Reflections on *Jaloud v. the Netherlands*: jurisdictional consequences and resonance in Dutch society

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Abstract

On 20 November 2014, the Grand Chamber of the European Court of Human Rights in *Jaloud v the Netherlands* held that the Netherlands had failed to adequately investigate the circumstances surrounding the death of an Iraqi citizen allegedly killed by a Dutch lieutenant at a vehicle control point in Iraq in 2004. The Court attributed the impugned conduct to the Netherlands and clarified that individuals injured by shots from a checkpoint fall within the jurisdiction of the Netherlands as it was controlling the checkpoint. These decisions on attribution and jurisdiction are open to criticism and may not have brought the clarification of that was perhaps expected. Furthermore, the implications of *Jaloud* for the scope of the duty to investigate the use of lethal force in out-of-area military operations remain unclear and contested. In the Dutch context, with a history of pressure on the relationship between military police and active serving soldiers, as well as an investigatory policy that is cautious about criminal investigations, more clarity was needed from the Court. As the judgment fails to set out unambiguous legal obligations, it is unlikely that the judgment will have an impact on investigatory policy.

Keywords

European Court of Human Rights – military operations – jurisdiction – attribution – right to life – duty to investigate

Introduction

On 20 November 2014, the Grand Chamber of the European Court of Human Rights (ECtHR) in *Jaloud v. the Netherlands*[1] held that the Netherlands had failed to adequately investigate the circumstances surrounding the death of an Iraqi citizen allegedly killed by a Dutch lieutenant at a vehicle control point in Iraq in 2004. The judgment addresses much-anticipated questions regarding the extent to which the European Convention on Human Rights (ECHR) applies to extraterritorial military operations, when conduct in international operations is attributable to the troop contributing States, and what investigatory standards would apply to overseas military operations.

After briefly introducing the facts of the case and the Court's decision (Section 1), this contribution addresses the intertwined questions of jurisdiction and attribution raised by the judgment (Section 2) which is followed by a discussion on the scope of the duty to investigate (Section 3). It then goes on to explain why clarity was dearly needed in the Dutch context, by narrating the relevant societal and institutional developments in the Netherlands both before and after the *Jaloud* incident (Section 4 and 5).[2] The authors argue that, while the Court has made a commendable effort to disentangle the notions of jurisdiction and attribution and to clarify their scope as well as the scope of the State's duty to investigate, it has not been able to dispel the prevailing uncertainty as to the applicable standards.[3] Moreover, its judgment appears to be insufficiently attuned to operational realities. This renders implementation problematic (Section 6).

1. The facts of the case and the Court's decision

As participants in the Stabilization Force in Iraq (SFIR), Dutch troops had been present in southeast Iraq between July 2003 and March 2005, under the command of an officer of the

[1] European Court of Human Rights (Grand Chamber), Application no. 47708/08, 20 November 2014, Judgment (Merits and Just Satisfaction), *Case of Jaloud .v the Netherlands*, available at http://www.echr.coe.int ("*Jaloud* case").

[2] This article is partly based on empirical research. Empirical data analyzed consists of archival data and an open-ended interview with a senior legal advisor to the military section of the public prosecution service, conducted by Haijer on 18 February 2015. The audio recording and the transcript of this interview are kept by the authors. Where the interview is used as a source, footnotes refer to the page of the transcript (*e.g.* IT, p. 8 refers to page 8 of the transcript of the interview).

[3] Aurel Sari, "Untangling Extra-territorial Jurisdiction from International Responsibility in *Jaloud v.* Netherlands: Old Problem, New Solutions?", in the *Military Law and Law of War Review*, vol. 54, 2015, pp. 4-19; Marko Milanovic, "The Bottom Line of Jaloud", in *EJIL: Talk!*, 26 November 2014, available at http://www.ejiltalk.org/the-bottom-line-of-jaloud/.

British armed forces, the UK being at the time the occupying power in the area. The Dutch soldiers involved in the incident at issue, which took place in April 2004, had been called in to assist the Iraqi troops who were manning a vehicle control point. When a vehicle approached the control point at high speed, soldiers, including a Dutch lieutenant, opened fire, as a result of which one of the car passengers, Azhar Sabah Jaloud, was killed. In October 2008, the deceased's father filed an application with the ECtHR, complaining that the Dutch authorities had, in his view, failed to adequately investigate the case.

