



Body Counts and Masking Wartime Violence

Liesbeth Zegveld

Lawyer at Prakken d'Oliveira human rights lawyers, Amsterdam,
Professor of War Reparations, Director of the War Reparations Centre,
University of Amsterdam
lzegveld@prakkendoliveira.nl

Abstract

This Article is the transcript of the Peace Lecture held by Prof. Zegveld as part of the Peace Week 2013. It criticises the fact that Western countries do not provide data on the numbers of civilian casualties their wars cause. It remains controversial whether this is the consequence of a choice 'not to do body counts', or whether the governments does not want these figures to be revealed. In any case, the absence of this data leads to a *de facto* denial of the existence of these victims. This is reflected by the difficulties encountered when accountability and compensation are sought. It is argued here that there is a legal obligation to register victim casualties, as well as a necessity to do so from democratic, military and moral perspectives. For, as a component of conflict in itself, we can only truly evaluate our wars when the victim casualties are known.

Keywords

civilians – war – body-count – casualties – Peace Lecture

Civilians in Times of War

Circumstances are not well for civilians in a war zone. And this does not just apply to non-combatants in African countries where genocide takes place or where people are scarred for life with machetes; it also applies to civilians who are faced with our Western armies. In Iraq, after the invasion in 2003, around

* The author represented Nuhanović in all instances in Dutch court between 2004–2013.

half a million people died.¹ The number of refugees and people whose homes had been destroyed ranges between 2 and 4 million.² In Afghanistan, the situation seemed to improve slightly. However, many victims were killed as a result of air attacks. The Afghani president Karzai repeatedly complained about this and NATO amended its policy accordingly.

So overall, matters do not look too bright for the non-combatant during a situation of armed conflict. He is bombed, shot at, and his possessions are destroyed. The psychological need that arises as a result encompasses pain, anxiety and loss and leads to long-term suffering during and after the war itself.

This is not to suggest that civilians do not matter to Western countries, since wars are often waged precisely in order to protect them, among other things.³ The Davids Commission (which investigated the decision-making process that led to Dutch involvement in the Iraq war) sets out the objective of participation in the Iraq war as ‘bringing about an end to the suppression of the population, particularly the Kurds and Shiites, by the Iraqi regime’.⁴ The Foreign Office states that the ‘protection of civilians’ was an ‘intrinsic element’ in our participation in ISAF (International Security Assistance Force in Afghanistan under NATO command).⁵

1 According to the Iraqi Minister of Health, there were between 400,000 and 650,000 deaths. This number is confirmed by researchers from the John Hopkins University, see: Jonathan Steele and Suzanne Goldenberg, ‘What is the real death toll in Iraq’, *The Guardian*, 19 March 2008, <https://www.theguardian.com/world/2008/mar/19/iraq> (last accessed 21 May 2016).

2 See BBC <http://www.bbc.co.uk/news/world-middle-east-21752819> (last accessed 21 May 2016) and the International Organisation for Migration: <http://www.iom.int/cms/en/sites/iom/home/news-and-views/events/events-listing/the-displacement-crisis-in-iraq.html> (last accessed 21 May 2016).

3 Parliamentary document number: 29521-192, Questions to: Government, Commission: Foreign Affairs, 12 December 2012, <https://zoek.officielebekendmakingen.nl/dossier/29521/kst-29521-192?resultIndex=203&sorttype=1&sortorder=4> (in Dutch only) (last accessed 21 May 2016).

4 *Rapport commissie van onderzoek besluitvorming Irak*, bijlage bij *Kamerstukken II 2009/10*, 31 847, nr. 14, p. 491. See also: ‘Authorization for use of military force against Iraq Resolution of 2002’ <http://www.gpo.gov/fdsys/pkg/PLAW-107publ243/html/PLAW-107publ243.htm> (last accessed 21 May 2016): [Page 116 STAT. 1500] Iraq Resolution (Public Law 102-1), ‘that Iraq’s repression of its civilian population violates United Nations Security Council Resolution 688 and “constitutes a continuing threat to the peace, security, and stability of the Persian Gulf region,” and that Congress, “supports the use of all necessary means to achieve the goals of United Nations Security Council Resolution 688”’.

5 Parliamentary document: 29521-192, Questions to: Government, Commission: Foreign Affairs, 12 December 2012, *supra* note 3.

It is not that Western states *want* to kill civilians; policies that explicitly target them do not exist.⁶ However, the West simply regards it as an issue that is unfortunate and yet unavoidable. It claims that it is focusing on military targets, and if civilians are caught up in this then that is regarded as an accident or ‘collateral damage’.

