem to have been drawn here.

The British experience moreover provides an interesting insight into the issue of the states parties' responsibilities under the Convention vis-à-vis the members of their own military whenever the latter become victims of an alleged violation of the Convention. This is in fact the reverse situation of what I have described so far. In the judgment in the case of *R (Smith) versus the Secretary of State for Defence*[16], it was found that members of the armed forces are at all times and in all places around the world within the UK jurisdiction for Convention purposes. This principle will obviously be relevant first and foremost in the light of the Government's positive obligations under Article 2 of the Convention, guaranteeing the right to life. It will inevitably have consequences for the level and quality of equipment the military are provided with whenever involved in operations. It will also, as expressly stated in the judgment, require an independent and effective investigation into the death of a member of the armed forces, whatever the circumstances and wherever in the world the death occurs. Since the facts of this particular case were rather straightforward – Private Smith in fact died of heatstroke at a UK military base in Iraq – these questions were dealt with only hypothetically in the judgment.

Be that as it may, I consider it no more than logical that members of the armed forces, who remain subject to their national state's military law and may be tried by their national military courts irrespective of the place where they operate, remain under the jurisdiction of their national state at all times. The law follows the flag. After all, the legality of the armed forces' presence abroad and of their actions depends on their being subject to the national state's jurisdiction and their compliance with national laws. This understanding also forms the basis of a draft recommendation on human rights of members of the armed forces, which is currently being prepared within the Council of Europe.[17]

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[15] House of Lords, 13 June 2007, [2007] UKHL26.
[16] Court of Appeal, 18 May 2009, [2009] EWCA Civ 441.
[17] Draft Recommendation of the Committee of Ministers to member states on human rights of members of the armed forces, CDDH (2009)019 Addendum III.

The Relationship between International Humanitarian Law and International Human Rights Law and its Perceptibility in Case Law

By Professor Peter Rowe[1]

The use of force during the course of military operations, particularly by the armed forces of a State within its own territory, has occurred relatively frequently within States, members of the Council of Europe. This paper will look at two broad questions. First, which bodies of law will govern the soldier's actions and secondly, why military misconduct occurs in a disciplined army. These two issues are related to each other since if the legal norms applicable to a soldier during military operations are unclear it may be expected that misconduct will occur more frequently than otherwise might be the case.

Which body of law? The relationship between international humanitarian law, human rights and national/military law

Whether international humanitarian law applies or not will depend upon whether there is an armed conflict in existence to which the State concerned, through its armed forces, is a party or which exists within the State. There may be some doubt as to whether an armed conflict exists within a State since the government may deny its existence. On the other hand, the human rights obligations of the State apply at all times, subject to any permitted derogations.[2]

The boundaries between international humanitarian law and international human rights law are not self-limiting. Despite their separate development the underlying purposes of each branch of international law lead us to conclude that there is considerable overlap between them.[3] It is, however, the nature of their enforcement procedures which might appear to establish differences. Before considering their relationship in detail, however, it is necessary to consider the angle from which the issue is approached.

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[2] See, for example, A and others v United Kingdom, Application No. 3455/05, Grand Chamber Judgment, 19 February 2009. No derogation is permitted from Art.3. Definitions of torture, inhuman or degrading treatment respectively are given in ibid, para. 127 . For a finding of torture within Art.3 see Elci and others v Turkey, Application Nos. 23145/93; 25091/94, Judgment, 13 November 2003, para. 646. For a permitted derogation from Art.2, see Art.15(2). Quaere whether 'war' includes a non-international armed conflict. It cannot cover any situation short of an armed conflict.

[3] See common Art.3 to the Geneva Conventions 1949; Art.75 of Additional Protocol I; the preamble to, and Art.4 of, Additional Protocol II, 1977; Geneva Convention III, 1949, Art.121 (investigation into death of a prisoner of war) and see Varnava v Turkey, Application No. 16064/90, Grand Chamber Judgment, 18 September 2009, para. 174 and for the role of the international Committee of the Red Cross, ibid., paras. 167, 208. A number of UN Security Council resolutions treat international humanitarian law and international human rights law as virtually interchangeable terms. See, for example, UN Security Council Resolution 1814 (2008), paras. 16, 17. In some cases, such as the prohibition on the recruitment of children under the age of 15 years to take part in an armed conflict, there may be disagreement as to whether the source of this prohibition is international humanitarian law or international human rights law.

This relationship can be observed from at least five levels. The first is the analytical, concerned principally with the lex specialis where, in the relatively rare case, each branch may produce a different norm to govern a particular situation.[4] The second is the liability of the State to a private individual (or another State) for the acts of its armed forces.[5] Thirdly, this relationship can be seen from the standpoint of the individual soldier. Fourthly, it can be considered in relation to rebels who have taken up arms against the government of their State.[6] Finally, the relationship of these two branches of international law needs to be considered in relation to national law.

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[4] See Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (1996) ICJ Rep 226, para.25; Legal Consequences of the Construction of a Wall in the Occupied Territory (2004) ICJ Rep 136, para.106; Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda), ICJ, 2005, para.215. The clearest examples of IHL being the lex specialis would be the right of combatants to attack other combatants (by means which are not prohibited) and military objectives, requisitions of property from private individuals (although compensation is to be paid) and the detention of prisoners of war until the cessation of active hostilities. In addition, a UN Security Council resolution may take precedence over a State's human rights obligations, R (Al-Jedda) v Secretary of State for Defence [2007] UKHL 58 and the effect of UN Security Council Resolution 1546 (2004).

[5] See Hague Convention (IV) 1907, Art 3; Additional Protocol I, 1977, Art 91. See also N.Jorgensen, The Responsibility of States for International Crimes (Oxford University Press, 2000), p.195. The European Court of Human Rights (ECtHR) has set its face against the award of punitive damages, see Varnava v Turkey (note 2 above) para.214. The United Kingdom Ministry of Defence was held vicariously liable for the torts of British soldiers who killed two civilians in Kosovo in 1999 while taking part in a United Nations peacekeeping operation, Bici and another v Ministry of Defence [2004] EWHC 786 (QB).

[6] The applicability of Common Art. 3 to the Geneva Conventions 1949 to 'each Party' to a non-international armed conflict is of considerable significance. This article has been described as a 'Convention in miniature' in J.Pictet (ed), Commentary to Geneva Convention I (ICRC,) p.48. Rebels may agree voluntarily to apply certain weapons control treaties. See Geneva Call <http://www.genevacall.org/home.htm> The position in relation to international human rights law is not so clear. The norms established by Common Art 3 are virtually identical to the fundamental principles to be found in human rights treaties. If Common Art.3 is applicable (in the case of an armed conflict) it would seem otiose, in practical terms, to determine whether, in addition, fundamental human rights obligations are also owed by rebels. Where the rebels are in breach of Common Art.3 it is likely that they will also be in breach of the national law (in some form or other) of their State and thus be liable accordingly. The importance of holding them liable principally to international humanitarian law is that they may more easily be prosecuted by another State exercising extra-territorial jurisdiction or by the International Criminal Court under the Rome Statute 1998. Very few States are likely to possess criminal jurisdiction over 'fundamental human rights' breaches (as such and distinguished from torture or international humanitarian law) committed outside their territory. Other sanctions might involve travel bans or deporting suspects. See S.Ratner, J.Abrams, J.Bischoff, Accountability for Human Rights Atrocities in International Law (Oxford University press, 3rd edn, 2009) p281; J.Crook (ed) 'US Efforts to Identify and Deport Human Rights Abusers' (2008) 102 American Journal of International Law 179. Compare A.Clapham, Human Rights Obligations of Non-State Actors (OUP, 2006), p.280. Andrew Clapham also argues that 'the added value of the human rights framework allows for a wider range of accountability mechanisms, including monitoring by the Special Rapporteurs of the UN Commission of Human Rights,' ibid., p.285. This is, no doubt so, but such monitoring of rebel activity is unlikely to lead, in itself, to a greater respect by those rebels of the human rights of those who may be their potential victims. Further, he quotes with approval the statement by Dieter Fleck that 'if non-state actors have human rights, it appears logical that they must also have responsibilities, no different from the obligations insurgents have under international humanitarian law,' p.284. I do not think this conclusion follows logically. There can be no doubt that individual rebels are owed human rights, like any other individual within the jurisdiction of the State concerned. But it does not follow that all recipients of human rights also have responsibilities to the extent that a particular group of individuals (the rebels, even though they may be have the attributes of an organised armed group) owes these responsibilities in the same way as a State. In discussing the Turku/Abo Declaration of Minimum Humanitarian Standards, Martin Scheinin < http://www.ichrp.org/files/papers/91/120B_-_Turku-Abo_Declaration_of_Minimum_Humanitarian_Standards_Scheinin__Martin__2005.pdf > is much more cautious. He refers to the 'challenge' of 'legality: what is the authority of states to use the medium of international treaties or other instruments adopted by themselves to impose obligations on other actors?' It is a fallacy to argue that if rebels do not have human right obligations they can do as they please unchecked. For other sanctions against organised armed groups se J.Kleffner, 'The Collective Accountability of Organised Armed Groups for Systems Crimes' in H.van der Wilt & A.Nollkaemper, (eds), System Criminality in International Law (CUP, 2009) p.238, 253.