The Court held that the impugned act could be attributed to the Netherlands and that Jaloud fell within the jurisdiction of the Netherlands for purposes of the application of the ECHR. On the merits, the Court largely accepted the arguments put forward by the applicant and held that the Netherlands had failed to meet its procedural obligations under Article 2 ECHR, which enshrines the right to life. Firstly, according to the Court, documents containing important information were not made available to the Dutch judicial authorities and the applicant. Secondly, no precautions were taken to prevent the Dutch lieutenant from colluding with other witnesses to the events before he was questioned. Thirdly, no attempt was made to carry out the autopsy under conditions befitting an investigation into the possible criminal responsibility of an agent of the State, and the resulting report was inadequate. And fourthly, important material evidence – the bullet fragments taken from the body – was mislaid under unknown circumstances.[4] The Court went on to order the Netherlands to pay the applicant EUR 25,000.

2. Jurisdiction and attribution

In ECtHR applications involving human rights violations allegedly committed by ECHR Contracting Parties in the course of out-of-area military operations, the preliminary question always arises whether the State actually has any obligations towards the applicant under the ECHR in the first place or, put more technically, whether the alleged victim falls within the jurisdiction of the State. This is by no means self-evident as in such operations the violation takes places extraterritorially. The picture may become even more complicated where the military operation is not conducted by just one State, but by *several* States, possibly under the

[4] *Jaloud* case, para. 227.

auspices of an international organization. Such multinational operations elicit the question as to whom violations are attributable. *Jaloud* presents us with exactly this complicated picture.

In theory, the issues of jurisdiction and attribution are conceptually separate. Jurisdiction pertains to the geographical scope of a human rights obligation and is governed by primary norms of human rights treaties. Attribution, for its part, pertains to the imputation of acts committed by natural persons to legal persons such as States or international organizations, and is governed by secondary rules of international responsibility. In spite of their different operation and goals, jurisdiction and attribution are related; to properly conduct the jurisdictional inquiry, it should first be established who exactly is the duty-bearing entity. Only when it is clear that acts can indeed be attributed to the State - and, for instance, not to an international organization - can one examine the jurisdictional relationship between the State and the alleged victim.[5] In *Behrami*, for instance, the ECtHR did not reach this second stage of the inquiry as it held that the impugned acts in Kosovo were attributable to the United Nations, and not to a State.[6] Sometimes the question of attribution is skipped and the Court immediately delves into the jurisdictional issue; this may happen when no other potentially responsible actor is on the horizon and attribution to the defending State is self-evident.[7]

Jaloud in essence follows the *Behrami* line of argument, but it does so in a somewhat confusing manner, subsuming the attribution analysis in the jurisdictional one. This merger of jurisdiction and attribution predictably elicited criticism from a minority of judges, who took issue with the Court's conflation of jurisdiction and the principle of State responsibility, and even

[5] In the third and final stage then, in case the ECtHR has held that an individual fell within the jurisdiction of the State, will it ascertain whether the State has also committed a wrongful act *vis-à-vis* the individual, and whether the State's responsibility under the ECHRcould accordingly be engaged. See section 2 for critical reflections on the applicable standard for wrongful conduct in overseas military operations.
Apparently *contra* Sari, above n. 3 (writing that "jurisdiction comes first and attribution of wrongful conduct second"). Sari, however, does not make a distinction between what Milanovic has called attribution of jurisdiction-establishing conduct, and attribution of violation-establishing conduct. The latter attribution operation indeed occurs in the final stage, *after* a finding of jurisdiction, but the former occurs *prior* to the finding of jurisdiction as it is concerned with identifying *whose* jurisdiction we are looking into. See Marko Milanovic, "Jurisdiction, Attribution and Responsibility in Jaloud", in *EJIL:Talk!*, 11 December 2014, available at http://www.ejiltalk.org/jurisdiction-attribution-and-responsibility-in-jaloud/.

[6] European Court of Human Rights (Grand Chamber), Applications no. 71412/01 and no. 78166/01, 2 May 2007, Decision, *Case of Behrami and Behrami v. France, and Saramati v. France, Germany and Norway*, available at http://www.echr.coe.int ("*Behrami* case"), paras. 132-143.

