Mandate of the Special Rapporteur on extrajudicial, summary or arbitrary executions

REFERENCE:
AL USA 25/2019

9 December 2019

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on extrajudicial, summary or arbitrary executions, pursuant to Human Rights Council resolution 35/15.

In this connection, I would like to bring to the attention of your Excellency’s Government information I have received concerning allegations that the killing of 11 civilians on 11 August 2019 in Kulalgo Village, Zurmat district, Paktia Province, Afghanistan, by National Directorate of Security Special Forces, locally known as Shaheen forces, and allegedly belonging to Unit 01, occurred with the assistance of, or under the direct command of American officials.

According to the information received:

On 11 August 2019, National Directorate of Security (NDS) Special Forces based in Urgun district, Paktika province, locally known as Shaheen forces, and allegedly belonging to Unit 01, supported by United States intelligence and military actors conducted a raid targeting several homes and shops in Kulalgo Village, Zurmat district, Paktia, Province, and shot dead 11 civilians.

The raid began at approximately 10.30 p.m. on 11 August and lasted until 3.00 a.m. on August 12. According to eyewitnesses, the NDS Special Forces were dropped at three different locations in the Kulalgo Village by helicopters. They split up into groups of five to six people, and included at least one United States operative. The groups searched fifteen walled compounds with several houses and other buildings inside each compound.

In a first house, the soldiers checked the identity of four men, including three residents of the house and a guest who had joined to celebrate Eid. The four men were separated from the rest of the family and taken to other rooms where they were shot dead. Multiple witnesses reported that the victims were shot in the eyes or the mouth.

The victims were:

1. Shafiullah, son of Dr Ulfatullah
2. Ansarullah, son of Qudratullah
3. Hayatullah, son of Muhammad Mokhtar
4. Enamullah, son of Dr Ulfatullah

In a second house, the operatives killed a farmer.

In the third house, the operatives killed two more farmers.

To access the fourth house, the operatives blew up the front gate of the compound, setting ablaze vehicles and motorbikes parked inside. Once inside, they shot dead four men: two shopkeepers, a teacher, and a student.

According to witnesses, more people would have been killed if not for the intervention of female members of the families who either protected the men with their bodies or by holding up the Quran in front of the men.

NDS Special Forces took the responsibility for the raid on social media by tweeting that “eleven members of the terrorist Taliban group were killed, including two group leaders (sar grub).” The same day NDS Special Forces issued a press release stating that it eliminated 11 members of the Taliban in a raid in Kulalgo Village.

The NDS Special Forces is said to function outside the official and regular chain of command of the Afghan national security forces. Several sources claimed that NDS Unit 01, including the Paktika-based Shaheen forces, and its sister units 02, 03, 04, operate under the control of the United States Central Intelligence Agency (CIA), supporting its covert operations in Afghanistan. In addition, the United States military reportedly provides these operations with logistical support such as transport of forces and other actors in and out of the area of operation by air, as well as airstrikes conducted in response to escalating engagements on the ground.

On 15 August 2019, the Afghan Office of the National Security Office ordered an investigation into the Kulalgo killings. Information about the investigation’s progress or any findings are unknown at this point.

On 30 October 2019, a non-governmental human rights organization submitted to the CIA allegations according to which a number of civilians had been killed during joint operations between the CIA and Afghan forces. In its response, the CIA did not deny or admit the allegations but commented that war will never be “immaculate”. It confirmed that it will continue to partner with the Afghan security forces and promised to investigate allegations of human rights violations by armed groups it supported and/or commanded in Afghanistan, including the 11 August 2019 raid led by NDS Unit 01.

While I do not wish to prejudge the accuracy of these allegations, should they prove to be true, several of these would contravene the right of every individual to life, as set out in article 3 of the Universal Declaration of Human Rights (UDHR) and article 6 of
the International Covenant for Civil and Political Rights (ICCPR), ratified by the United States on 8 September 1992. The right to life is non-derogatory and the obligations of your Excellency’s Government under international human rights law continue to apply in the context of an armed conflict and extra territorially. I am particularly concerned that in at least several of the cases alleged, the death did not occur in the context of combats, that the victims were unarmed, that they were taken in the custody of the soldiers and seem to have been summarily executed at point blank.

Under international law, the use of force, especially lethal force, must abide by the principles of proportionality and necessity, which do not seem to have been respected by either the NDS Special Forces in these killings or the United States operatives who either commanded them or assisted in the raid.