I want to concentrate on the impact of this law on the individual soldier and to consider why breaches of it occur from time to time. In particular, I want to stress how important it is for the law to be as clear as possible to the soldier and to his commanders so that the limits of any use of force can be understood by young men who have not been trained as lawyers.[7] It is the law with which I am concerned and not with military policy since if the two are in conflict the law must prevail.

In relation to an international armed conflict it is much more likely that soldiers will be trained in depth on the basic principles of international humanitarian law than on international human rights law, since the principal focus of a State's armed forces in the Council of Europe area will be to train for an international armed conflict. Should they be engaged in a non-international armed conflict, or in occupation of territory,[8] the role of human rights law will, perhaps, be thought of as being of greater significance, principally where civilians are detained by soldiers.

In terms of preventing breaches of human rights law terms it is, however, likely to be the national law of the soldier which will be most relevant to the legal issues surrounding a use of force in military operations. This statement needs, however, to be qualified. The national law concerned, whether in the form of the criminal, military or civil[9] law, should be compatible with the European Convention on Human Rights 1950 (ECHR).[10] Where it is the liability of the

[7] See generally, A.Carswell, 'Classifying the Conflict: a Soldier's Dilemma,' (2009) 873 International Review of the Red Cross 143.

[8] See generally, Y.Dinstein, The International Law of Belligerent Occupation (Cambridge University press, 2009) pp.81-88.

[9] Once a person is 'within the jurisdiction' of a State party to the European Convention on Human Rights obligations will also arise under the civil (non-criminal) law. Thus, a State is likely to owe obligations to a prisoner of war (other than under Art.5 or any other Article of that Convention inconsistent with Geneva Convention III, 1949) such as to protect his right to life from the unlawful activities of other prisoners of war in certain circumstances or even to prevent suicide by a prisoner of war. See, for example, Osman v United Kingdom (2000) 29 EHRR 245; Secretary of State for Defence v The Queen on the Application of Mrs Catherine Smith [2009] EWCA Civ 441; Van Cole and Another v Chief Constable of the Hertfordshire Police et al [2008] UKHL 50, [2009] 1 AC 225. It is likely also that a tribunal established by Art 5 of Geneva Convention III, 1949 or Art.45 of Additional Protocol I, 1977 would need to comply with Art.6 of the European Convention on Human Rights (although this is not dissimilar to Art.75 of Additional Protocol I, 1977). In the discussion above it is assumed that the detaining State has not issued any derogation from Art.6 of the European Convention on Human Rights.

[10] In McCann v United Kingdom (1996) 21 EHRR 97 the Court stated that 'the Convention does not oblige contracting parties to incorporate its provisions into national law. Furthermore, it is not the role of the Convention Institutions to examine in abstracto the compatibility of national legislation or constitutional provisions with the requirements of the Convention,' para.153. See, however, the Court's assessment of the relevant national law with Art.2 of the Convention, at para.156. Whilst the relevant national law is set out in Ramshai v Netherlands (2008) 46 EHRR 43, para.334 there is no direct attempt to compare it against Art.2.

individual soldier will match the human rights obligations of the State.[11] This is the real value of human rights law in relation to State actors. Through its implementation in national law soldiers can be held accountable for their actions.[12]

The scenario posed[13] of soldiers coming across a rebel leader in the supermarket can be resolved by applying national law, with which the soldier is familiar. To shoot the rebel leader there and then would involve issues (which I express in terms of Article 2 of the ECHR[14]) of whether it was 'absolutely necessary' for one of the purposes set out in that Article (which would included self-defence of the soldier concerned). This is unlikely to be the case unless a serious threat is actually perceived when the soldiers attempt to arrest the rebel leader.[15] If there is no threat to the soldier or to anyone else in the vicinity[16] and he, nevertheless, kills the rebel leader in the supermarket he will have committed a serious criminal offence. The risk of being held personally to account is likely to deter the soldier from committing a breach of the

[11] Compare Makaratzis v Greece (2005) 41 EHRR 49, para.55 and Nachova v Bulgaria (2006) 42 EHRR 43, paras.99-100, 104, 150 with McCann United Kingdom (1996) 21 EHRR. 97, para.156, Ramashai v Netherlands (2008) 46 EHRR 43, para.355 and Giuliani & Gaggio v Italy, Application No 23458/02, Judgment, 25 August 2009, para.244. In theory, a derogation from Art. 2 permitted for lawful acts of war, under Art. 15(2) may, or may not result in a divergence between human rights law and national law. There has, to date, been no such derogation. A further divergence might occur where human rights would hold the State responsible for the acts of those who planned a military operation but the national criminal law does not encompass this behaviour as a criminal offence. See McCann v United Kingdom, paras. 202-213, where those who planned the operation in Gibraltar caused the United Kingdom to be in breach of Art.2. See also Ergi v Turkey (2001) 32 EHRR 18, para. 79, 81; Isayeva, Yusopova and Bazayeva v Russia (2005) 41 EHRR 39, paras 170-171; Isayeva v Russia (2005) 41 EHRR 38, para. 176; Makaratzis v Greece (2005) 41 EHRR 49, para.68 (which shows the need for 'clear chain of command' to prevent police 'officers shooting erratically'); Erol v Turkey (2009) 49 EHRR 27, para.26 and compare Bubbins v United Kingdom (2005) 41 EHRR 24, para.150. There may be no criminal liability on the part of an individual but the State may be held to be in breach of Art.2 where it does not comply with the procedural aspects of that Art (or of Art. 3), where it fails to protect human life, Erol v Turkey (2009) 49 EHRR 27 or where the mental element for criminal liability is not present on the part of a State agent.

[12] So can the rebels, if caught. As to the enforcement of minimum standards of humanity on non-State actors through implementation in national law of internationally initiated statements or codes, see Martin Scheinin (note 5 above). This is the underlying reason for the obligation to conduct an independent investigation where a possible breach of Art 2 or 3 is apparent. The accountability of soldiers might, in some circumstances be based on military law which, by its nature, applies only to military personnel and not to all citizens.

[13] C. Droege, 'Effective Affinities? Human Rights and Humanitarian Law' (2008) 90 International Review of the Red Cross 501, 529. See also M.Sassoli and L.Olson, 'The Relationship Between International Humanitarian and Human Rights Law where it Matters: Admissible Killing and Internment of Fighters in Non-international Armed Conflicts' ibid., at p.599, 613.

[14] The ECtHr has also applied the UN Basic principles on the Use of Force and Firearms by Law Enforcement Officials in Panayi v Turkey, Application no.45388/99, Judgment, 27 October 2009, para.22.

[15] See Gul v Turkey (2002) 34 EHRR 28, para.80; Juozaitien and Bikulcius v Lithuania (2008) 47 EHRR 55, para.83; Panayi v Turkey, Application No.45388/99, Judgment, 27 October 2009, para.61. Compare McCann v United Kingdom (1996) 21 EHRR 97, para.200 where the soldiers concerned honestly believed that the three IRA suspects possessed a detonation device to explode a bomb in a place where there were a number of civilians. See also Bubbins v United Kingdom (2005) 41 EHRR 24, paras. 138-140; Makaratzis v Greece (2005) 41 EHRR 49, para.66; Akkum v Turkey (2006) 43 EHRR 26, para. 238; Ramsahai v Netherlands (2008) 46 EHRR 43, para. 382. See, however, the reasoning of Mr L Loucaides in his dissent from the decision of the European Commission on Human Rights in McCann v United Kingdom (1996) 21 EHRR 97 to the effect that the criminal liability of individuals must be distinguished from the liability of the State. Compare the position where soldiers are stressed because of a difficult situation they face, Kakoulli v Turkey (2007) 47 EHRR 12, para. 113.