[7] See, *e.g.*, European Court of Human Rights (Grand Chamber), Application no. 3394/03, 29 March 2010, Judgment (Merits and Just Satisfaction), *Case of Medvedyev and Others v. France*, available at http://www.echr.coe.int ("*Medvedyev* case"); European Court of Human Rights (Grand Chamber), Application no. 27765/09, 23 February 2012, Judgment (Merits and Just Satisfaction), *Case of Hirsi Jamaa and Others v, Italy*, available at http://www.echr.coe.int.

characterized 'attribution' as a non-issue.[8] This criticism is misguided insofar as, as indicated above, attribution and jurisdiction are not entirely separate. However it is understandable to the extent that the Court in *Jaloud* first summarizes the principles on the exercise of jurisdiction within the meaning of Article 1 ECHR (para. 139), then ascertains what State (the Netherlands, the UK, or Iraq) was actually exercising authority for attribution purposes (para. 140-151), and then briefly revisits the jurisdictional issue (para. 152). It would certainly have been more logical for the Court to clearly separate the attribution inquiry from the jurisdictional one. That being said, the Court is to be commended for its identification of the dual challenge posed by attribution and jurisdiction. The subsequent question then is whether the principles of attribution and jurisdiction as laid down by the ECtHR in *Jaloud* are defensible, and were applied correctly.

As far as attribution is concerned, the Court observed that, while Dutch troops were under the command of an officer from the United Kingdom, the Netherlands assumed responsibility for providing security in south-eastern Iraq "to the exclusion of other participating States, and retained full command over its contingent there" (para. 149). Thus the Dutch troops were not "placed 'at the disposal' of any foreign power, whether it be Iraq or the United Kingdom or any other power; neither were they 'under the exclusive direction or control' of any other State" (para. 151). This determination is open to criticism, as it seems to affirm that acts of State military personnel who participate in multinational operations are *per se* attributable to the State. States, in principle, retain full command of their troops, as evidenced by their power to take disciplinary action and impose criminal sanctions. However, as Sari has pointed out, "just because States retain full command does not mean that they exercise effective control over their armed forces or that those forces cannot fall under the effective control of another State or organization".[9] Indeed, "effective control", rather than "full command", is the term used in Article 7 of the ILC Draft Articles on the Responsibility of International Organizations for the purposes of apportioning responsibility in multinational operations involving a State and an organization.[10] Note also that the "full command" standard is different from the 'ultimate control and authority' standard which the ECtHR had earlier embraced in *Behrami*.[11] When bracketing "full command", it is not entirely clear whether the Netherlands had effective

[8] *Jaloud* case, Concurring Opinion of Judge Spielmann, joined by Judge Raimondi, para. 7.
[9] Sari, above n. 3, p. 12.
[10] *Yearbook of the International Law Commission*, 2011, vol. II, Part Two.
[11] *Behrami* case, para. 133.

control over the situation. A more detailed factual inquiry should establish this, but a reasonable case can certainly be made that the UK – under whose authority the Dutch troops fell – had effective control, and that Dutch troops were just implementing UK policy.[12] Accordingly, that the shootout at the checkpoint was attributable to the Netherlands was not a foregone conclusion.

However that may be, the fact remains that the ECtHR attributed the impugned conduct to the Netherlands, as a result of which the relevant inquiry shifted to the jurisdictional issue. It is pointed out that jurisdiction is a stand-alone question that in many situations is not clouded by the question of attribution, simply because the answer to the latter is straightforward, *e.g.*, when the military operation was not carried out in a multinational framework. This implies that the answer which the ECtHR gives to the jurisdictional question is applicable to *any* military or law-enforcement operation abroad.

In *Jaloud*, the issue of jurisdiction received at first sight only scant attention from the ECtHR. After reiterating its previous stance regarding jurisdiction (which it had set out in its earlier judgment in *Al-Skeini*)[13] in just one paragraph, the Court considered itself to be satisfied that the Netherlands exercised its jurisdiction "within the limits of its SFIR mission and for the purpose of asserting authority and control over persons passing through the checkpoint".[14] "Checkpoint" had never before been considered as a jurisdictional trigger. This may lead one to believe that the Court is coining a new jurisdictional standard, "checkpoint jurisdiction", but, in fact, this appears to be just an application of the State agent control model, which the Court has upheld in a line of cases. Pursuant to this model, jurisdiction is established where a State's agents operate outside the State's territory and bring an individual under its control and authority. Earlier cases typically pertained to *detention* abroad,[15] but the model need not exclude other relevant scenarios of State agent authority, *e.g.*, a patrol killing an individual whom they come across or a vehicle checkpoint from which shots are fired. A broad

