



LEFT IN THE DARK

FAILURES OF ACCOUNTABILITY
FOR CIVILIAN CASUALTIES
CAUSED BY INTERNATIONAL
MILITARY OPERATIONS IN
AFGHANISTAN- SUMMARY

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First published in 2014 by
Amnesty International Ltd
Peter Benenson House
1 Easton Street
London WC1X 0DW
United Kingdom

© Amnesty International 2014

Index: ASA 11/008/2014
Original language: English
Printed by Amnesty International,
International Secretariat, United Kingdom

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Cover photo: Bodies of women who were killed in a September 2012 US airstrike are brought to a hospital in the Alingar district of Laghman province.

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EXECUTIVE SUMMARY

“Three days after the attack, the commander invited us to the base and said please forgive us ... We said we won’t forgive you. We told him we don’t need your money; we want the perpetrators to be put on trial. We want to bring you to court.”

Mohammed Nabi, whose twenty-year-old brother Gul Nabi was killed, together with four other youths, in a helicopter strike near Jalalabad on 4 October 2013

A group of women from an impoverished village were collecting firewood in a mountainous area in Laghman province, in September 2012, when a US plane dropped at least two bombs on them. Seven women and girls were killed and seven more were injured, four of them seriously. Mitalam Bibi, aged 16, survived but was blinded in one eye, as was her cousin, Aqel Bibi, aged 18.

Ghulam Noor, an elderly farmer, lost his 16-year-old daughter Bibi Halimi in the attack. He and other family members of the dead, hearing that international forces claimed that only insurgents had been killed in the bombing, brought the women’s bodies to the district capital, Mihtarlam. “We had to show them that it was women who were killed,” he told Amnesty International.

Noor wanted the circumstances of his daughter’s death to be investigated, but he felt utterly without recourse. “I have no power to ask the international forces why they did this,” he said. “I can’t bring them to court.” Although a group of villagers filed complaints about the killings with the district governor and the provincial governor, such complaints have little value, as international forces in Afghanistan are immune from Afghan legal processes. No one ever contacted Noor or other family members to investigate the circumstances and legality of the attack. None of the family members were informed why the attack took place or what justification it might have had.

The Laghman bombing case is one of many. Thousands of Afghan civilians have been killed

since 2001 by international forces, and thousands more have been injured. Incidents like the killing of five civilians near Gardez in February 2010, in what appears to have been a war crime, go uninvestigated and unpunished. In the vast majority of cases, even where the available evidence suggests that killings were unlawful, family members of the victims have no means whatsoever of accessing justice.

This report examines the record of accountability for civilian deaths caused by international military operations in the five-year period from 2009 to 2013.

US forces have comprised the large majority of international forces in Afghanistan, and have been implicated in the large majority of incidents involving civilian casualties. Therefore, this report focuses, in particular, on the performance of the US government in investigating possible war crimes and in prosecuting those suspected of criminal responsibility for such crimes. Its overall finding is that the record is poor.

RESPONSIBILITY FOR CIVILIAN CASUALTIES

Amnesty International notes that, especially in recent years, the vast majority of civilian deaths in Afghanistan have been the result of attacks by the Taliban and other parties in conflict. Such groups have failed to take basic precautions to avoid harming civilians, have employed civilians as human shields, and in some instances have directly targeted civilians in violation of the laws of war. In 2013, according to the United Nations Assistance Mission in Afghanistan (UNAMA), insurgents were responsible for more than three-quarters of civilian deaths, while international forces were responsible for just 5 percent of them. While this is not the focus of the current report, Amnesty International continues to condemn all attacks on civilians and deplores the increase by Taliban and other armed opposition groups.

Judging from interviews with 125 Afghan victims, family members, and eyewitnesses to attacks that resulted in civilian casualties, as well as from a thorough review of the documentary record, the US military's investigative and prosecutorial practices fall far short of what is needed to ensure accountability for alleged crimes against civilians. In numerous cases in which there is credible evidence of unlawful killings of civilians, the military has failed to conduct prompt, thorough and impartial investigations.