[16] Compare the situation where bystanders are injured in an exchange of fire. In Ozkan and others v Turkey, Application No.21689/93, Judgment, 6 April 2004 the Court concluded that 'the callous disregard displayed by the security forces as to the possible presence of civilian casualties amounted to a breach of the Turkish authorities' obligation to protect life under Article 2 of the Convention,' para.307.

national law and, thereby, from causing his State to be responsible before the European Court of Human Rights (ECtHR) for his actions. The relevant human rights of potential victims are thereby protected not directly, but indirectly, by human rights law.

The same issue arises in the same form in relation to international humanitarian law since the obligations contained therein are, like national law, directed primarily towards actors rather than States. Where norms of IHL are fully implemented into national law (by whatever means) the same deterrent effect will occur as described above.[17] International humanitarian law may, however, provide a different answer in the case of the rebel leader found by soldiers shopping in a supermarket where it is clear that he 'participates directly in hostilities' by way of a 'continuous combat function.'[18] It appears that he can be attacked merely because of this status.[19] In the absence, however, of common Article 3 of the Geneva Conventions 1949 or Article 4 of Additional Protocol II, in national law the justifications for taking life will be those set out in the 'normal' national law as discussed above. An alternative view, would be to say that, in this circumstance, national law must be understood in the light of IHL and, in this sense be the lex specialis[20] or, should this be the case, that the order of a superior (which might be in the form of rules of engagement or RoE[21]) to shoot in these circumstances is a lawful order (it being consistent with IHL).

The view that the national law enforcement arrangements continue to apply, in spite of the application of international humanitarian law to a particular armed conflict, can be

[17] In some States the crimes set out in the Rome Statute 1998 of the International Criminal Court have been implemented directly into national law. In exercising their complementary national jurisdiction States are also acting 'on behalf of the international community as a whole,' J.Kleffner, Complementarity in the Rome Statute and National Criminal Jurisdictions (OUP, 2008) p.1.

[18] 'Interpretive Guidance on the Notion of on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (2008) 90 IRRC 991, 1007.

[19] International humanitarian law would permit his killing since the protection given to a civilian not taking a direct part in hostilities does not apply, ibid., p.1036. Quaere whether this is sound guidance where there is no risk to the soldier. It would justify a 'shoot to kill policy' on behalf of the State. The imbalance with soldiers is recognised but this will always be the case under national law. Upholding the rule of law is an obligation on States (and not on rebels) and the frequently used political statement that rebels will be 'brought to justice' should not mean killing them on sight. It would also seem to be contrary to the reasoning underlying para. 4789 in Y. Sandoz et al, Commentary on the Additional Protocols (ICRC, Nijhoff, 1987). For a warning that the statement, in para. 25 of the Legality of the Threat or Use of Nuclear Weapons Advisory Opinion (1996) ICJ Rep. 226 that 'the test of what constitutes an arbitrary deprivation of life…must be determined by the applicable lex specialis, namely, the law applicable in armed conflicts', should be read in the context of the 'legality in abstracto of the use of a certain weapon', see M.Sassoli and L.Olson, op cit, p.613. It is unlikely that the International Court of Justice had in mind, when considering an arbitrary deprivation of life, a non-international, as opposed to an international armed conflict. The Court may, in fact, have set a hare running since it need not have referred to the lex specialis at all in an international armed conflict. During such an armed conflict, and considering the International Covenant on Civil and Political Rights, 1966, Art.2, enemy soldiers would be unlikely to be within the jurisdiction of the State whose soldiers killed them. This approach would have produced the same result under the ECHR Art 2 where the word 'arbitrary' does not appear but the jurisdictional limits are not dissimilar. A better example, with respect, of the principle of lex specialis (IHL) would be the provisions in IHL relating to the detention of prisoners of war, where the issue of 'within jurisdiction' would be unlikely to arise.

[20] See generally, P.Rowe, 'Murder and the Law of War' (1991) 42 Northern Ireland legal Quarterly 216.

[21] See, for example, The Queen (on the Application of Al-Skeini and others) v Secretary of State for Defence [2005] EWCA Civ 1609, Brooke, LJ, paras. 23-28. The decision was upheld by the House of Lords, [2007] UKHL 26, without referring directly to this issue.

seen where a sustained breakdown of law and order occurs within a State member of the Council of Europe. In these circumstances the ECtHR may even be faced with a case involving the use of aerial bombardment and artillery by the State in an attempt to restore the rule of the ordinary law. The Court has shown itself reluctant to go beyond the European Convention on Human Rights and consider international humanitarian law.[22] Thus, when faced with an instance by the Russian armed forces in Chechnya of aerial bombardment 'in a populated area, outside wartime and without prior evacuation of the civilians' the Court relied on the European Convention model of law enforcement by stating that it was 'impossible to reconcile [this activity] with the degree of caution expected from a law enforcement body in a democratic society.'[23]

Should the national law reflect the human rights obligations of the State and any appropriate norms of international humanitarian law[24] this will enable commanders to draw up RoE which reflect this law.[25] In so doing soldiers (including, where appropriate their commanders) can be held accountable for any breach of their rules of engagement committed during the course of military operations.[26] Individual soldiers can be trained to avoid crossing the limits of permissible action. Any transgression which leads to disciplinary proceedings is likely to be very visible to all soldiers within the same unit and thus contribute significantly to a deterrent effect.[27]

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[22] Korbely v Hungary, Application No. 9174/02, Judgment, 19 September 2008, paras 86-94, might suggest the contrary but the detailed consideration of common Art 3 to the Geneva Conventions 1949 related to the applicant's trial by a court in Hungary. The ECtHR was considering the nature of national law in Hungary. It is also difficult to accept the comment made by A. Orakhelashivili, 'The Interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism, or Convergence' (2008) 19 EJIL 161, 174 that 'the legitimacy of the Court's findings in the cases involving armed conflicts will always be conditional upon the compliance of these findings with the standards of international humanitarian law.' Any use of force must be 'strictly appropriate to the achievement of the permitted aims' of Art.2, see Akkum v Turkey (2006) 43 EHRR 26, para. 237. These 'permitted aims' are not identical, for instance, with those in Additional Protocol I (1977) Art. 51(5)(b) and see Isayeva v Russia (2005) 41 EHRR 38, para. 176; Isayeva, Yusopova and Bazayeva v Russia (2008) 41 EHRR 39, para. 170-171. Moreover, international human rights law and IHL are performing different functions. The latter is, most commonly, interpreted when it is the governing body of law during the prosecution of an individual. In these circumstances it must be stated as clearly, and provide as much certainty, as would any national criminal law. The applicants in Isayeva, Yusupova, Bazayeva v Russia (2005) 41 EHHR 39 referred to common Art.3 to the Geneva Conventions, at para.157. Compare the position taken by the Inter-American Commission on Human Rights in 'the Tablada case,' Inter-American Commission on Human Rights report No.55/97, Case no.11.137, Argentina, 30 October 1997; L. Zegveld, 'The Inter-American Commission on Human Rights and International Humanitarian Law: a Comment on the Tablada Case' (1998) 324 International review of the Red Cross 505..

[23] Isayeva v Russia (2005) 41 EHRR 38, para.191. For the scale of the loss of life in the 'serious disturbances between the security forces and the [PKK in Turkey]' see Akdivar v Turkey (1997) 23 EHRR 143, para.13.

[24] All such norms may not be fully incorporated into national law but breaches could be prosecuted under some other head, eg failing to obey lawful orders, or failing to report breaches of military law.

[25] It is clear that instructions should be given to soldiers as to when they are permitted to use firearms, Kakoulli v Turkey (2007) 47 EHRR 12, para. 113 and that they should be trained to assess whether their use would be 'absolutely necessary', ibid, para. 110. See also McCann v United Kingdom (1996) 21 EHRR 97, para.156.