[12] Sari, above n. 3, pp. 14-15. Moreover, the UK, rather than Dutch troops were in a hierarchical position *vis-à-vis* the Iraqi security services. *Jaloud* case, para. 150 ("the ICDC was supervised by, and subordinate to, officers from the Coalition forces").
[13] *Jaloud* case, para. 139, citing European Court of Human Rights (Grand Chamber), Application no. 55721/07, 7 July 2011, Judgment (Merits and Satisfaction), *Case of Al-Skeini and others v. The United Kingdom*, available at http://www.echr.coe.int ("*Al Skeini* case"), paras. 130-139.
[14] *Jaloud* case, para. 152.
[15] See, *e.g.*, European Court of Human Rights (Grand Chamber), Application no. 46221/99, 12 May 2005, Judgment (Merits and Just Satisfaction), *Case of Öcalan v. Turkey*, available at http://www.echr.coe.int; *Medvedyev* case, para. 67.

interpretation of State agent control may even come dangerously close to a "cause and effect" approach to the question of jurisdiction. The Court has opposed it in the past,[16] but by embracing "checkpoint jurisdiction" it can be argued that it has abandoned this opposition in all but name: individuals arguably fall within the jurisdiction of the State due to the sole fact that they have been targeted by persons manning a checkpoint controlled by that State, regardless of the fact that this checkpoint was located outside the State's territory.[17] Note also that for targeted individuals to fall within a State's checkpoint jurisdiction, it suffices that the checkpoint is *controlled* by the State, whether or not the State's own forces man the checkpoint.[18]

At the same time, however, this "checkpoint jurisdiction" may have to be viewed, not just as an application of the State agent control model, but also as implying elements of the territorial model, much in line with the Court's earlier judgments in *Al-Skeini* and *Hassan*. In those cases, the Court held that the ECHR, and Article 2 in particular, could apply outside the territory of a Contracting State, notably where that State exercises "public powers normally to be exercised by a sovereign government",[19] including where the State holds individuals in custody.[20] According to the Court, such powers could be exercised even if the State was not in effective control of the area, provided that the individual was within the physical power and control of State agents, such as soldiers.[21] But ultimately, the applicable jurisdictional standard in these cases was a hybrid of the State agent control model and the territorial model. In both cases, the State (in this case the UK) *occupied* the relevant area, in the sense of belligerent occupation pursuant to Articles 42 to 56 of the Hague Regulations concerning the Laws and Customs of War on Land. In *Jaloud*, the Netherlands did not occupy South-Eastern Iraq. However, it remains no less true that Dutch troops operated under the command of the United Kingdom which, as a coalition force, *did* occupy Southern Iraq, and that the incident occurred during the occupation period.[22] In this respect, the Court's observation that "the status of 'occupying

[16] European Court of Human Rights (Grand Chamber), Application no. 52207/99, 12 December 2001, Decision, *Case of Banković and others v Belgium and others*, available at http://www.echr.coe.int, para. 75.
[17] Cf Sari, above n. 3, p. 10 ("the Court does appear to be inching closer to a 'cause and effect' notion of jurisdiction after all").
[18] *Jaloud* case, para. 150 ("It is not decisive either that the checkpoint was nominally manned by Iraqi ICDC personnel […] the ICDC was supervised by, and subordinate to, officers from the Coalition forces.").
[19] *Al-Skeini* case, para. 149.
[20] European Court of Human Rights (Grand Chamber), Application no. 29750/09, 16 September 2014, Judgment (Merits), *Case of Hassan v. The United Kingdom*, available at http://www.echr.coe.int, para. 76.
[21] Idem, paras. 75-76.
[22] The occupation of Iraq lasted from 1 May 2003 through 28 June 2004. See *Al-Skeini* case, paras. 9-19; *Jaloud* case, para. 56. The incident at issue occurred on 21 April 2004: *Jaloud* case, para. 10.

power' within the meaning of Article 42 of the Hague Regulations, or lack of it, is not *per se* determinative"[23] may well not be convincing. Indeed, the (alleged) personal control exercised by the Netherlands over the checkpoint may have to be construed against the background of the territorial control exercised by another ECHR Contracting Party, the UK, whose officer commanded Dutch troops territorially stationed in the south-eastern part of Iraq.[24]