What one exactly could expect from the law during periods of war remains a highly intriguing issue. Recklessness, anger, but also genuine boundaries in relation to human behaviour mean that civilians are killed on a large scale. Examples are soldiers who become ‘trigger happy’ after a colleague is killed by a roadside bomb in Afghanistan and who shoot a civilian dead, or an air attack that does not differentiate between the Taliban and ordinary civilians. The law has little understanding of this type of behaviour. Careless conduct, rage, accidents; the ‘heat of the fight’ is not the best environment for the rules of law.

Lawyers endeavour to allocate responsibility ‘after the event’. Things have already gone wrong and the victims want to know why their child was shot or why their house was bombed. They want someone to be held accountable for these actions.

The fact that this responsibility is not easily accepted is a familiar problem in the Netherlands. The victims of Srebrenica, the widows from the former Dutch India; they have been waiting decades for their suffering to be recognised. And this is not only the case in the Netherlands. International law is not especially keen when it comes to redress for victims of war. The United Nations spouts big words about human rights but does little for the victims that are killed during the missions themselves.

I have never understood why this is the case. During my speech at the University of Leiden, I said: “No matter what the case is during the conflict, *after* the war things must be different. After the war, when the victims of breaches of the law of war ask for redress, the law must represent them. The excuse that refers back to the ‘heat of the fight’ is no longer acceptable. After the war, we must observe the pledges that are provided to the victims of war within the rules.”⁷

I used to think: surely nobody could oppose this? Naturally, in any individual case, the other party – a commander-in-chief, a state, the UN or NATO – will

6 H. Slim, *Killing civilians; Method, Madness and Morality in War* (2007), at 121.

7 L. Zegveld, ‘Restoration of rights for victims of violations of international humanitarian law’ (2008) Inaugural Lecture Leiden University, available at <http://media.leidenuniv.nl/legacy/restoration-of-rights.pdf> (accessed 23 June 2016).

defend itself. However, on a more fundamental level, I thought, nobody could possibly oppose legal redress. If victims have suffered, they must be compensated. This assumption, however, is not necessarily supported in practice.

And then I wondered: if compensation is so difficult to obtain, what does that say about one's views of the civilians *during* the conflict? Fair enough, taking care of the civilians is one of the reasons given for going to war in the first place. But aside from that, what do we know about how is dealt with civilians in war zones? How many victims are there? How did they die? Providing compensation thereafter and protection at the location concerned are, in fact, two sides of the same coin. If, after the conflict, there is no enthusiasm for providing the victims with compensation, it is highly likely that this is based on a notion regarding how the civilians must be treated during the conflict. Reparations come to nothing because the war came to nothing.⁸

Whether or not the war was, in fact, lost is not easy to establish. Outsiders speak out about specific incidents or violence at their peril: 'I wasn't there'; 'I don't really know exactly what happened, how the combatant conducted himself or whether the response was proportionate'. In terms of the military personnel in the field, it is often preferable not to have seen exactly what took place. Situations are disorganised and confusing and reconstructions contain gaps or are often contradictory.

The army is very much a closed community, which makes it difficult for outsiders to form an opinion about the war. The army is not generous with information about what it does and why, which means it uses and what results it achieves with those. Military personnel are discreet about their work. This has never been any different: 'In India I made a pledge to Queen Wilhelmina to keep all of the secrets of the army', states veteran Harry Nouwen. In a later interview in *NRC Handelsblad*, he said that he recognised himself in a photo of summary executions in Dutch India.⁹

There are clearly 'insiders' and 'outsiders'. And one cannot form a coherent opinion about whether a particular war is fought legitimately or contains misdemeanours when so many aspects of the actual nature of warfare are unknown. The reality is that one has to leave that moral estimation to the army.

A fundamental question is how wartime violence generally is masked. While it may well be difficult to obtain a good overview and form an opinion about actual wartime conduct, it is possible to assess the *information* about the war that reaches the general public. In a more specific sense, this is the information

8 J.A.A. van Doorn and W.J. Hendrix, *Ontsporing van geweld; het Nederlands-Indonesisch conflict* (2012), at 320.

9 *NRC Handelsblad* 13 July 2013, <http://www.nrc.nl/nieuws/2013/07/13/veteraan-bekent-betrokkenheid-onbekende-executie-in-indonesie> (last accessed 21 May 2016).

regarding the transparency of states – or the lack thereof – regarding the victims they create; the numbers involved, who these victims are and how they fell.