[26] Should the RoE not be based upon national or international law they may possess no more than the status of policy directives which a soldier may be bound to comply with as a lawful order providing he or she does not thereby act in conflict with national or international law. A factor which may be of some significance on some occasions is that the RoE may be a classified document. An alleged breach of Art 2 or 3 will also give rise to an obligation on the State to ensure that an independent investigation takes place.

[27] Even if the soldier is acquitted or no charges are eventually brought. See The Aitken Report, An Investigation into Deliberate Abuse and Unlawful Killing in Iraq in 2003 and 2004, 25 January 2008, United Kingdom Ministry of Defence, pp.2, 17.

So far I have discussed one way of enforcing the law applicable during an armed conflict, namely through the liability of the individual soldier for his actions. Any legal or disciplinary proceedings against him or her will be brought by military or State prosecutors. For one reason or another no actual prosecution may be brought. On the other hand, and quite unconnected with any State authority, a victim of a claimed violation of a Convention right by a soldier during a military operation may make an application to the European Court of Human Rights (ECtHR). In this situation the Court is likely to look at the relevant national law.[28]

An actual or a potential application to the ECtHR is not unconnected to national law. Where that national law enables Convention rights to be enforced directly under it, with the object of securing an appropriate remedy, this may be the chosen avenue for redress. Unlike the ECtHR, a national court will need to take into account all relevant parts of its law. This may include the law giving effect to the 1950 Convention, international humanitarian law, criminal and military law. It may need to determine criminal law/military discipline liability of the soldier prior to determining any claim by the victim for an effective remedy.[29]

Any use of force by a soldier which might fall within Article 2 or 3 of the 1950 Convention requires the State to conduct an independent investigation into the circumstances, with the object if necessary, of bringing a prosecution against one or more individuals. Whilst this is unlikely to cause any particular problems where the alleged use of unlawful force was committed within the territory of the State a different range of issues will arise where the incident has occurred abroad but within the jurisdiction of that State.[30] Will, for instance, an investigation by the armed forces in relation to its own members be sufficiently independent for the purposes of the 1950 Convention?[31]

It is likely, however, that in all States Party to the ECHR a soldier engaged on a military operation outside his own country will remain subject to his national and/or his military law. Whether this will give the military authorities of his own State the power to hold courts-martial or other disciplinary proceedings abroad will depend upon that law (and upon a Status of Forces Agreement with the receiving State). In some States there will be a power to do so, in others there will not. In the latter group soldiers will have to be repatriated should a trial or disciplinary proceedings be contemplated.

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[28] This includes procedural issues, to determine whether an applicant has exhausted domestic remedies or, indeed, whether national courts have accepted jurisdiction in a particular case, see Marcovic v Italy (2007) 44 EHRR 52.

[29] R (Al-Skeini and others) v Secretary of State for Defence [2007] UKHL 26. At a British court-martial in 2007 one of six soldiers pleaded guilty to causing inhumane treatment to one of the appellants. See N.Rasiah, 'The Court-Martial of Corporal Payne and the Future Landscape of International Criminal Justice' (2009) 7 Journal of International Criminal Justice 177.

[30] R (Al-Skeini and others) v Secretary of State for Defence (note 28). In Secretary of State for Defence v The Queen on the application of Mrs Catherine Smith [2009] EWCA Civ 441 the Court of Appeal held that a British soldier was within the jurisdiction of the UK when serving abroad in Iraq and when he died. The subsequent coroner's investigation in England into his death had to take account of this finding and apply Art.2 of the ECHR. The issue of whether a military board of inquiry would constitute an independent investigation for the purposes of Art.2 was not therefore necessary to decide.

[31] In Ramsahai v Netherlands (2008) 46 EHRR 43, para. 407 the investigation into the death of the applicant was carried out by 'direct colleagues of the persons alleged to have been involved' resulted in the investigation not being independent.

I will assume that the criminal and the military law of the soldier's State continue to govern his actions wherever he is deployed, whether at home or abroad. The national legal system will also determine the criminal or military procedure adopted should the soldier face criminal or disciplinary procedures in respect of his use of force. I will also concentrate on military operations falling short of war fighting.

Military misconduct: why does it occur within the context of the ECHR?

The ECtHR has dealt with a significant number of cases involving applications in which the alleged breach of a Convention right has been caused by the use of military force.[32] Whilst these cases have turned on the liability of the State concerned there is, underlying each decision, an issue as to why individual soldiers acted in the way they did. This is a matter calling for further analysis.[33]

It should be said that, despite the large numbers of soldiers who have taken part in military operations of the type under consideration, the actual instances of misconduct against civilians brought before the ECtHR are relatively small. This is hardly surprising since the armed forces of a democratic State should be a disciplined force. Military discipline is most frequently considered to be at the pinnacle of the level of discipline required of any profession or organisation. It has to be taught and enforced, directly or indirectly, on a daily basis.

Why then does misconduct occur at all? It is, in my view, too superficial to say that those who use any degree of unlawful force are 'bad apples' whose removal will prevent such action occurring again. Whilst there is likely to be a small number of bad apples in any organisation the circumstances facing soldiers at the time, their training, the general military structure of the particular unit involved and their own personality will all have their part to play in their conduct, whether good or bad, during military operations.

(a) The circumstances facing soldiers at the time

These can vary enormously. Soldiers may be deployed in full 'battle kit' with war-fighting weapons or merely wearing informal military uniform carrying no weapons or, indeed, somewhere along this spectrum. There may be some risk to their own lives from fighters who are indistinguishable from peaceful civilians or there may be no risk at all. They may be faced with guarding humanitarian supplies, such as food and medicines which are at risk from local thieves or guarding civilians prior to handing them over to the local police, or releasing them. They may be operating abroad or within a State where local public services are working well or not at all. The armed forces of which they form part may have been present in that locality for some time, during which they will have acquired considerable local knowledge, or only for a short period.

[32] The Court has taken the view that, in principle, there is no distinction between the use of force by soldiers or by police officers. The reason for this is that it has seen the use of any force by State agents as a means of law enforcement, in which the particular role of the agent concerned is irrelevant.

[33] This issue is explored more fully in P.Rowe, 'Military Misconduct During International Armed operations: "Bad apples" or "Systemic Failure"' (2008) 13 Journal of Conflict & Security Law 165.

Some soldiers will be highly motivated to progress within their military careers whilst others will not. In some armed forces a unit may be comprised of a mix of professional soldiers and conscripts or only of the former.

Soldiers themselves may consider, with good cause or otherwise, that their normal high standards of military discipline have been relaxed by their commanders, especially if they are serving abroad as a small national contingent in multinational operations. For young men, in particular, the availability of alcohol (especially if not limited in terms of quantity) and the opportunities to buy sexual favours from the local population are relevant factors in determining the degree of military discipline shown when they are subsequently engaged in military operations.[34]

It can therefore be seen that the risk of military misconduct committed against a civilian will, to some extent, depend upon the circumstances of the military operation concerned. In some the risk is much greater than in others and the detailed planning for the operation should be able to take this into account. The risks of death or serious injury to soldiers engaged in the conflicts in Chechnya, south-eastern Turkey, Northern Ireland,[35] Iraq or Afghanistan are (or were) of a much greater magnitude than to those involved on peace support operations abroad.

I will concentrate on military operations in which it is not envisaged that the use of force by soldiers will be a common occurrence. These are likely to include deployments within a State or abroad authorised by NATO or through the European Defence and Security Policy.

(b) Training for the military operation

The opportunities for training within the armed forces are often much greater than in many civilian organisations. Soldiers will, of course, be taught the basic war-fighting skills along with those parts of the law of armed conflict /international humanitarian law considered to be most relevant. In a sense, this is relatively easy since to the soldier the uncertainties involved in an international armed conflict are much less than those in a military operation where he may be attacked by someone who does not distinguish himself from other members of the civilian population.

Again, on a military mission the soldier is likely to have to interact with civilians much as a police officer would. A significant difference is that the soldier, unlike the police officer, will be unlikely to have a sound knowledge of the civilian population and the particular tensions faced by them.

Effective training will have to take into account the particular circumstances faced by the soldiers concerned. Training, for instance, on the treatment of prisoners of war is likely to be of little value when any person detained, even briefly, will be a civilian. Rules of engagement (RoE) will need to take into account the actual circumstances faced by the soldiers and on which they will need to be trained.[36]

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[34] For the 'zero tolerance' of misconduct by UN peacekeeping forces see, for example, UN Security Council Resolution 1820 (2008), para.7.