In *Jaloud*, the Court may have clarified that individuals injured by shots from a checkpoint fall within the jurisdiction of the State controlling the checkpoint, thereby opening the door for "patrol jurisdiction", *i.e.* jurisdiction over individuals injured by patrol brigades (after all, both checkpoints and patrols are not permanent establishments). Nonetheless, the Court may not have brought the clarification of the notion of jurisdiction that was perhaps expected; it has laid down a State agent control model that still depends, at least in part, on a territorial control model. After *Jaloud*, it remains an open question whether the Court will be ready to find that individuals fall within a State's personal jurisdiction in the absence of some measure of territorial control. Does the ECHR apply extraterritorially to persons hit by aerial bombardment (the *Bankovic* decision excluded this in 2001) or drone attacks where the State does not exercise territorial control? In an interview with a Dutch senior legal advisor to the military section of the public prosecution service, doubts also surfaced as to the applicability of the ECHR to anti-piracy operations in the Gulf of Aden and beyond.[25]Accordingly, after *Jaloud* the geographic scope of the ECHR remains unsettled, with the attendant consequences for military planning and investigation.

3. The scope of the duty to investigate

From the interview with the Dutch legal advisor, it can also be distilled that the implications of *Jaloud* for Dutch authorities' scope of the duty to investigate the use of lethal force in out-of-area military operations remain unclear and contested. It is recalled that, in *Jaloud*, the Court, dealing with the merits of the case, held that the Netherlands had failed to discharge its procedural obligations under Article 2 ECHR. Citing insufficient cooperation with Dutch judicial authorities, witness collusion, unsatisfactory autopsy and disappeared evidence, the

[23] *Jaloud* case, para. 142.
[24] Idem, para. 53.
[25] IT, p. 21.

Court ruled that the Netherlands had not properly investigated the applicant's death.[26] While averring that "it cannot be found that these failings were inevitable, even in the particularly difficult conditions prevailing in Iraq at the relevant time",[27] the Court did not explain how it weighed these local conditions, which were very relevant for three of the four grounds of non-cooperation mentioned. First of all, the judgment does not show that the Court investigated whether there were possibilities at the time of the incident to prevent witness collusion, referring to the possibility that witnesses may have shared their stories with one another and, intentionally or accidentally, changed or tailored their stories in order that their testimony would seem more similar or convincing. The incident was reported almost immediately to the Royal Netherlands Marechaussee (RNLM), the military police force responsible for criminal investigations during military missions abroad, which immediately started an investigation. RNLM officers arrived at the scene within a few hours after the incident.[28] They heard all the crucial witnesses, including the Dutch lieutenant, that same morning.[29] Given the unstable security situation, it is not immediately clear what the RNLM could have done differently to prevent witness collusion. It would appear to have been problematic if not impossible from a practical and operational perspective to hear the witnesses sooner or to isolate witnesses from one another. The Court does not provide reasoning as to why the RNLM's course of action was insufficient. To continue, the Court does not explain how it weighed local circumstances in the matter of the autopsy. The Court acknowledges that written permission had to be asked from a local court,[30] but it does not discuss the extent of the local legal obligations the RNLM were under at the time and how the RNLM should have weighed these legal obligations against their international human rights obligations. Similarly, as regards the mislaid bullet fragments, it is clear from the judgment that these were in the hands of the Iraqi police.[31] Considering that the Iraqi police were not operating under the command of the RNLM, it is not self-evident that the RNLM could have examined these fragments under its own authority. The Court does not explain how it assessed the relationship between the RNLM and the Iraqi police.

These points were also raised in the joint concurring opinion of seven judges, who would not have found a violation of the Netherlands' procedural obligations under Article 2 on these

[26] *Jaloud* case, para. 227.
[27] Idem.
[28] Idem, paras. 17-18.
[29] Idem, paras. 22-28.
[30] Idem, para. 19.
[31] Idem, para. 36.

grounds.[32] In the view of these judges, the Court may have overstepped its role and competence by attempting to analyze the effectiveness of the investigation that was conducted by the Netherlands.[33] In our opinion, however, the fact that the Court analyzed the effectiveness of the investigations is not the issue. On the contrary, considering that the individual who was killed fell within the jurisdiction of the Netherlands, such an analysis by the Court was certainly required in order to address the Applicant's claim. Yet, in doing so, the court omitted to give an understandable reasoning of how it balanced human rights obligations against the requirements of the local and operational context.