The killings also appear to amount to a violation of international law applicable to non-international armed conflict, and as such may qualify as a war crime. In particular, the killings may have violated common Article 3 of the four Geneva Conventions, which the United States of America are party to, which defines the following minimum rules of behavior:

“1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; […]

(d) […] The carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;

2) The wounded and sick shall be collected and cared for.”

Under international law, a State can be held responsible for the actions of persons or groups which are not part of its armed forces. In this case, Your Excellency’s government could be held responsible for the crimes referred above if the allegations that NDS Special Forces acted under the instruction, control, or with the support of the CIA or United States Armed Forces are correct.
In light of the above, I express my support for the United Nations Assistance Mission’s to Afghanistan call to reintegrate NDS Special Forces into the official Afghan chain of command and urge Your Excellency’s government to assist in realizing this recommendation.1 The full respect and protection of the right to life in the ongoing, brutal conflict in Afghanistan can be achieved only by creating clear reporting lines and regulating the activities of pro-government forces.

In connection with the above alleged facts and concerns, please refer to the Annex on Reference to international human rights law attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.

2. Please explain the relationship between NDS Special Forces and the United States intelligence agencies and the United States armed forces.

3. Please provide detailed information, in the specific instances described in this communication, about the chain of command linking the NDS Special Forces and the United States intelligence agency and the United States military forces involved in the operation, and the decision-making throughout the operation.

4. Why were the 11 men killed instead of being taken prisoner in what seems to be an extrajudicial execution?

5. Please clarify the current policies and instructions concerning the rules of engagement and the use of lethal force by United States military and intelligence actors with regard to the protection of civilians, the procedures for the enforcement of such policies, the mechanisms of control of these operations, and for accountability of the personnel involved.

6. Has the United States Department of Defence and the Central Intelligence Agency developed policies requiring that operations involving United States armed forces or other personnel in Afghanistan that result in civilian casualties are properly investigated? If such protocol exists, I would be grateful to receive a copy. I would also be grateful to learn how it is effectively implemented and if it has resulted in the past in judicial or

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other sanctions in the case of unlawful acts that have resulted in the loss of life and serious injuries.

7. Please indicate whether any investigation has been launched into the operations described in this communication and which have resulted in the death of 11 persons; and what have been the results of that investigation. If no investigation has been conducted, please explain how this is consistent with the obligations of the United States of America under international law.

8. Please provide information on the existing measures in place to prevent the recurrence of such serious violations, and how they are being effectively implemented.

This communication and any response received from your Excellency’s Government will be made public via the communications reporting website within 60 days. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, I urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

Given the seriousness of these cases, I may choose to publicly express my concerns in the near future as, in my view, the information appears to be sufficiently reliable to indicate a matter warranting immediate attention. Given the seriousness of the facts alleged, I believe that the wider public should be alerted to their human rights implications. Any public expression of concern on my part will indicate that I have been in contact with your Excellency’s Government’s to clarify the issue/s in question.

Please note that a letter expressing similar concerns was sent to the Government of Afghanistan.

Please accept, Excellency, the assurances of my highest consideration.

Agnes Callamard
Special Rapporteur on extrajudicial, summary or arbitrary executions
Annex
Reference to international human rights law

In connection with the alleged facts and concerns, I would like to refer your Excellency’s Government to article 3 of the Universal Declaration of Human Rights which states that “Everyone has the right to life, liberty and security of person”; and to Article 6 (1) of the International Covenant on Civil and Political Rights which states that “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”

The right to life is non-derogatory and the obligations of your Excellency’s Government under international human rights law continue to apply in the context of armed conflict, as acknowledged by the International Court of Justice (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, paras. 24-25; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, para. 106.), the Human Rights Committee (General Comment 29, States of Emergency, para. 3) and the Committee on Economic, Social and Cultural Rights (Concluding observations on the initial report of Israel; 2001, para. 12) and the Committee on Economic, Social and Cultural Rights (Concluding observations on the initial report of Israel; 2001, para. 12).

The Human Rights Committee, in its General Comment 31 (Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004)), established that the ICCPR applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain ICCPR rights, more specific rules of international humanitarian law may be especially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.