[35] This was not considered to be an armed conflict by the government of the United Kingdom at the time.

[36] See Kakoulli v Turkey (2007) 47 EHRR 12, para.113; Acar and others v Turkey, Application No.30742/03, Judgment, 6 October 2009, para.34; Andreou v Turkey, Application No.45653/99, Judgment, 27 October 2009, para.56.

(c) The general military structure of the unit concerned

The importance of military discipline as a means of trying to prevent misconduct has been referred to above. The role of the commander is often pivotal to the actions of those under his command. He can give direct and clear orders or leave the task, to be performed by those subject to his command, vague. He will generally set the scene in which the degree of force (if any) to be used is determined. In doing so he may, or may not, provide any alternative to the use of force.

The commander may have a strong commitment to military discipline and to the accountability of himself and his subordinates for his and their actions. Alternatively, he might take the view that he can act with relative impunity and justify this to himself through the risks perceived to the lives of his soldiers and the need to restore order, where this task has been entrusted to the armed forces.[37] This attitude is likely to be transmitted easily to the soldiers under his command.

Under the ECHR the actions of the commander can be considered separately from those of his subordinates. Through the planning and preparation for a particular military operation the commander may cause his State to breach a Convention right even though the soldiers who carry out his orders do not, by themselves, do so.[38] This is similar to the position under IHL where the State is 'responsible for all acts committed by persons forming part of its armed forces.'[39]

(d) Personalities of soldiers

Loyalty to a particular unit is a strong feature of military life. In battle conditions its importance can hardly be exaggerated as soldiers act as a group and not merely as individuals. Where misconduct during military operations occurs it is uncommon for soldiers to act in isolation from other members of their unit.[40] Recent incidents show this. They also show the prevalence of 'trophy photographs'. It is, perhaps, even more difficult for soldiers of the same rank in the unit to challenge the wrongful conduct. Some will, but others will not.

Conclusion

Within the Council of Europe, with its emphasis upon the nature of a democratic State, the armed forces are expected to be a highly disciplined force. All members of those armed forces, at whatever level of the chain of command they occupy, are required to comply with the law. In the course of an international armed conflict this will generally be IHL. It will be the lex specialis and will displace IHRL (should the State's obligations apply outside its jurisdiction) if any of its norms are contradictory to IHL. National law must be understood in the light of it.

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[37] See, for example, Guygova v Russia (2009) 49 EHRR 22, para.95 (inability to determine which units were involved); Shemilova and Shemilov v Russia, Application No.42439/02, Judgment, 8 October 2009, para.8.
[38] McCann v United Kingdom (1996) 21 EHRR 97.
[39] Additional Protocol I, 1977, art.91. see also the Hague Convention IV, 1907, Art.3 and for discussion, F.Kalshoven, 'State Responsibility for Warlike Acts of the Armed Forces' (1991) 40 International and Comparative Legal Quarterly 827 and note 4 above.
[40] For examples see McCann v United Kingdom (note 37 above); Andreou v Turkey, Application No.45653/99, Judgment, 29 October 2009, para.42; Bici and another v Ministry of Defence [2004] EWHC 786 (QB).

In a non-international armed conflict IHL, IHRL and national law will continue to apply. Soldiers cannot be expected to weigh up which set of norms will govern their actions when faced with a situation in which the use of armed force is an option. They can expect their commanders to do so in drawing up the RoE, the principal component of which will be national law, in which is included the soldier's military law.

Once the source of the soldier's obligations are made clear the issue of why they are disregarded through military misconduct is a separate issue. Military discipline is built primarily upon national (including military) law. The importance of national law has been increased through the complementarity provisions of the Rome Statute of the International Court.[41] It is not difficult to show a causal connection between lapses of discipline and a breach of this national law. In order to prevent misconduct of this nature occurring during military operations it is essential to study the causes of it.

[41] The Rome Statute 1998, Art. 17.

The task and role of the Dutch Public Prosecution Service in criminal investigations into military crime cases

By Irene E.W. Gonzales, LL.M[1]

The prosecution of criminal cases

The prosecution of criminal offences in the Netherlands is entrusted exclusively to the Public Prosecution Service. Only the Public Prosecution Service determines whether a criminal case is brought to court or whether such a case is dealt with outside the court room. In article 167 of the Criminal Procedure Code is stated that not all criminal offences need to be prosecuted. The accepted interpretation of this opportunity principle is that the prosecution of criminal offences should not only occur on basis of the law, but also on basis of general interest. The prosecution monopoly of the Public Prosecution Service also applies to criminal offences committed by military personnel.

The Dutch Public Prosecution Service is independent of the Dutch Ministry of Defence and the armed forces. The public prosecutor at both the district court and appeal court who are responsible for the prosecution of crimes committed by military personnel do not hold a military position themselves. Neither is it required that these prosecutors have ever held a military function. Nevertheless, it is of importance that these prosecutors have affinity and knowledge of the armed forces and the legal framework regarding military operations.

The Military Penal Code is complementary to the general Penal Code. The combination of the territorial defined jurisdiction (article 2 of the Penal Code) with the flag principle of article 4 Military Penal Code entails that Dutch criminal law applies to the military personnel, where ever in the world it finds herself.

Generally, when Dutch forces are sent abroad to participate in a military mission the Dutch government will negotiate exclusionary jurisdiction for criminal offences committed by military personnel. The criminal investigation as well as the decision of the public prosecutor whether or not to prosecute is based on the Dutch system of criminal law. This does not only apply to regular offences such as theft (which will not be entered into further here), but also in case of military actions resulting in death.

[1] Public Prosecutor Court of Appeal, Arnhem. Public prosecutor Arnhem. This article is written in her personal capacity.

The assessment of military conduct abroad is more complicated as to the nature of the case, because the circumstances and possibilities of a further investigation cannot be compared to a normal criminal investigation. Any use of force by Dutch military personnel should be reported not only in the chain of command but also to the judicial authorities. The Rules of Engagement are a guiding principle in the consideration of how such an incident should be interpreted. When there are deaths as a result of military action it may be decided to carry out further investigations.

The circumstances can complicate such further investigations. The so-called crime scene must be safe and accessible for the investigating officers of the military police (Royal Netherlands Marechaussee). The hearing of witnesses is probably immediately possible or not at all, for whatever reason. In case some forensic investigation is possible, this opportunity should certainly be taken. The possibilities for such an investigation will be limited, but this should not result in cancelation of the forensic investigations. Some creativity and purposive consultation with the public prosecutor and perhaps also with the local authorities can lead to openings that can be used for further findings. When for instance an autopsy is necessary but not possible, then that is not always a reason to refrain from an examination for which matters are recorded in writing, with accompanying photographs or possibly a scan. Forensic research carried out with victims and goods objectively offers the judiciary great clarity about the course of affairs at which the investigation is directed.

To illustrate the above an example concerning a lethal shooting incident near a Vehicle Checkpoint on the Main Supply Route in the surroundings of Ar Rumaythah (Iraq) in April 2004. This incident involved a Dutch soldier.[2] That night a car ignored the road block and the persons in the car started shooting at the Iraqi security forces. The security forces returned fire. Dutch soldiers who are attached to these security forces as observer, trainer and liaison are informed and decided to go the scene of incident to investigate the incident. While a Dutch soldier was looking for shells at the roadside another car ignored the road block. A gun was fired and the soldier thought he was shot upon by persons in the car. The Dutch soldier returned fire in self defence. When the car had stopped, the passenger appeared to be seriously wounded and died of his injuries short afterwards. The persons in the car were unarmed. Apparently one of the Iraqi security forces had opened fire when the car ignored the checkpoint and refused to stop.

The Marechaussee tried to establish whether the passenger was killed by the Dutch soldier or the Iraqi security forces. The Iraqi were using other weapons than the Dutch soldiers. The car that was fired at has been temporarily confiscated by the Marechaussee. Forensic investigations were carried out as far as possible, including taking photographs of the bullet holes in the car. The bullet holes have been measured, the impact of the bullet and the angle from which has been shot, was further defined. Witnesses have also been heard.

[2] Court Arnhem 7 April 2008; LJN: BC9390.