In the remainder of this article, we will delve into how the Netherlands attempted to balance these imperatives before *Jaloud* and evaluate the prospects of the investigatory standards laid down in *Jaloud* - to the extent that they are clear to the military in the first place -being implemented. Understanding the policy at the time of the *Jaloud* incident, and appreciating the prospects for implementation requires us to first reconstruct, with a socio-legal approach, the Netherlands' reaction to a prior incident, involving Eric O.

4. The prelude to *Jaloud*: *Eric O.*

The fatal shooting in the case of *Jaloud* and the investigation that followed took place in the aftermath of another fatal shooting in Iraq; an Iraqi citizen had been killed on 27 December 2003 in an incident that is known in the Netherlands as the case of Eric O. The facts in Eric O. were similar to those in *Jaloud* in that it was a road-side incident in which a Dutch military officer perceived a threat and fired his weapon, which resulted in the death of an unarmed Iraqi citizen. In the case of Eric O., a full criminal investigation was started. After consultation with the Dutch Public Prosecution Service (PPS), the RNLM arrested and charged Dutch sergeant-major Eric O.[34] He was immediately transferred to the Netherlands for prosecution. In a *habeas corpus* procedure on 6 January 2004, an investigating judge ordered the release of Eric O. on the grounds that the PPS had presented insufficient evidence to justify a criminal charge and

[32] *Jaloud* case, Joint concurring opinion of judges Casadevall, Berro-Lefevre, Sikuta, Hirvela, Lopez Guerra, Sajo and Silvis.
[33] Idem, paras. 5-7.
[34] In the Netherlands, the Royal Netherlands Marechaussee (RNLM) is the military police force responsible for criminal investigations during military missions abroad. While its law enforcement tasks are supervised by the Dutch Public Prosecution Service (PPS), which falls under the responsibility of the Ministry of Justice, RNLM officers fall under the responsibility of the Ministry of Defence. The PPS, assisted by a specialized military legal department, decides on the type and depth of the investigations. IT, pp. 2-6.

detention. In Dutch criminal justice practice, such a ruling indicates that the investigating judge anticipates an acquittal. And Eric O. was in fact acquitted of all charges later that year, both in first instance and later on appeal.[35]

In the months subsequent to the arrest and release of Eric O., public opinion turned against the RNLM and the PPS for having rashly started a criminal investigation. The public sentiment, as reflected in the media, was that the PPS had shown insufficient support for the work of soldiers in the Dutch armed forces.[36] Military unions and Parliament accused the PPS of having insufficient understanding of the practice of military operations.[37] The government openly criticized the head of the PPS about his view on the legality of using lethal force in Iraq.[38] The Eric O. incident exacerbated existing tensions between active serving soldiers and the RNLM.[39] In the early months of 2004, Dutch soldiers were quoted, referring to the RNLM as the "Blue Khmer" and the "Blue SS", the color blue referring to the color of their uniforms and SS and Khmer obviously referring to dictatorial regimes.[40]

It was against this backdrop that the RNLM and PPS had to take a decision whether and how deeply to investigate, and potentially prosecute the case of *Jaloud* in April 2004. A decision to start a full criminal investigation - just weeks after the Eric O. turmoil - could have seriously affected the working relationship between the RNLM and active serving soldiers which was already very tense. It remains an unanswered question to what extent the need to improve this relationship affected the way in which the RNLM carried out its investigative duties in the case of *Jaloud*. There is, however, much evidence to suggest thatthe effects of Eric O. still resonate today and will affect the extent to which the *Jaloud* judgment is going to have an effect, both