The amount of victims concerned also says a great deal about the way in which the war is conducted. Military violence is normalised violence. Huge numbers of victims are not part of it. So, if many fatalities occur, this says a great deal about the way in which war is being conducted and about the likelihood that rules are being breached.

We don't do Body Counts

Sabar Gul lived in Kakrak, in Deh Rawod, Uruzgan. On 25 September 2007, his village was bombed. In the weeks leading up to the event, Taliban insurgents were advancing on the Dutch military that was in control there. The response came from the skies.

Sabar Gul tells his story.¹⁰

I was having a lie-in with my family when the bombing began. I got up and went outside. I saw a huge amount of dust and there was a lot of noise. I saw that a bomb had fallen on my uncle's house. While I was outside, I saw that my own family were being shot at from the skies. Many people were buried under the rubble. In my family, 17 died and 21 people were wounded. In our neighbourhood, 53 people were killed. We went to Kabul to submit a complaint. We spoke to the Dutch ambassador. He spoke to me personally. He promised that our houses would be rebuilt once things had calmed down in Deh Rawod. That's what he promised but nothing has ever come of it. Nobody helped us. The houses that were destroyed have still not been rebuilt.

During the bombing, Sabar Gul lost his daughter Aminah who was seven years old. He also lost two brothers. Immediately after the bombing began, he sheltered with his family members and other villagers in a mosque. This mosque however was also hit by a bomb during the night. According to him, seventeen died and twenty people were injured.

The *Volkskrant* reported on 27 September that in the night of 25 or 26 September a 'six-hour battle' led to the death of sixty-seven Taliban insurgents and ten civilians.

10 *Altijd Wat*, 10 July 2013, <http://www.uitzendinggemist.nl/afleveringen/1350440> (last accessed 21 May 2016). The author acted as the legal representative of Sabar Gul.

Sabar Gul could not determine which types of aeroplane were attacking his village and from which country they came.

According to Sabar Gul, the village was not warned about the attack. 'They could have told me; I was working as a driver on their base. I delivered water from a truck to the Americans and then later the Dutch. I had been paid \$ 200 two days before.'¹¹

It is unknown how many people the Dutch army has shot in Afghanistan. It is unknown how many people are permanently injured by our guns. It is unknown who those victims are, or where they come from, whether they have families or whether their children also died.

Western states send their military personnel to a country thousands of kilometres from here and have no idea at all how many civilian lives they are taking.

Anyone who genuinely wants to know how many victims Western armies have created in Afghanistan will not easily find an answer. The American General Tommy Franks, who led the invasions in both Iraq and Afghanistan, is well known for saying 'We don't do body counts'.¹²

One year after the start of Operation Enduring Freedom in Afghanistan, a military anti-terrorism operation led by the United Nations, the White House published a factsheet called 'One Year of Accomplishments'. Under the heading 'Casualties', only American soldiers were given:

Fifty-two American servicemen and women have been killed in the war against terror while more than 200 have been injured. Coalition forces have suffered deaths and injuries while supporting OEF. The CIA suffered one killed in action in Afghanistan.¹³

This fact sheet said nothing whatsoever about Afghan civilians.

11 Arnold Karskens in *Nieuwe Revu*, January 2008. Also, notes from an interview with Sabar Gul, in the possession of the author.

12 'Counting the civilian cost in Iraq,' *BBC News*, 6 June 2005; http://news.bbc.co.uk/2/hi/middle_east/3672298.stm (last accessed 21 May 2016).

13 'Operation Enduring Freedom – One Year of Accomplishments', *The White House*, 7 October 2002; <http://georgewebush-whitehouse.archives.gov/infocus/defense/enduring-freedom.html> (last accessed 21 May 2016).

ISAF, the other military operation in Afghanistan, under the leadership of NATO, also primarily reports ISAF dead and wounded. Practically no reports regarding Afghan victims exist at all.¹⁴

The Netherlands knows precisely how many Dutch soldiers have been killed in Afghanistan. The number is 24. Also the circumstances under which these deaths occurred are well-known. Ten Dutch military personnel were killed by a roadside bomb; 3 were killed in a gun battle; 1 died as a result of a rocket attack; 2 died as a result of 'friendly' fire; 1 committed suicide; 1 was killed by a car-bomb; 1 was killed by an explosive; 1 died as a result of an accident with an armoured vehicle; 1 killed himself with his service weapon; 1 died as a result of an F-16 accident; and 2 died as a result of a helicopter crash.