Photographs were taken of the passenger while he was still alive. An Iraqi doctor carried out the autopsy. The records do not show at whose request this was done. The Marechaussee was not welcome during the autopsy. However, later a drawing was handed over to the Marechaussee, depicting a human body. In this drawing, the doctor had indicated where the bullets had entered the body of the deceased. Some textual information was also written down in Arabic.

The bullets that were taken out of the body have been further examined on request of an Iraqi judge, without knowledge of or consultation with any Dutch prosecution official. This examination did not have any results. Neither is the documentation clear on this subject. On the basis of the results of the investigation, the ROE and the tasks of the Dutch Military Forces at that moment, the public prosecutor has decided not to prosecute this case.

The rights of the victim.

Since 1926 the Dutch Code of Criminal Procedure (article 12) offers the possibility to directly interested parties to file a complaint in writing to the court of appeal if an offence is not submitted for trial or if prosecution is not continued, the so-called article 12 procedure. This complaints procedure attempts to compensate for the prosecution monopoly of the Public Prosecution Service. The prosecutor who deals with cases in appeal (advocate-general) has an advisory role to the court. When a complaint is filed, the advocate-general will contact the public prosecutor to explain in an official report why he decided not to prosecute the case. The lines of communications between the public prosecutor and advocate-general are short and further consultation is customary.

The rights of victims have increased since the eighties of the previous century. Two international declarations form the basis for this:

1) The United Nations Declaration of Basic Principles of Justices for Victims of Crime and Abuse of Power (1985) and
2) The Recommendation on the Position of Victims in the Framework of Criminal Law and Procedure of the Council of Europe (1985).

The framework decision of the Counsel of Europe from March 2001[3] on the standing of victims in criminal proceedings is also binding for the Netherlands. Amongst others, the following rights are generally acknowledged as basic rights of the victim:

1) The right to respect and recognition during all phases of the criminal proceedings;
2) The right to receive information concerning the developments of his/her case;
3) The right to compensation (from the offender or from the state);
4) The right to legal assistance and juridical advice, if necessary paid for by the state.

According to Dutch law the victim, the directly injured, can file a complaint in writing to the court of appeal if an offence is not prosecuted. In case the victim has deceased, the surviving relatives count as directly injured. The relatives may be the parents, the children or the spouse. It is a

[3] This Decision is published in de Offical Journal of the European Union and is in force since 22nd March 2001.

task of the court to determine whether the decision not to prosecute taken by the public prosecutor is justified. If not, then the court can order the prosecutor to further investigate the matter. The court can also decide that a case should immediately be brought to the district court. In case the suspect is a soldier, the Court of Appeal is the competent court to handle the complaint.

In the example of the Iraqi case, the father of the deceased citizen had filed the complaint to the court of appeal with the assistance of a Dutch lawyer. He stated that the Dutch soldier should be prosecuted for committing a war crime and murder. The advocate-general advised in this case also to consult the jurisprudence of article 2 of the European Convention of Human Rights (ECHR), the right to life. After all, it is the task of the public prosecutor to bring the principles of opportunity and prosecution in accordance with the imperative positive law of the ECHR. Not only the material claims that are derived from case law are of importance in this case, but also the requirements of independent criminal investigation in case government authorities have used lethal force.

In this context I will restrict myself to the criminal investigation which was conducted in Iraq and the investigations at the court session. The question whether article 2 ECHR and the obligation, derived from the right to life, to investigate use of force by government also applies outside the treaty area is put aside at present. With this, I do not wish to suggest that the imperative obligation for carrying out a juridical investigation based on the ECHR directly leads to the conclusion that the ECHR also applies in mission areas.

The European Court in Strasburg has more than once commented upon the obligation to carry out further effective criminal investigations. In the case Hugh Jordan/England (4th May 2001), the case Nachova/ Bulgaria (26th February 2004) and Makaratzis/Greece (20th December 2004) the court has determined that a criminal investigation into use of force by government authorities should be effective, while any omissions and inconsistencies are impermissible. The conclusions of the court do not only apply to the activities of the investigating authorities, but also to the actions of the public prosecutor.

The investigation should be effective, adequate and independent which means that it should lead to an answer to the question whether the force used was justified. The result of the criminal investigation should convince the victim that his rights have been respected. When an effective investigation is not carried out, this can in itself result in a violation of article 2 ECHR.

In this matter the case Ramsahai/the Netherlands[4] is of importance for the Netherlands. A policeman had shot at a citizen who died as a result. The case lead to a complaint at the European Court. The Court stipulated that the criminal investigation should be independent. An investigation like this cannot be carried out by policemen of the same police station as that of

[4] Case Ramsahai and others/The Netherlands; applications nr 52391/99; 10 November 2005, NJ 2007/618; LJN:-BA8982.

the police man who fired the shot. Independent also means that the leadership of the inquiry cannot be in the hands of the public prosecutor who is attached to the same working area as the police station. Independent also means that the public prosecutor who leads the inquiry may not decide whether or not to prosecute the case. On this point public prosecutors in the Netherlands have different opinions.

Along lines of prior statements, the European Court also stipulated that in such judicial inquiries all efforts should be made to reveal all facts and circumstances. Firstly after this statement in the matter of Ramsahai, the direction of the Public Prosecution Service has studied and adjusted some aspects of the "Direction conduct in case of use of force (police) civil servant" ("Aanwijzing handelswijze bij geweldsaanwending (politie)ambtenaar").

Considering the imperative character of the jurisprudence of the European Court regarding the performance of a criminal investigations into cases involving force used by government authorities, there is no argument asserting why a criminal investigation, in an area outside the Netherlands where some jurisdiction has been given to the Dutch Government, does not have to meet the requirements of the ECHR.[5]

The Royal Marechaussee is independent of the Armed Forces during the performance of such an investigation. The same holds for the Public Prosecution Service. Problematic remains the possibility for carrying out such a criminal investigation. In the case of the Iraqi vehicle checkpoint, some investigation into the impact of the bullets on the car had been carried out. In this respect the drawing of the body made after the victim's death has also been of importance. The investigation concerning the bullets from the body did unfortunately not have any results so that it could not be determined which bullet caused the death of this man; a bullet from the weapon of a Dutch or a bullet from the weapon of an Iraqi. In this case the court had decided that it was justified that the Public Prosecutor refrained from proceedings.

Secret documents

In the Iraqi example, the largest part of the investigation was carried out by the Royal Marechaussee and the files were also handed to all parties involved in the legal proceedings. Now an example from Afghanistan, where there is an incident among the Dutch troops: a friendly fire incident during which people died.

Also this time an investigation was started, by the Royal Marechaussee, conducted by the public prosecutor as well as by the Ministry of Defence. In the Dutch newspapers reports were published about the perfect cooperation between both research teams. There was report of a good mutual understanding between parties.

[5] R.Smith/Secretary of State for Defence, 18 May 2009, EWCA Civ 441; consideration 30.

The internal investigation by the Ministry of Defence and the fact finding investigation by the Royal Marechaussee was coordinated well. The facts and the interrogations of the witnesses were all saved in one and the same database. The aim of the judicial investigations was to find out what exactly had happened; why the shooting had taken place and how it could have happened that Dutch soldiers were shooting at their own units. It had to be assessed whether there had been any conduct leading to criminal judicial consequences. The aim of the investigation of the Ministry of Defence was to discover the grounds on which lessons and experiences a repetition of such a misfortunate incident can be prevented. Even though both parties had access to the same database, both parties have carried out their own research and with that drawn their own conclusions. On ground of the fact finding investigation, the public prosecutor had decided not to start a prosecution. The relatives of the deceased have been informed.

The relatives have the opportunity to file a complaint ex art. 12 Code of Criminal Procedure at the court of appeal in Arnhem. The file of the public prosecutor, which might contain classified documents, shall then have to be submitted. The report of the Ministry of Defence is classified. The reason for this is surely understandable. But during a judicial procedure, the leading principle is that there has to be question of "equality of arms". This imperative principle has to be respected and may give rise to problems during the trial session.

The lawyers assert the interests of their clients. During the proceedings at the trail session, the counsellors will try to floor all motives for prosecution and sentence in order to induce the judge to a verdict of acquittal. Whereas in case of a complaint procedure the lawyer will try to convince the court that the public prosecutor has made a gross mistake *not* starting prosecution.