[35] Arnhem Court of Appeal, Judgment in the case of Eric O., 4 May 2005, ECLI:NL:GHARN:2005:AT4988. The judgment is also the source for the facts of the case that are summarized in this paragraph.
[36] Trouw, "*Kritiek op OM na vrijspraak*", 19 October 2004, available at http://www.trouw.nl.
[37] VBM|NOV, "*VBM|NOV eist stopzetting vervolging marinier*", Press release, 27 January 2004, available at http://www.defensieforum.nl and Kamerstukken 29800 nr. 38: Motie van de leden Van Baalen en Eijsink, 25 November 2004, available at https://www.zoek.officielebekendmakingen.nl.
[38] Wegener Dagbladen, "*Kabinet oneens met baas OM over geweld*", 27 February 2004, available at http://www.wegener.nl.
[39] Nova TV, "*De militairen in Irak versus de Marechaussee*", Documentary, 27 April 2004, available at http://www.novatv.nl. This documentary shows that working relations were already tense. In particular, the documentary reveals three letters that were sent by RNLM commander General-mayor Neisingh in November 2003 in which he refers to "cultural differences" between different sections of the Dutch military in Iraq. See also: NRC, "*Spanningen mariniers en marechaussee*", 28 April 2004, available at http://www.vorige.nrc.nl/. The existence of these tensions was confirmed in the interview with a PPS official, see IT. pp. 6-9.
[40] Nova TV, "*Kloof tussen mariniers en Marechaussee*", Documentary, 16 March 2004, available at http://www.novatv.nl.

on the expected behavior of active serving soldiers in the Dutch armed forces and on the policies of the RNLM and PPS.

5. Prosecutorial restraint following the Eric O. prosecution

After the official and public outcry following the Eric O. prosecution and other public debates about the Dutch involvement in Iraq, the Dutch government responded by commissioning several inquiries. The reports of these inquiries, that are referred to in the *Jaloud* judgement,[41]make reference to the tense situation.[42] One of these reports, the Borghouts report, recommends changes in the prosecutorial policy to enhance the legal protection of active serving soldiers. In this report it was recommended that soldiers should feel confident that they would not be prosecuted if they followed the rules of engagement.[43] This report served as a building block for prosecutorial reform in 2006.[44]

Until 2006, there was no written policy on investigating the use of force in military operations, which meant that the PPS had very large discretionary powers. The practice was that every instance of the use of force was investigated by the RNLM, but some investigations were criminal and some were preliminary (or factual). Unlike in the case of Eric O., the investigation in the case of Jaloud was not criminal, but preliminary. The scope of preliminary investigations was, first of all, limited by what was operationally possible.[45] Secondly, the scope of investigations was determined by what the PPS determined was their legal and moral authority. This was reflected in the case of Jaloud, in which the armed forces of the Netherlands were subject to a duty to respect the laws of Iraq and could not intervene in its internal affairs.[46] This duty was in fact experienced as a strict legal limit to the authority of the PPS to conduct an investigation.[47]A less clearly defined duty to respect local religious and cultural traditions was

[41] *Jaloud* case, paras. 75-89.
[42] *Eindevaluatie Stabilisation Force Iraq (SFIR) 2003-2005*, Report, 1 Juanary 2006, available at http://www.rijksoverheid.nl/, p. 31; *Onderzoek ondervragingen in Irak*: *Rapport van de commissie van onderzoek naar de betrokkenheid van Nederlandse militairen bij mogelijke misstanden bij gesprekken met gedetineerden in Irak*, Report, 18 June 2007, available at http://www.novatv.nl, p. 71; H.C.J.L. Borghouts, R.D.E. Daverschots and G.C. Gillissen, *Evaluatie toepassing militair strafprocesrecht bij uitzendingen*, Haarlem, 31 August 2006, available at http://www.eerstekamer.nl, pp. 59-63.
[43] Borghouts, Daverschots and Gilissen, above n. 42, pp. 66-70.
[44] IT, p. 11.
[45] Idem, p. 7
[46] Sari, above n. 3, p. 15.
[47] IT, p. 16.

also experienced as such a limit.[48] In the perception of the Dutch authorities, the investigation they conducted in the case of Jaloud, including the confiscation of the body, the car and weapons and the taking of witness statements,[49] stretched the limits of what they were legally and morally permitted to do, and possibly even crossed these limits.[50]

That the Netherlands was under an international obligation to investigate and that the ECHR should determine the scope of such an investigation had not yet entered the legal consciousness of PPS officials, in that they did not experience this as "law".[51] As the PPS official interviewed explains: "We just conducted an investigation to the best of our abilities, as we were used to, not knowing that we were under an obligation to do so. No one even thought about the ECHR back then."[52] That the obligation to investigate was not part of the legal consciousness is understandable, because the landmark case in which these obligations were established, *Al-Skeini*, was not decided until 2011. In academia, arguments that every incident of civilian casualties during armed conflict should be investigated, were quickly dismissed as "human rights activist" until 2012,[53] a position that was already hard to reconcile with *Al-Skeini* and has become more difficult to uphold after *Jaloud*.