But knowledge about the civilian victims made in Afghanistan is not available. The Dutch Ministry of Defence claims that it does not keep track of the number of victims that it makes there. When asked how many Taliban insurgents the Dutch army had killed, the former Chief of Defence, Dick Berlijn, answered 'It is not a criterion that we believe is relevant.'¹⁵ Given that it is often hard to establish whether the person concerned is a civilian or member of the Taliban, does this mean that civilian victims also form an irrelevant criterion?

Sabar Gul tells that no investigation was carried out after the bombing of his village. Nobody went to the village to register casualties or to establish their identity. The villagers collected the bodies themselves and took them to a coalition troop checkpoint. One witness who spoke to the reporter Arnold Karskens stated:

The day after, we used loudspeakers to make it clear to the checkpoint manned by foreign military personnel outside the city that civilians had been killed. (...) We shouted: 'come and see, then you'll know it was civilians! If you don't want to come here, then we'll bring the bodies to you.' Then we stacked about thirty bodies, like a pile of firewood, on a vehicle and drove to the checkpoint.¹⁶

14 ISAF casualty reports: <http://www.isaf.nato.int/article/casualty-report/index.php> (last accessed 21 May 2016).

15 S. Derix, 'We wisten niet dat we zó vaak moesten knokken', *NRC Handelsblad* 12 April 2008, 3.

16 A. Karskens in *Nieuwe Revu*, January 2008. Also notes from an interview with Sabar Gul, in the possession of the author.

It is not only the coalition troops but also the media that fail in this regard. Few reports about Afghan civilian casualties exist. The Guardian acknowledges the media failings:

While we are pretty good at providing detailed statistical breakdowns of coalition military casualties (and by we, I mean the media as a whole), we've not been so good at providing any kind of breakdown of Afghan civilian casualties.¹⁷

The coalition troops have endeavoured to pay as little attention to victims as possible in Iraq, too. George W. Bush claimed the number of victims was 30,000 but various investigations have come up with different numbers, between 100,000 and one million.

A good example of this type of investigation is the Iraqi Body Count Project, an online project by a British Non-Governmental Organisation. By following press releases, the project has tried to estimate the number of civilian casualties. In December 2012, the IBC concluded that, as a result of the invasion of Iraq and the subsequent war, between 113,143 and 123,807 civilians had been killed.¹⁸

In 2006, the British medical journal *The Lancet* published a study into the numbers of fatalities since the fall of the Saddam Hussein regime. The report – even back in 2006 – reported an estimate of 654,965 deaths, with a margin between 392,979 and 942,636. Of these, 601,027 (426,369–793,663) were killed as a result of the military action.¹⁹

The precise number of Iraqi victims will always remain a mystery.²⁰ But whichever report one believes, the numbers are in any case far removed from the 30,000 to which Bush referred.

So the pertinent question is whether Western countries genuinely do not 'do body counts' as stated by American General Franks, or whether they do in fact count the bodies, but simply do not release information.

17 <http://www.theguardian.com/news/datablog/2010/aug/10/afghanistan-civilian-casualties-statistics> (last accessed 21 May 2016).

18 www.iraqbodycount.org/database.

19 G. Burnham *et al.*, 'Mortality after the 2003 invasion of Iraq: a cross-sectional cluster sample survey,' *The Lancet*, 12 October 2006: <http://www.thelancet.com/journals/lancet/article/PIIS0140-6736%2806%2969491-9/abstract> (last accessed 21 May 2016).

20 J. Steele and S. Goldenberg, 'What is the real death toll in Iraq,' *The Guardian*, 19 March 2008.

The Dutch Ministry of Defence states that the army of the Netherlands has registered the victims in Afghanistan but that the registration process was unsound. According to the Ministry, the registration is 'not based on grounded, factual research.'²¹ As a justification for this, it emphasises that it is impossible to say whether a victim is a civilian or Taliban.

In violent contact during operations, it is not always possible to establish whether the victims were civilians. It is usually hard to determine whether a victim is a civilian or an enemy combatant.²²

The Ministry therefore 'cannot presume that this registration is full or indeed accurate'.

The US also appears to have registered how many people died during the attack and occupation of Iraq. A 2005 report from the Pentagon reported on the civilian victims of the Iraqi rebels. It held its tongue, however, on the victims created by the US and allied troops. That aside, the Americans are certainly capable of keeping track of the victims and also regard this information as important for their military operations.²³

Wikileaks documents also seem to show that American troops often keep detailed records of where and when people died during military operations.²⁴ Wikileaks revealed a document indicating that the US knew full well that the number of victims in the Iraq war was not 30,000 but 109,032; 66,000 of whom had been civilians and 23,000 of whom had been armed insurgents.

