

United Kingdom, Unlawful Killings in Afghanistan

In the summer of 2022 the BBC published an investigation according to which members of the UK armed forces in Afghanistan repeatedly executed detainees and unarmed men under dubious circumstances. These killings potentially qualify as war crimes and raise the individual criminal responsibility of the perpetrators as well as the responsibility of the UK.

Acknowledgments

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N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

A. SAS UNIT REPEATEDLY KILLED AFGHAN DETAINEES

[Source: Hannah O'Grady and Joel Gunter, "SAS unit repeatedly killed Afghan detainees, BBC finds", 12 July 2022, BBC Panorama; available at <https://www.bbc.com/news/uk-62083196>]

[1] Newly obtained military reports suggest that one unit may have unlawfully killed 54 people in one six-month tour.

[2] The BBC found evidence suggesting the former head of special forces failed to pass on evidence to a murder inquiry.

[3] The Ministry of Defence said British troops "served with courage and professionalism in Afghanistan".

[4] The BBC understands that General Sir Mark Carleton-Smith, the former head of UK Special Forces, was briefed about the alleged unlawful killings but did not pass on the evidence to the Royal Military Police, even

after the RMP began a murder investigation into the SAS squadron.

[...]

[5] BBC Panorama analysed hundreds of pages of SAS operational accounts, including reports covering more than a dozen "kill or capture" raids carried out by one SAS squadron in Helmand in 2010/11.

[6] Individuals who served with the SAS squadron on that deployment told the BBC they witnessed the SAS operatives kill unarmed people during night raids.

[7] They also said they saw the operatives using so-called "drop weapons" - AK-47s planted at a scene to justify the killing of an unarmed person.

[8] Several people who served with special forces said that SAS squadrons were competing with each other to get the most kills, and that the squadron scrutinised by the BBC was trying to achieve a higher body count than the one it had replaced.

[9] Internal emails show that officers at the highest levels of special forces were aware there was concern over possible unlawful killings, but failed to report the suspicions to military police despite a legal obligation to do so.

[...]

[10] In 2019, the BBC and the Sunday Times investigated one SAS raid which led to a UK court case and an order to the UK defence minister to disclose documents outlining the government's handling of the case.

[11] For this latest investigation, the BBC analysed newly obtained operational reports detailing the SAS's accounts of night raids. We found a pattern of strikingly similar reports of Afghan men being shot dead because they pulled AK-47 rifles or hand grenades from behind curtains or other furniture after having been detained. • On 29 November 2010, the squadron killed a man who had been detained and taken back inside a building, where he "attempted to engage the force with a grenade". • On 15 January 2011, the squadron killed a man who had been detained and taken back inside a building, where he "reached behind a mattress, pulled out a hand grenade, and attempted to throw it". • On 7 February, the squadron killed a detainee who they said had "attempted to engage the patrol with a rifle". The same justification was given for the fatal shooting of detainees on 9 February and 13 February. • On 16 February, the squadron killed two detainees after one pulled a grenade "from behind the curtains" and the other "picked up an AK-47 from behind a table". • On 1 April, the squadron killed two detainees who had been sent back inside a building after one "raised an AK-47" and the other "tried to throw a grenade".

[12] The total death toll during the squadron's six-month tour was in the triple figures. No injuries to SAS

operatives were reported across all the raids scrutinised by the BBC.

[...]

[13] The squadron's primary role was carrying out deliberate detention operations (DDOs) - also known as "kill or capture" raids - designed to detain Taliban commanders and disrupt bomb-making networks.

[14] Several sources who were involved in selecting targets for special forces operations told the BBC that there were grave problems with the intelligence behind the selection process, meaning civilians could easily end up on a target list.

[15] According to a British representative who was present during target selection in Helmand in 2011, "Intelligence guys were coming up with lists of people that they figured were Taliban. It would be put through a short process of discussion. That was then passed onto special forces who would be given a kill or capture order."

[16] According to the source, the targeting was pressured and rushed. "It didn't necessarily translate into let's kill them all, but certainly there was a pressure to up the game, which basically meant passing out judgements on these people quickly," he said.

[...]

B. AFGHANISTAN: IMMEDIATE INVESTIGATION NEEDED ON ALLEGATIONS OF WAR CRIMES BY UK SPECIAL FORCES

[Source: Amnesty International, "Afghanistan: Immediate investigation needed on allegations of war crimes by UK Special Forces", July 12, 2022; available at <https://www.amnesty.org/en/latest/news/2022/07/afghanistan-immediate-investigation-needed-on-allegations-of-war-crimes-by-uk-special-forces/>]

Responding to the BBC investigation of repeated killing of unarmed men in suspicious circumstances in Afghanistan between 2010 and 2011 by the UK Special forces, Zaman Sultani, Amnesty International's South Asia Researcher, said:

[1] "The BBC's findings are horrifying, and clearly depict an alarming level of impunity and lack of accountability of UK troops who operated in Afghanistan. The BBC's reporting outlines unlawful killings, including deliberate killing of individuals after they were detained, targeting of civilians and fabricating evidence to justify the killing of unarmed men, pointing to potential war crimes having been committed. The suggestion that there's been a high-level cover-up compounds the moral outrage and suggests an

unwillingness on the part of the UK to pursue independent and effective investigations into the allegations.'