That said, US spokespersons claim the opposite. "We take all allegations of misconduct by our personnel very seriously," said US General Joseph Dunford, commander of the international coalition, promising a full investigation of reports of abusive behaviour last year.¹ Yet a close look at a range of cases—including night raids by Special Operations Forces, air strikes, and missiles shot from drones—reveals that these promised investigations almost never occur.

Under international humanitarian law (the laws of war), not every civilian death occurring in armed conflict implies a legal breach. Yet if civilians appear to have been killed deliberately or indiscriminately, or as part of a disproportionate attack, the incident requires a prompt, thorough and impartial inquiry. If that inquiry shows that the laws of war were violated, a prosecution should be initiated.

Amnesty International has identified important structural flaws in the US military justice system that hinder the investigation and prosecution of crimes against civilians. Most importantly, the military justice system is “commander-driven” and, to a large extent, relies on soldiers’ own accounts of their actions in assessing the legality of a given operation. As a 2013 report of the Defense Legal Policy Board concluded, the functioning of the system depends very much on initial, ground-level reporting from troops at the point of contact. It is, in significant ways, a system of self-policing. Yet troops have scant incentive to report possible violations up the chain of command, and many reasons not to. Commanders, too, have little reason to push investigations forward, particularly in cases in which the commander’s own conduct or judgment might be called into question. Because the military justice system lacks independent prosecutorial authorities, it is the commander who decides whether a case will be referred to trial, resolved administratively, or dropped altogether. Any prosecution, no matter how clearly in the interests of justice it is, can be vetoed by a defendant’s commanding officer. Given these obstacles, it is no wonder that few cases make it to court. It is only in the rarest of circumstances—where fellow soldiers are so appalled by another soldier’s behaviour that they insist on reporting it up the chain of command, where commanders support a prosecution, and, sometimes, where the media draws unwanted attention to flagrant abuses—that criminal cases involving civilian casualties go forward.

Amnesty International is aware of only six cases over the last five years in which members of the military have been criminally prosecuted for unlawfully killing Afghan civilians, including one case that involved 12 defendants. Out of those prosecutions, a total of 10 defendants were convicted of serious crimes, of whom seven remain behind bars. The most notorious case is probably that of Army Sgt. Robert Bales, who admitted to gunning down 16 Afghan civilians in March 2012, pleaded guilty to murder and other crimes, and was sentenced in 2013 to life in prison without parole.

But other serious cases have not even been meaningfully investigated. Family members in nine of the 10 incidents that Amnesty International documented in this report said that they and other eyewitnesses had never been interviewed by US military investigators. Without an effort to document the facts by speaking to those who could describe them directly, it is hard to see how an investigation could be considered serious or thorough. Many family members and eyewitnesses were interviewed by local human rights organizations, UN investigators, Afghan police, and members of the media, but not by anyone with power to bring a criminal prosecution against the alleged perpetrators.

“No military investigators ever came to see us,” said Rafiuddin Kashkaki, the father of a 16-year-old boy who was killed in a US Special Operations Forces raid on a family compound in May 2010—a raid in which eight others were killed. “We did everything we could to fight for justice, but we don’t even know if there was an investigation. We were left in the dark and we’re still in the dark.”

Kashkaki’s account was typical of the cases that Amnesty International documented. As he suggests, a major defect of the US military justice system is its near-complete lack of transparency. The US military fails to keep the public—and, more importantly, the victims of abuses—informed of the initiation, progress, and results of investigations. There is generally no public indication of whether a formal criminal investigation has been brought, or, if the investigation has been terminated, whether and why it was discontinued.

It is possible that in some cases involving unlawful civilian casualties the military has relied on administrative sanctions—so-called non-judicial punishments—to punish the alleged perpetrator, for example, by docking the defendant's pay, issuing a formal reprimand, or imposing a reduction in rank. Yet where this is the case the fact of the punishment is not made public; nor are the victim's family members informed. It is only when a case reaches the pre-trial hearing stage (known as the Article 32 hearing) that the existence of the investigation necessarily becomes public. While court-martial proceedings are public, only a small number of cases involving civilian casualties in Afghanistan have ever led to a court-martial.