'We don't do body counts.' Or: 'we do not want you to *know* that we do body counts.' 'We don't count.' Or 'we say we don't count and keep the numbers of victims secret.'

In both cases, there is a problem. The general public, the civilians, and to a certain extent also the military machine, do not know whether there have

21 Government response to Parliamentary question by Van Bommel <http://parlis.nl/pdf/kamervragen/KVR38957.pdf> (last accessed 21 May 2016) and <http://harryvanbommel.sp.nl/weblog/2009/11/26/burgerdoden-in-afghanistan/> (last accessed 21 May 2016).

22 Ministry of Defence response to data information request, 18 December 2009 (BS/2009021173). See also parliamentary document 27925, nr 403, tackling international terrorism, 5 August 2010, <https://zoek.officielebekendmakingen.nl/dossier/23530/kst-27925-403.html> (in Dutch only) (last accessed 21 May 2016).

23 <http://www.nytimes.com/2005/10/30/international/middleeast/30civilians.html?page-wanted=2> (last accessed 21 May 2016).

24 <http://www.theaustralian.com.au/news/world/documents-released-by-wikileaks-question-us-civilian-casualty-figures-in-iraq/story-e6frg6so-1225942814035> (last accessed 21 May 2016).

been victims, how many there were and how they died. This comes very close to denying the occurrence of civilian victims. This ignorance about numbers of victims means that one of the most important gauges for 'measuring' the war is lacking. While it is said that one is at war in the interests of the civilian and his safety, it is unknown what price this civilian is paying for the war itself.

We don't Want to Know

The usual answer to the question about registration of civilian victims is that it is basically impossible to keep track. Both the American army and the Dutch claim that they do not have the appropriate capacity.

Collating reliable figures is certainly no simple task. Numerous practical problems occur, such as lack of security in the most dangerous countries in the world and the limited freedom to manoeuvre in war zones. This makes registration both complex and hazardous. Problems also arise as a result of Western war methods. Mainly these consist of the use of bombs, instead of extensive ground troops, which renders counting very tricky.²⁵ Also methodological difficulties arise when trying to count the victims. In Iraq or Afghanistan, for example, there is no central registration point for deaths. Reports from hospitals and mortuaries are of limited reliability.

However, these practical complications are not the only reason for unawareness of victim numbers. Another is the fact that Western armies do not want to know who they are killing. The Americans learnt their lesson in Vietnam: don't count the civilian dead.²⁶ One of the rituals in that conflict consisted of the daily messages regarding the number of Vietnamese combatants killed by the Americans. A sceptical American public had to be convinced that victory was nigh. But the body count came across as cold and ruthless, particularly when it transpired that many of the so-called guerrillas were actually women, children and other innocent civilians.²⁷

Things had to change in Iraq. The US would count their own dead but the price that the Iraqis were paying as a result of the war would not be registered by the Americans.²⁸

25 A. Ahmed, 'Afghanistan says 10 children among U.S. strike fatalities', *International Herald Tribune*, 8 April 2013.

26 Steele and Goldenberg, *supra* note 20.

27 *Ibid.*

28 *Ibid.*

The Dutch Ministry of Defence appeared to tread a similar path. 'The government does not regard it as the task of the military to count civilian deaths,' said minister Verhagen of the Foreign Office. Parliament was not provided with information about Afghan civilian victims. According to the minister, 'Our military services are not reporters or journalists.'²⁹

The government of the Netherlands therefore has a deliberate strategy to not gather data and also to screen the facts. One reason for this is that it doesn't want to know who it is killing.

It would seem that highlighting victims does not fit into the image of a clean war, one that is fought in the interests of human rights. The civilian plays a central role in the communication from Western states about their wars. Numbers of injured people and deaths determine how the population view these countries and their conflicts. The public relations department of the Ministry of Defence tries to prevent victims from having a 'face'. States carry on as if the only dead are Taliban. Showing civilian victims and their bodies would lessen the support from their own civilians for the war.

Another reason for not wanting to register who is being killed is of a military-strategic nature. Practically every time a fatal incident in Afghanistan occurs, it is immediately reported that the victims were enemies and that the only or most of the deaths involved the Taliban. In 2007, the NRC Handelsblad carried a much-used message:

In May 2007 a provisions convoy was ambushed by the Taliban in Helmand; the Afghan driver died and three soldiers were wounded. In the subsequent battle and air strikes, a US statement indicated that 'around two dozen enemy combatants' had been killed. There were "no messages about civilian casualties". However, according to a resident of the area, three houses were destroyed and, as a result, seven civilians were killed and ten to fifteen were wounded. Five people are missing.³⁰

Every report of victims leads to a dispute about the exact identification of the people concerned. Local organisations and civilians contest the claim by coalition troops that exclusively or primarily Taliban were killed and insist that civilians also died. This, however, works in two ways: also the Taliban suddenly appear out of nowhere to claim that the people killed were innocent civilians.