[2] "The UK is obligated to urgently commence investigations into all allegations of war crimes involving its Special Forces, and any UK nationals who are suspected of individual criminal responsibility must be brought to justice in UK courts. If the UK is unwilling to bring cases against its own military, as it has shamefully demonstrated in relation to war crimes committed by its forces in Iraq, the ICC should do so.'

[3] "The International Criminal Court (ICC) has also opened an investigation in Afghanistan and the Prosecutor must urgently investigate, without fear or favour, allegations of war crimes committed by all parties to the conflict as soon as possible. However, despite harrowing reports of war crimes and crimes against humanity being committed in Afghanistan by western militaries, including the USA, the ICC has not initiated any investigations, other than into the Taliban – leading to accusations of double standards in its approach."

[...]

DISCUSSION

I. Classification of the Situation and Applicable Law

1. (*See United Kingdom, The Case of Serdar Mohammed (Court of Appeal and Supreme Court Judgments), Document A, paras. 29-32*)

1. How would you classify the situation in Afghanistan at the time of the facts described in the document? Which rules of IHL apply? (GC I-IV, Common Art. 3; P II, Art. 2(1))
2. Does the UK's involvement in Afghanistan play a role for the classification of the situation? What rules of IHL apply to the UK in Afghanistan?
3. Does the classification of the situation matter for determining whether IHL was violated in the present case?

II. Death of civilians

2. (*Document A, para. [6]-[7], [11], [15], Document B, para. [1]*)

1. When a civilian is killed, does it matter if he or she was killed during the conduct of hostilities or if he or she was killed while in the power of a party to the conflict? Are there any differences when assessing a civilian death under each scenario? Is it always a war crime to kill a civilian during an armed conflict?
2. What rules of IHL does the conduct described violate? Does it matter if the acts alleged were committed against fighters or civilians? (GC I-IV, Common Art. 3; P II, Art. 4(2); CIHL Rules 47, 87, 89, 90, 129, 131)
3. Could these people be killed if, after being arrested and detained, they had tried to grab a weapon? Does planting a weapon nearby a civilian, for the purposes of justifying a killing, violate IHL?
4. Under IHL, when is it permissible to kill someone without trying to capture him or her first?

III. War crimes

3. (*Document B, paras [1]-[3]*)

1. What is the difference between an IHL violation and a war crime?
2. According to the ICTY, which conditions must be fulfilled to trigger individual criminal responsibility for war crimes? Do these conditions also apply to war crimes under the ICC Statute? Under customary law? (ICTY, *The Prosecutor v. Tadić: A. Appeals Chamber, Jurisdiction*, para. 94; ICC Statute, Art. 8; CIHL Rule 156)
3. Is the UK under an obligation to investigate, try and punish its soldiers for such conduct? (CIHL Rule 158; ICRC/Geneva Academy, *Guidelines on investigating violations of IHL: Law, policy and good practice*, 2019, p. 26)
4. Do States have an obligation to investigate rumours of war crimes? To investigate all violations of IHL? Where is this obligation contained? Does it exist in treaty law applicable to NIACs? If not, does it exist under Customary International Humanitarian Law (CIHL)? What other arguments could be made so that the obligation exists also in NIACs? (ICC Statute, Preamble; CIHL Rule 158; ICRC/Geneva Academy, *Guidelines on investigating violations of IHL: Law, policy and good practice*, 2019, pp. 4-6)
5. Can the ICC investigate and prosecute the individuals that have allegedly committed the acts described in the document? How does the ICC jurisdiction and the UK jurisdiction articulate? (ICC Statute, Preamble, Arts. 1 and 17)

IV. Command Responsibility

4. (*Document A, paras. [2], [4], [9]*)

1. In order to find a commander responsible for the crimes committed by their subordinates, what elements must be fulfilled? (ICC Statute, Art. 28)
2. When is the “should have known” threshold met by a commander? Was it fulfilled in this case?
3. Does the duty of a commander to repress include the duty to investigate allegations of crimes committed by the subordinate forces? (CIHL Rule 153)
4. Does it include the duty to punish after the commission of a crime? Is this realistic for commanders in NSAGs? (CIHL Rule 153)

V. State responsibility

5. Do these violations of IHL raise the international responsibility of the UK, apart from the individual criminal responsibility of the perpetrators? (CIHL Rule 149)