A number of lawyers have filed a complaint at the court of appeal in Amsterdam on behalf of the relatives of the victims of Desi Bouterse, former president of the Republic Suriname. Mr. Bouterse is held responsible for giving order in December 1982 to kill fifteen prominent Surinam citizens. In another complaint procedure, a complaint was filed against the father-in-law of the crown prince, a Mr. J. Zorreguita, in connection with crimes against humanity committed in Argentina. Even though a number of these complaints involve torture and the question whether the Dutch judge is indeed authorized to pass judgment in these cases cannot be directly answered, I mention these cases to illustrate the zeal of some Dutch lawyers to denounce cases dealing with the violation of human rights. Every juridical possibility that can be used for this shall indeed be used. When an investigation has been carried out and led by the public prosecutor, every omission in that investigation will be brought forward. In order to gain a complete picture of the whole situation, every document will need to be submitted on the basis of equality of arms.

The English legal system includes the so-called 'disclosure' procedure. This system offers possibility for the Judge to determine on the basis of classified information whether that information has been properly acquired and used. The classified information itself does not become a part of the public file. A similar procedure does not exist in the Dutch legal system. All parties

involved should have the same data at their disposal and the public prosecutor is also compelled to include exculpatory material in the file. This obligation is not carried out to the extend that the names of the informants need be revealed or the way in which a certain investigation was conducted by the criminal intelligence. Nevertheless, the public prosecutor is compelled to inform the judge whether the way in which the investigations were performed meets the criteria of law and the jurisprudence concerned. In case any reasonable doubt of the judge concerning this issue cannot be removed, the possibility exists that the public prosecutor will be declared inadmissible.

The public prosecutor cannot reveal the secret documents of the Ministry of Defence, nor can the Rules of Engagement (ROE) be added to the crime file. In a number of military criminal cases the defence has explicitly asked for these ROE. Until today the ROE have not been submitted by the Public Prosecution Service.

However, this does not mean that these ROE will always remain secret. In one criminal case it had become public that a ROE was found on the internet.[6] Theoretically there is a possibility that the soldier himself will hand over the ROE to his counsellor, even though this is formally forbidden. Depending on the rank and function of the military men/women, these papers may be of interest for the lawyer and the other parties involved in case these ROE are also handed over to the Public Prosecution Service and the judges.

In case the lawyer does not hand over these ROE, but refers to them during the crime procedure in order to achieve an acquittal, the principle of 'equality of arms' is violated. In case a military man/woman is prosecuted, one of the members of the court is a military who is also a jurist.[7] In theory it is possible that the military member of the court is informed about the contents of the secret report of the Ministry of Defence in the Afghani case, the friendly fire incident. Theoretically – and at this point I would like to emphasize not having any doubts concerning the integrity of the military members of the courts – it is possible that the military member shares this knowledge with the other two judges. When subsequently at the trial session this knowledge is not shared with the public prosecutor and the lawyer, there is once again a violation of the principle of equality of arms.

The complaint procedure ex art. 12 Code of Criminal Procedure is not open to the public; it is a procedure behind closed doors. This point has also led to complaints at the European

[6] Appeal Court Arnhem, 4 May 2005, LJN: AT4988. At the centre was the power to use force from the Rules of Engagement (ROE). These ROE were part of the Memorandum of Understanding (MOU) which a number of countries had agreed on with the United Kingdom in connection with their participation of the Multinational Division (South East). The MOU and the Rules of Engagement incorporated in these were confidential and could therefore not be made public, at least in principle. The power to use force that was at the centre of that case was nevertheless made public by the court. On appeal the court judged that the confidential nature of the power to use force must give way to the transparency, also external, which fair criminal proceedings require. The court added that essential parts of the judgment of the court would not be comprehensible if it were impossible to take note of the powers to use force.

[7] The same applies to the Chamber of Appeal of the court Arnhem. In case of appeal for prosecution of a military man/woman, one of the members of the court must also be military.

Court in the case of Ramsahai. The Court has decided that this procedure, which does not involve a 'criminal charge' because the complaint in fact is that the public prosecution has decided not to start prosecution, is permissible. Perhaps a procedure behind closed doors offers a possibility to submit the secret documents during the trial session. Question is then how to prevent the contents of those documents from becoming public.

As soon as it is spread in the media that there is a coordinated investigation of the Public Prosecution Service and the Ministry of Defence into the conduct of soldiers during a military operation, this statement counts as an open source. Information from open sources may be used in criminal cases. In various criminal cases in which military men/woman were prosecuted, lawyer have submitted documents such as a handbook for certain military actions or such as rules that apply to certain situations. With this, the defence wanted to prove that the training has not been adequate; that the communication has been unclear; that the tasks of the prosecuted military man/woman were not clear and that in fact the military man/woman was erroneously prosecuted. In this connection the investigation by the Ministry of Defence into the friendly fire incident, which was directed at the prevention of repetition in the future, may be of importance for the complaint procedure so that can be demonstrated who should be prosecuted according to the defence.

The imperative obligation of equality of arms does not only apply in the courtroom in case a person is prosecuted. This stipulation also applies in the courtroom where it has to be determined whether or not the p prosecutor has rightly decided not to start prosecutions. In the case of Ramsahai, the European Court has stipulated that not all documents need to be handed over to the lawyer. The possibility of inspection of the documents may suffice.

Conclusion

The Dutch legislation offers the possibility to the public prosecutor not to prosecute every criminal case. This applies to criminal cases for civilians and for military personnel. Use of force by government might be necessary, with the addition that a distinction must be made between force used by the police and force used by the military. For the latter the Law of Armed Conflict may be applicable. Even though the Law of Armed Conflict does not directly apply to all cases, in practice the limitations of this law are taken into account.

It must be possible to demonstrate the legitimacy of the decision not to start a prosecution, with a thorough criminal investigation. The criteria of such an investigation are found in the Dutch criminal procedural law, in which the jurisprudence of the European Court plays an imperative role. These criteria are important for the position and rights of the victim, but also for the person who is prosecuted. This applies to criminal investigations as well as to the decision whether a case is prosecuted or not and to the examination in the court session.

The obligation for carrying out an effective, adequate and independent investigation in my opinion also applies to an extraterritorial setting because the performance of such an investigation is closely connected to the flag principle. The obligation does not only apply in case of an friendly fire incident in which Dutch soldiers are involved, but also in case non-Dutch citizens are the victim of

force used by Dutch soldiers. In this respect the rights of the victims play an important role. Classified documents or rules that may not be revealed during the court session all have their own dynamics. In fact, the criminal investigation should be carried out in such a thorough manner that the need for revealing such classified documents is not necessary for finding the truth.

The possibilities of forensic investigations in these matters must be further explored. Some forensic training of the own military medical personnel is an option. An explanation of the cause of death on the basis of forensic criteria offers more clarity in the cases which are investigated than a simple confirmation of death. Photos, descriptions of the injuries or a scan can be used for finding the truth. Also the possibility may be explored whether the various foreign troops could offer each other help and support in this respect. Note: the juridical judgement of the results of such a forensic investigation is always reserved for the juridical authorities.

When on basis of the SOFA there are possibilities for confiscating goods for further investigations, this option should be seriously taken into consideration. In case a SOFA is lacking but consultation with local authorities is possible, this option should also seriously be considered.

In an area where one has to struggle to carry out a thorough investigation, where the safety of the investigators should not be forgotten, these practical problems may not be the basis for minimalisation of every possibility for investigation. In case the criteria for a judicial investigation are not met, this may result in violation of article 2 ECHR. Such an event is not only a red card for the investigation in question but also for the legitimate actions of the country in question.

RESPONSIBILITIES

An obligation to investigate the use of force: the relationship between the responsibilities of commanders and prosecution authorities

By Brigadier Philip McEvoy[1]

The obligation to investigate the use of force differs from country to country. Some countries will always investigate by means of an independent police force – military or civilian while others will rely upon investigations conducted by the chain of command.

[1] Deputy Director of Service Prosecutions (UK).

The start point is to consider the standard imposed by Article 2 of the European Convention on Human Rights (ECHR) which says:

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

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
   (a) in defence of any person from unlawful violence;
   (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
   (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 2(2) therefore prohibits intentional killings by the state unless the force used is strictly proportionate to a legitimate aim like preventing unlawful violence. The degree of force exercised must remain "absolutely necessary" To determine what is "absolutely necessary" there must be some form of investigation.

