

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

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### 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.

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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 cancellation 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.<sup>2</sup> 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.

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<sup>2</sup> 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<sup>3</sup> 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

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<sup>3</sup>This Decision is published in de Official 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* (4<sup>th</sup> May 2001), the case *Nachova/ Bulgaria* (26<sup>th</sup> February 2004) and *Makaratzis/Greece* (20<sup>th</sup> 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*<sup>4</sup> is of importance for the Netherlands. A policeman had shot at a citizen who died as a result. The case led 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

<sup>4</sup> 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.<sup>5</sup>

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.

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<sup>5</sup> 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 trial 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 extent 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.<sup>6</sup> 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.<sup>7</sup> 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

<sup>6</sup> 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.

<sup>7</sup> 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 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.

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