29 <http://www.cloggie.org/linksgedacht/2008/01/17/hoeveel-afghaanse-burgers-hebben-onze-jongens-al-vermoord/> (last accessed 21 May 2016).

30 H. Chin-A-Fo, 'Burgerslachtoffers? Lastig te zeggen', NRC Handelsblad, 30 May 2007.

Civilian casualties are, therefore, a component of a conflict in themselves and they are used to accuse the enemy of misdemeanours.³¹

There are very good reasons not to trust the official figures that are presented in relation to the overall toll of the war. Killing Taliban is a military success. Assessing whether a civilian is a regular citizen or a rebel is often a political evaluation. For a soldier, it is better to say he shot a combatant than admit to killing a civilian.³² So Western armies tend to kill Taliban and rarely kill civilians. In the absence of the media, facts and figures will lead a life all of their own. Without journalists to check the facts, states are tempted to present the facts in their favour.

Finally, civilian deaths are not registered because it is, quite simply, not a priority. It takes up a great deal of time and involves risks that are too high for the personnel concerned, it does not serve any military purpose, and is insufficiently relevant; that, at least, is the perception.

All in all, this ignorance regarding the civilian victims created during warfare comes very close to denial. There are either no or very few victims at all, and that suits the West just fine.

Civilian Victims do Matter

Every victim, however, has a name and a family and they once had a house. Though his face and story are unknown here, our war has robbed him of his life.

Victims do matter. It is important to know how many people are killed and who these people are. The concept of civilian fatalities is a very uncomfortable one, and this is even more so when nothing at all is known about these victims. A democratic society prioritises information and transparency. However, when it comes to civilian deaths caused by Western military forces, the people are shrouded in darkness and ignorance. All of these unknown victims should be extremely concerning.

Victims matter in law. The law of war states that civilians must be protected. The Fourth Geneva Convention is called 'Protection of Civilian Persons in Time of War'. This treaty was drawn up after the end of the Second World War

31 Department of Defense (USA) 'Report on Progress Toward Security and Stability in Afghanistan' http://www.defense.gov/pubs/pdfs/1230_Report_final.pdf (last accessed 21 May 2016) [= US/OEF, operation enduring freedom], December 2012.

32 See table on page 4 'Summary Table 1. The Human Costs of War: Direct War Death in Afghanistan, Iraq, and Pakistan October 2001–February 2013' for a comparison of the figures between the civilian casualties from Afghanistan, Pakistan and Iraq.

as a response to the enormous numbers of civilian deaths during the war. The first protocol in this treaty bans attacks on civilians. Civilian deaths must be distinguished from military objectives. It would be possible to assess whether armies abide by the rules if only the facts were collated, if the number of dead was registered, and if the wartime processes during which these victims died were reported.

But the law is not enough. Moreover, exclusively referring to the law could very well end up being counterproductive. In a context of non-compliance with these norms, the norms could become somewhat meaningless. Hugo Slim, international commentator on humanitarian action suggested that a more convincing argument is needed.³³ Legal discourse is insufficient in a discussion about acknowledging civilian victims.

But there are other reasons why victims have to be registered. Hiding the reality about civilian victims is not simply a legal mistake, it is also a military, political and moral one.

The military error herein is elaborated as follows. If one does not keep track of victims, one does not know whether or not a military operation has been successful. The fact that military operations often encompass the objective to protect civilians and facilitate local safety, means it simply *must* be known how many civilians were have killed and how that happened. The number of victims provides with information on the war in which one is fighting and the effectiveness of one's actions. If there is a high number of civilian victims, we must immediately question the purpose of and need for the operation and the techniques that are being employed. New military action can then be reconciled with this information.³⁴

'Careful and, where possible, restrained military operations are vital in order to win over the trust of the population and encourage effective governance and reconstruction',³⁵ according to the Dutch Defence and Foreign Office ministers. Whether or not the action was careful and restrained can only be assessed if the figures regarding victims are available. Military interventions will be less effective if one is not prepared to comprehend the extent to which death and suffering are caused, and the consequences thereof for the local population.

33 Slim, *supra* note 6, at 260.

34 S. Breau and R. Joyce, "The legal obligation to record civilian casualties of armed conflict", Discussion Paper: Oxford Research Group, June 2011.

