

VOORWOORD

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

VOORWOORD

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.

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