The European Court of Human Rights has considered Article 2 on numerous occasions. These cases relate to deaths caused by "agents of the state" in a variety of circumstances from, on the one hand to deaths in civil custody, to the use of force by firearms officers and to the use of force by soldiers exercising their duties when on operations. The requirement is strict – there must be a prompt, thorough, independent and effective investigation. The characteristics of such investigations are:

- must be initiated by the state
- must be independent
- must be capable of leading to a decision that force was justified
- must identify those responsible and prosecute if appropriate
- must be prompt
- must be subject to public scrutiny
- next of kin must be involved to the extent of safeguarding their legitimate interests.

If it is accepted that this is the start point then what are the practical difficulties for military forces when conducting operations? Most military organisations are in fact excellent at conducting internal investigations or enquiries into "incidents". After any incident there is usually a flurry of activity to ascertain what happened; who was involved; what was the result and what lessons, if any, can be learned. There will be records from logs, patrol reports or incident reports but these written reports are not written for investigative purposes but are usually a contemporaneous record of recording the unfolding situation as it happens. The purpose will be to inform higher authority of the incident. To alert other units. To call for additional support whether offensive or defensive. The difficulty for most military organisations is that this routine type of inquiry is conducted orally and while the results may have been committed to paper it is more of a lessons learned account than an Article 2 compliant investigation.

An investigation can take many forms from a police investigation to a coronial inquiry to a public inquiry but the overarching characteristic is that it must be independent. Thus the prison service should not investigate itself for deaths in civil custody, the police should not investigate itself and neither should the military investigate. In the complexities of a counter insurgency operation the question of independence is difficult and a balance needs to be struck between independence and effectiveness. The most effective investigation will be carried out by police. They are best equipped to question, conduct forensic examination, record evidence and refer cases for prosecution where required. While almost all police forces will conduct their investigations in an independent manner – and the final police report should reflect this - the link between military police forces and the chain of command will always leave a suspicion – usually perceived rather than real - of a lack of independence.

The next question is whether we, in the armed forces, can actually achieve the high standard on operations and here there are numerous difficulties.

In July 2005 British undercover police shoot and killed Jean Charles De Menezes in London in the aftermath of a terror campaign. It is accepted that the incident was a tragic mistake and Mr De Menezes was an entirely innocent person who happened to be in the wrong place at the wrong time. The investigation was conducted by the Independent Police Complaints Commission. It consisted of 6 support staff and 17 investigators and cost £383,000. This does not include the numerous forensic and expert scenes of crime officers. The investigation lasted 6 months but the aftermath, with consideration of charges, an inquest and calls for a public inquiry it still continues. The points to note are that this was a single incident, the area could be sealed off to conduct forensic examination. The body was recovered for autopsy and the witnesses were available for interview. The family of the deceased were represented at the proceedings.

If we compare this to an incident on operations then the opportunity to seal off the area to conduct a scene of crime examination is rare. Bodies are seldom recovered and pathology and autopsies are rare. Exhumation is seldom achieved. Witnesses seldom come forward and this leads inevitably to a one sided investigation. In Northern Ireland at the conclusion of each incident weapons were surrendered and stored for forensic and ballistic investigations. In the Loughgall incident which was the subject of the Kelly v UK case before the European Court, each of the 26 soldiers handed in their weapons for examination and they were retained by the police. If we were to investigate cases to this standard then the military police would be over stretched and under resourced. The de Menezes incident, although complex, was a single incident. On operations there may be multiple incidents involving troops from many nations and shared intelligence with security considerations limiting the publication of security sensitive evidence.

Another factor to consider is the effect of investigations on the soldiers who may be involved in them. Mistakes will occur in the complex and demanding operational environment. Despite the very best of efforts innocent civilians will be killed or injured. Blue on Blue incidents, sadly are not uncommon. In police investigations while there may be a desire to assist in investigations the right to silence or the right against self incrimination may hinder an effective investiga-

tion. To know that to open fire will involve you in a police investigation may constrain the use of force in what would be appropriate circumstances. Conversely an effective investigation may serve to assure the soldier or commander that his actions were justified.

Operational investigations will therefore be difficult and, generally speaking, the more dangerous the environment the more difficult it will be to achieve an effective investigation. Rather than relying upon the ECHR standard for investigations a more pragmatic approach might be simply to rely upon the dictionary definition of "investigation" – to inquire into, examine, study carefully. If however there is an allegation of criminal wrongdoing then there should be absolutely no doubt that the case must be reported immediately to the police to permit an independent investigation. There may also be other cases where, although there is no evidence of criminal wrongdoing an independent investigation actually helps. One such example is the television coverage in Iraq of an American soldier who was seen firing into the body of an Iraqi when clearing a building in Fallujah. There were dead and wounded in the room and the soldier is heard shouting "He's faking it, he's faking it" He then fires into the body. The narrator paints the picture of the soldier deliberately firing at a defenceless wounded person. The coverage was concluded by a senior officer stating:

"We uphold the Geneva Conventions there will be a thorough investigation"

Of course an investigation without the ability to do something with it renders it a pointless exercise. Where there has been an allegation of criminal impropriety then the prosecutor plays a key role in identifying the degree of impropriety, whether it should be formally dealt with through the criminal courts and if so at what level. Like the police most prosecutors are independent in exercising their prosecutorial duties.

So what is the relationship between the investigators, command and the prosecution authorities? If you had asked me 5 years ago I would have said it was a very uneasy relationship. Commanding Officers are very protective of their soldiers. Command want to stay in control and be informed of what is going on and of course investigators and prosecution authorities are independent. Iraq and Afghanistan has however been an education in this subject of investigations. The presence of military police investigators on the Normandy beaches may have been unusual and probably undesirable but today the military police play a vital role in support of current operations. In the vast majority of cases their investigations actually help to clear soldiers of allegations of wrongdoing rather than support a prosecution.

What has changed therefore is the greater trust that now exists. Trust that the military police will investigate fully and fairly. They will also try to put the incident in its operational context so that prosecutors setting in the safety of our offices in UK can understand the broader operational picture. Trust also in the prosecuting Authority that they will make the right decision within an appropriate time frame.

While not absolutely necessary it is desirable that prosecutors have some recent operational experience to assist them in this role.

But what is absolutely vital in this process is the responsibility of commanders to have this confidence to hand cases over for investigation where appropriate. If we look at some of the horror stories - the My Lai Massacre, the death of Shidane Arone in Somalia, the death of Firmin Mahe in the Ivory Coast and the Haditha incident then they are all blighted by allegations of a cover up. With the openness under which we now operate and the intense media coverage, a cover up is virtually impossible to achieve and the only proper and sensible course of action is to report incidents and allow the due process to take place.

In all of this we must not forget that there is another potential victim and that is the soldier under investigation himself. He might be no more than 18 years of age; he might be straight out of training; this might be his first contact. We also owe it to him to investigate promptly. There have been instances of soldiers suffering from the stress not of combat but by the investigation.

I can only talk from a UK perspective but there have been numerous police investigations into operational shooting incidents. The type of case varies but in some the wrong target has been identified, or the soldier has misread the situation. Not one soldier has so far been prosecuted for an operational shooting incident.

In the whole history of the Northern Ireland campaign which lasted over 30 years,the security forces – army and RUC – were attributed with the deaths of 362 individuals of those 190 were classed as "civilian" that is they had no paramilitary association although of course this is in doubt. Some were killed by operational shooting some by rubber bullets some killed in street disturbances and some killed while engaged in ordinary decent crime. One of the first shootings by British troops was in fact of 3 bank robbers not directly involved in terrorist killings.

21 soldiers were brought to trial in relation to operational shootings and 16 were acquitted. One was convicted of manslaughter, one had the charge withdrawn at trial and three were convicted of murder. The notable cases are those of Ptes Thain, Clegg and Guardsmen Fisher and Wright. Clegg was initially convicted of murder but the case was overturned and there was a retrial. Clegg was acquitted of murder and found guilty of GBH with intent and eventually acquitted of that charge on appeal in 2000.

Where a soldier acts honestly, even if he gets it wrong, he has little to fear from investigation and prosecution.

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