Since 2006, the PPS has a reformulated prosecutorial policy.[54] This policy incorporates the recommendations of the abovementioned report.[55] In this way, the reformulated policy is at least in part an outcome of the Eric O. case. The intention of the 2006 policy was to improve legal certainty, as well as the working relations between RNLM and active serving solders.[56] According to the new policy, all instances of the use of force are reported, but the presumption on the side of the PPS in all cases is that the use of force was legal.[57] The PPS instigates factual

[48] Idem, pp. 16-17. The interviewee gives as an example that in Islam, a person must be buried within 24 hours after death and that the body should not be touched. Dutch officials perceived an obligation to comply with this rule, which may have been an obstacle to conducting a more thorough autopsy. This raises the question as to whether troop sending nations to Islamic countries have an accurate understanding of sharia, which may not be as strict on the above-mentioned rules as was experienced by Dutch officials.
[49] *Jaloud* case, paras. 17-38.
[50] IT, pp. 16-17.
[51] Marc Hertogh, "A 'European' Conception of Legal Consciousness: Rediscovering Eugen Ehrlich", in the *Journal of Law and Society*, vol. 31, no. 4, 2004, pp. 457-481.
[52] IT p. 16-17.
[53] Alon Margalit, "The Duty to Investigate Civilian Casualties During Armed Conflict and Its Implementation in Practice", in the *Yearbook of International Humanitarian Law*, vol. 15, 2012, pp. 155-186.
[54] Brief d.d. 20 november 2006 van het College van procureurs-generaal gericht aan de hoofdofficier van justitie te Arnhem, inhoudende de Handelwijze bij geweldsaanwending militairen, Staatscourant 29 november 2006, nr. 233.
[55] IT, p. 11.
[56] IT, pp. 9-10.
[57] Idem, p. 5.

investigations if clarifications are necessary or if there are civilian casualties,[58] but the PPS only starts a criminal investigation if there are strong reasons to assume a crime has been committed, for example if a commander or a witness files criminal charges.[59] A novelty is that the RNLM, before it starts an investigation, has to consult with the military commander to gain situational awareness and to assess the extent to which an investigation will disrupt an ongoing military operation.[60]

Since the new Dutch prosecutorial policy is in place, the relationship between the RNLM and other branches of the military has substantially improved.[61] However, the PPS constantly invests into maintaining this relationship.[62] There is a fine balance in which the PPS on the one hand appreciates the importance of situational awareness and on the other hand constantly educates active acting soldiers about its role and function. An important part of the latter is that the PPS explains that it serves to guard the legitimacy of military operations. Without legitimacy there would be no public support from the population, both in the Netherlands and in the country of operation, which would make any military operation impossible.[63]

6. Concluding observations: challenges of implementing *Jaloud*

A carefully formulated policy on investigations, cautious about criminal investigations and a deliberately managed relationship between the RNLM and active serving soldiers, was the landscape in which the *Jaloud* judgment landed in the Netherlands. Under these circumstances, the clearer a judgment is on issues of jurisdiction, attribution, and the limits to the scope of the duty to investigate, the more likely it is that it will have an impact on the behavior of active serving soldiers, the RNLM and the PPS.[64] A clear legal obligation would correspond with the already applied legitimacy argument made by the PPS. This is where the Court has failed to give guidance to the Dutch military. Obviously, it is not the Court's role to provide prosecutorial or investigatory guidelines, but it could have given a much more precise explanation why

[58] Idem, pp. 4-6.
[59] Idem, p. 5.
[60] Idem, p. 12.
[61] Idem.
[62] Idem, p. 13.
[63] Idem, pp. 24-25.
[64] This is illustrated by what the senior legal advisor to the military section of the PPS states at IT, p. 20: "I think it is a very complicated judgment. What direction does it give us? What is the scope of our obligation to investigate? This is relevant for us to know.".

Jaloud fell within the Dutch jurisdiction, why the acts were attributed to the Netherlands in the context of the multinational operation in which it participated, and exactly where, particularly in light of local circumstances, the perceived limits to the duty to investigate deviated from human rights obligations. Considering the background of the Dutch policy, without clear requirements from the Court any argument for prosecutorial reforms, lower thresholds for investigations or more thorough investigations in future cases of civilian casualties are likely to fall on deaf ears in the Netherlands.