In addition to the secrecy surrounding individual cases, the US military also withholds overall data on accountability for civilian casualties. Responding to a request from Amnesty International for quantitative and other information about investigations and prosecutions, Pentagon officials gave no substantive information whatsoever. While the Pentagon now issues an annual report on sexual assault in the military, another sensitive and controversial issue, it fails to provide similar reporting on its efforts to prevent and investigate civilian casualties. This is a glaring gap that needs to be filled. The annual sexual assault report, with its comprehensive data on complaints, investigations, and the disposition of cases, could be a good model for future Department of Defense reports on civilian casualties.

Existing mechanisms for transparency are clearly insufficient. The US Government's freedom of information system, meant to ensure transparency when government bodies fail to provide information, does not function effectively when civilian casualties are at issue. Responses to requests under the federal Freedom of Information Act (FOIA) for information about civilian casualties are often extremely slow and/or non-existent. For example, journalist Robert Dreyfuss of *The Nation* magazine filed a broad FOIA request with the US Department of Defense in September 2011 for information on civilian casualties in Afghanistan; as of July 2014, more than two-and-a-half years later, he had not received a single document in response.

This report describes 10 case studies in which a total of at least 140 civilians were killed, including at least 50 children. In Amnesty International's view, all of these incidents raise concerns about the unlawful use of force, and merit a thorough and impartial investigation. Two of them—involving a special operations forces raid on a house in Khataba village, Paktia province, in 2010, and enforced disappearances, torture, and killings in Nerkh and Maidan Shahr districts, Wardak province, in November 2012 to February 2013—involve abundant and compelling evidence of war crimes. Not a single person has been criminally prosecuted for any of these incidents.

Reform of US laws and policies on military justice is urgently needed. On a positive note, because the flaws of the system have come to light in another context—involving sexual assault and harassment within the ranks—efforts at achieving reform are ongoing. Several members of Congress have co-sponsored draft legislation that would, in cases involving serious crimes, transfer prosecutorial decision-making power away from commanders and give it to more independent military prosecutors. While this change would not, in itself, bring US practice into line with international legal standards, it would help the country catch up with developments elsewhere. Notably, over the last two decades, several countries have improved their systems of military justice, establishing external investigatory mechanisms that are

independent of the command system of control. Indeed, several European countries have carried out even more ambitious reforms, mandating that war crimes and serious human rights abuses carried out by members of the military are tried by civilian judges.

Yet, while forward-looking structural reform is crucial, efforts to provide justice to the Afghan families who have lost relatives in past attacks are also needed. In an encouraging precedent, the US military recently reopened an inquiry in a case involving the killing of two unarmed teenagers in Iraq in 2007, even though several years had passed since the alleged crime took place. Amnesty International urges US military officials to consider doing the same with the Afghan cases outlined in this report.

The planned withdrawal of international forces from Afghanistan at the end of 2014 should make these questions all the more relevant. At least in recent years, international military forces have made significant efforts to prevent civilian harm, and are now responsible for far fewer civilian casualties than either the Taliban or Afghan national forces. The legacy of international military operations is seriously tainted, however, when military forces leave behind families whose efforts to seek justice have been ignored.

METHODOLOGY

Amnesty International delegates conducted research in Afghanistan in July 2013 and March 2014, interviewing civilian survivors of military operations by international forces, family members of civilians who had been killed in such operations, and eyewitnesses to such operations. In all, the delegates spoke to 125 Afghans who had first-hand information about 16 attacks that resulted in civilian casualties. In many of the cases only civilians were killed.² Besides reviewing these cases in detail, the delegates also compiled and assessed a database of 97 reported incidents between 2007 and 2013 in which international military operations allegedly resulted in the deaths of two or more civilians.