35 Answer to question about implications for the strategy to be followed as a result of civilian casualties in Afghanistan, the minister of Foreign Affairs, of Defence, for Development Cooperation. 'ISAF's objective is to create the conditions for good governance and reconstructions in Afghanistan so that the legitimate Afghan authorities and international and non-governmental aid organisations can carry out their tasks'.

There is one other reason for counting victims, and this is a political one: the West may very well not be counting, but the enemy and the local populations certainly are. The Palestine psychiatrist Eyad el Sarraj is very clear on this topic:

‘The children who are agitated today will become the suicide bombers of tomorrow(...) Worldwide psychological research has shown that an unending stream of armed conflict will lead to chronic social toxicity. People become less sensitive and more impulsive and violent. This has also happened to us.’³⁶

Ignoring civilian victims leads to anger and misunderstanding among local populations and it pushes civilians into the arms of the rebels. Our military forces must protect civilians and also demonstrate that this is the case. Following a failure to do so, civilians will seek refuge with the enemy and be tempted to bear arms themselves and resist the original military advances. The local population thus gradually turned against the NATO troops during the Afghanistan war as a result of anger about the huge numbers of civilian deaths due to the unending aerial attacks. The Taliban easily found new recruits among these angry civilian populations.³⁷ President Hamid Karzai said:

‘I am not happy with civilian casualties coming down; I want an end to civilian casualties... As much as one may argue it’s difficult, I don’t accept that argument... It seriously undermines our efforts to have an effective campaign against terrorism.’³⁸

The more violence used against civilians, the more violent their response becomes. Non-combatants must therefore be treated correctly during wartime. ‘[T]he cleaner you fight, the easier it is to make and keep a lasting peace,’³⁹ says

36 Interview with Palestinian psychiatrist Eyad el Sarraj, *NRC Handelsblad*, 3 and 4 January 2009.

37 K.F. Inderfurth, ‘Losing the ‘other war’: Afghanistan’, *International Herald Tribune*, 30 May 2007 (‘Mounting civilian casualties are turning Afghans against the nearly 45,000 U.S. and NATO troops in their country, provoking demonstrations and a motion in the upper house of Parliament to set a date for their withdrawal. These incidents also provide a propaganda windfall and new recruits for the Taliban’.) Also: Human Rights Watch ‘Troops in contact; airstrikes and civilian deaths in Afghanistan’, September 2008, 3.

38 In: Human Rights Watch, ‘Troops in contact; airstrikes and civilian deaths in Afghanistan’, September 2008, p. 2.

39 Slim, *supra* note 6, at 287.

Hugo Slim. Whether or not this fight is indeed clean can only be assessed if civilian casualties are no longer ignored.

Ignoring civilian victims also has another negative effect: the figures begin to take on a life of their own. This is already clear from the difference between Bush's 30,000 and the 400,000 to 650,000 provided by the Iraqi Minister of Health.⁴⁰ The Netherlands has never bothered to count up how many people were executed by its army in the former Dutch India. This has left room for stories about the corresponding numbers to vary vastly. The Dutch claimed, for example, that its military shot and killed 150 people in the Javan village of Rawagede on 9 December 1947. The villagers counted 430 dead. According to the Dutch version of events, 3,000 to 4,000 people were killed on South Sulawesi. According to the South Sulawesi authorities however, there were 30,000 victims. This number does not seem realistic, but the fact that the Netherlands has failed to offer an accurate and viable alternative that is based on reliable registration means it is difficult to counter local estimates.

The number of civilian casualties is, therefore, a component of a conflict in itself. Not keeping abreast of deaths provides an opportunity for the various versions of reality to take flight. These various realities then take on their own lives and they have a negative impact upon the attitude of the local population and their support for the war. Generally circulating astronomical figures about numbers of victims lead to anger and a feeling of denial among civilians and thus encourage further violence.

Finally, ignoring civilian victims is a moral failing. Civilians must be protected. Respect for fellow humans means one cannot do otherwise, and respect for fellow humans is the most fundamental argument one can provide for acknowledging victims. The law of war is based on this very concept of human value. It is the civilians whose houses are bombed and whose children are shot dead at checkpoints. They must be paid the attention they deserve; their deaths oblige this. From a moral perspective, all civilians are entitled to acknowledgement and their deaths must therefore also be recognised and registered.⁴¹

The Obligation to Register Victims

To return to the law, strong moral, strategic, and political arguments exist for registering victims. However, the law also seems to stipulate this, and not only in a general sense (i.e. the obligation to protect civilians): the law also sets out

40 Steele and Goldenberg, *supra* note 20.

41 Breau and Joyce, *supra* note 34.

the specific obligation to register victims. This is an obligation to which in general is paid less heed and which doesn't sit easy with states.