Violations under international humanitarian law fall within the mandate of the Special Rapporteur. The Human Rights Council in Resolution 35/15 of 19 June 2017 acknowledges the key role of the Special Rapporteur on extrajudicial, summary or arbitrary executions in preventing crimes against humanity and war crimes. The General Assembly, in resolution 71/198 of 17 December 2016, dealing with the mandate of the Special Rapporteur acknowledges “the important role of the Special Rapporteur in identifying cases where extrajudicial, summary or arbitrary executions could amount to genocide and crimes against humanity or war crimes, and urges the Special Rapporteur to collaborate with the United Nations High Commissioner for Human Rights and, as appropriate, the Special Adviser to the Secretary-General on the Prevention of Genocide in addressing situations of extrajudicial, summary or arbitrary executions that are of particularly serious concern or in which early action might prevent further deterioration.”

International humanitarian law, through Common Article 3 to the four Geneva Conventions, establishes the minimum standards that all parties involved in a non-international armed conflict should observe concerning the treatment and protection of
civilians. While humanitarian law recognizes that some civilian casualties are inevitable during armed conflict, it imposes a duty on parties to the conflict to take all feasible precautions to avoid, and in any event, to minimize incidental loss of civilian life, injury to civilians and damage to civilian objects. To achieve this goal, international humanitarian law obliges States to distinguish between combatants and civilians, and to target only combatants and other military objectives. States are required to take all feasible precautions to avoid and minimized incidental loss of civilian life, injury to civilians and damage to civilian objects (Rule 15 of the Customary Rules of International Humanitarian Law identified in the study of the International Committee of the Red Cross). The only exception to this rule is if the “civilian objects” are used for military purposes. For instance, when military forces are deployed into what are normally civilian objects, such as a house or a home. However, “in case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used. The attacking force must presume it to be civilian” (Protocol I, article 52(3)).

A State is responsible for the conduct of persons or groups acting on whatever basis on its behalf (I.C.J., Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro, Judgment of 27 February 2007) and is obligated to take all necessary steps to ensure its officials do not perpetrate an attack causing an extrajudicial killing or arbitrary deprivation of life. Similarly, the State is responsible for violations of international humanitarian law attributable to it, including violations committed by entities it empowered, or groups acting on the State’s instruction or control, as well as violations committed by groups that the State acknowledges and adopts as its own (Rule 149 of the Customary Rules of International Humanitarian Law identified in the study of the International Committee of the Red Cross).

A State is responsible for violations of international humanitarian law attributable to it and to armed groups it empowered, or groups acting on the State’s instruction or control. Article 8 of the International Law Commission Draft Articles on the Responsibility of States for Internationally Wrongful Acts (thereafter ILC States responsibilities) provides that the conduct “of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.” Thus, a State can be held responsible for the actions of persons or groups which are not part of its armed forces.

Furthermore, conduct of subordinate armed forces, militias or paramilitary units is attributable to a State which has control of an “overall character,” which exists where a State “has a role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group”. (I.C.T.Y., The Prosecutor v. Tadic (C. Appeals Chamber, Merits))
The State cannot take refuge behind the notion that, according to the provisions of its internal law or to instructions which may have been given to its ... agents, their actions or omissions ought not to have occurred or ought to have taken a different form. This is so even where the organ or entity in question has overtly committed unlawful acts under the cover of its official status or has manifestly exceeded its competence (Draft Articles on the Responsibility of States for Intentionally Wrongful Acts, Art. 7, Commentary, para. 2).

Both international humanitarian and human rights law require States to carry out thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions, and war crimes committed by their nationals or armed forces. This obligation is enshrined in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (General Assembly Resolution 60/147, Chapter II, paragraph 3).

The Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, (resolution 1989/65 Economic and Social Council) recall that even exceptional circumstances including a state of war may not be invoked as a justification of extrajudicial execution executions, and that it is States’ duty to conduct thorough, prompt and impartial investigations of all suspected cases of extra-legal, arbitrary and summary executions, and bring to justice all persons identified by the investigation as having participated in those executions.

Furthermore, as set forth in the forth in the Minnesota Protocol on the Investigation of Potentially Unlawful Death, “where, during the conduct of hostilities, it appears that casualties have resulted from an attack, a post-operation assessment should be conducted to establish the facts, including the accuracy of the targeting. Where there are reasonable grounds to suspect that a war crime was committed, the State must conduct a full investigation and prosecute those who are responsible” (para. 21).

The families and dependents of victims of extra-legal, arbitrary or summary executions shall be entitled to fair and adequate compensation within a reasonable period of time.