The delegation also spoke to a range of other interlocutors in Afghanistan, including human rights defenders, journalists, civil society representatives, government and police officials, and members of ISAF's Civilian Casualties Mitigation Team. The Afghan Independent Human Rights Commission (AIHRC)—including their civilian casualties investigations unit and their staff in Kabul, Jalalabad and Herat—provided particularly helpful information and assistance. In addition, in the UK, Belgium, and the USA, Amnesty International researchers spoke to journalists, lawyers, military prosecutors, NATO officials, and civil society representatives familiar with these issues.

KEY RECOMMENDATIONS

International military forces, in particular the United States, must take urgent action to ensure that the family members of civilians killed in international military operations have meaningful access to justice. Steps must also be taken to improve transparency, both regarding cases of civilian casualties and regarding their investigation and prosecution. The public—and in particular the family members of victims—should be given accurate information about the numbers of civilians killed and injured in air strikes, raids, and other international military operations, as well as about the relevant government's response to those incidents.

Below are Amnesty International's key recommendations for reform. A full set of recommendations is included at the end of the report. The organization notes that some of these recommendations have been made before, but have not been acted upon. In a 2009 report, for example, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions urged international forces to show greater transparency regarding incidents in which civilians are killed or injured, and take meaningful steps to improve accountability.¹

TO THE GOVERNMENT OF THE UNITED STATES OF AMERICA:

- After any incident in which civilians have been killed by US forces, ensure that a prompt, thorough and impartial investigation is conducted, and, wherever there is sufficient admissible evidence, suspects are prosecuted in fair trials in line with admissible standards and without recourse to the death penalty.
- When investigations into killings of civilians have concluded, make their findings public, and share them, in particular, with family members of the victims.
- Review any existing investigative materials relating to the cases outlined in this report, and consider reopening the investigations by interviewing the family members of those who were killed, and others with first-hand information about the killings.

TO THE NORTH ATLANTIC TREATY ORGANIZATION (NATO):

- Carry out prompt, thorough and impartial fact-finding inquiries whenever there are plausible reports of civilian casualties caused by ISAF military operations, and release the results of these inquiries publicly.

¹ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Addendum: Mission to Afghanistan, UN Doc. A/HRC/11/2/Add.4 (6 May 2009), pp. 33-36.

TO THE GOVERNMENT OF AFGHANISTAN:

- Ensure that accountability for civilian casualties is guaranteed in any future bilateral security agreements signed with NATO and the United States.
- Continue to press the US and NATO authorities to take meaningful steps to enhance civilian protection, investigate reports of civilian casualties, and prosecute violations of international humanitarian law that result in civilian casualties.

¹ Bianca Hall, "Australian troops accused of mutilating body of Afghan man," *Sydney Morning Herald*, 30 August 2013.

² The majority of interviews were conducted directly by a Dari and Pashto-speaking Amnesty International staff member, while an interpreter was used for some.



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LEFT IN THE DARK: FAILURES OF ACCOUNTABILITY FOR CIVILIAN CASUALTIES CAUSED BY INTERNATIONAL MILITARY OPERATIONS IN AFGHANISTAN - SUMMARY

Thousands of Afghan civilians have been killed since 2001 by international forces, and thousands more have been injured. Incidents like the killing of five civilians near Gardez in February 2010, in what appears to have been a war crime, go uninvestigated and unpunished. In the vast majority of cases, even where the available evidence suggests that the killings were unlawful, family members of the victims have no means of accessing justice.

Left In The Dark examines the record of accountability for civilian deaths caused by international military operations in the five-year period from 2009 to 2013. Because US forces have comprised the large majority of international forces in Afghanistan, and have been implicated in the large majority of incidents involving civilian casualties, this report focuses, in particular, on the performance of the US government in investigating possible war crimes and in prosecuting those suspected of criminal responsibility for such crimes. Its overall finding is that the record is poor.

Based on interviews with 125 Afghan witnesses, victims and family members, this report describes 10 case studies in which a total of more than 140 civilians were killed, including at least 50 children. Not a single person has been criminally prosecuted for any of these incidents.

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Index: ASA 11/008/2014
August – (11 August 2014)

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