The Oxford Research Group has investigated this obligation to register the dead. The group established that '(i)t is evident that governments do not record civilian casualties in any type of systematic basis and those that do so do not publish the records.'⁴² The research group indicated that states are obliged to register deaths. Article 16 of the Fourth Geneva Convention⁴³ states: 'As far as military considerations allow, each Party to the conflict shall facilitate the steps taken to search for the killed'. Article 33 of the First Protocol to the Convention defined the following: each Party shall to the fullest extent possible record information of persons that have died as a result of hostilities or occupation.

The obligation to register deaths can also be based on the right to not become a missing person. The treaty against enforced disappearance⁴⁴ forbids individuals being denied their freedom as a result of arrest, detention or kidnap and having their fate kept secret. People who have simply disappeared create more victims than the specific individual concerned. Families and friends are left behind to suffer anxiety and insecurity.

During wars, people disappear on a very large scale. Summary executions and illegal detentions are commonplace. The question is whether the rules governing enforced disappearance also cover victims of the 'regular' battlefield, such as those killed by bombing. It could be argued that the regular deaths on the battlefield must be registered accurately, if only to rule out the fact that someone has simply disappeared. Victims are entitled not to go missing; their families have a right not to have to search for their loved ones.⁴⁵

In peacetime, in Western countries, it is accepted that deaths will be registered. Death is the moment at which many rights expire but certain new rights are created too. These include the right to have one's death registered. Without the desire to start a debate about whether the dead have rights, living people are certainly entitled to have their deaths registered after the event and to be treated with dignity after death. Furthermore, families also seem to be entitled to notification of the death of a loved one. The family subsequently acquires

42 *Ibid.*

43 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, 1949.

44 International Treaty on the protection of all persons against enforced disappearance, New York 20 December 2006, *Trb.* 2008, 173 (Dutch translation in *Trb.* 2011, 93), entered into force on 23 December 2010.

45 Compare to Art. 32 of the First Supplementary Protocol to the Geneva Treaties that speak of the right of families to know the fate of family members.

new rights as a result of this death, e.g. the right to take possession of the body of their loved one.

These rights (specifically, the right to have a death registered) also exist during times of war. States must not only prevent high numbers of deaths but must also care for those who do succumb.⁴⁶ Human dignity requires that states do not simply allow civilians to disappear as a result of not registering them after a bombing incident.⁴⁷ The state must – within the confines of the possible – provide information about casualties. If a victim dies, the family must be told about the location of the physical remains and accessibility thereto.

The state obligation not to breach the right to life also encompasses research into the facts.⁴⁸ Facts are vital in order to distinguish between a crime and an accident. If one is not fully aware of the facts, one can never know whether the rules have been applied correctly. War veteran Nouwen commented on the summary executions in Dutch India:

What you are now seeing on television in Syria, what people are doing to one another: we did that too. That was how the war was. People in the Netherlands simply don't realise.⁴⁹

Shooting or bombing people can also be considered a crime. In situations where Western countries claim that victims are regrettable but that it was an accident or that they were collateral damage, information is vital for supporting these claims. Of course, information about numbers of deaths is insufficient in order to establish responsibility. Questions about what the military leadership knew, what their intentions were in relation to a specific attack, the precautionary measures they took; all of this is extremely important. But registering the dead is the first and most important step.

A reason frequently used by states to explain why they do not register victims is that it is unclear whether an individual is a civilian or a combatant.⁵⁰

46 Breau and Joyce, *supra* note 34.

47 *Ibid.*

48 Judgment, *Isayeva v. Russia*, nr. 57950/00, ECtHR, 24 February 2005.

49 NRC Handelsblad 13 July 2013.

50 Ministry of Defence, response to data information request, 18 December 2009 (BS/2009021173). See also Parliamentary Document 27925, nr 403, tackling international terrorism, 5 August 2010 ("During violent encounters as part of operations, it is not always possible to ascertain whether civilian victims have been killed. It is common not to be able to establish whether the victim is a civilian or an enemy combatant. It is equally difficult to figure out whether the victim was killed as a result of Dutch intervention", according to the Ministry).

But this argument does not hold water. The obligation to register deaths applies to combatants as well as civilians; the law does not distinguish between the two.⁵¹ Registration must be part of the process of gaining clarity on the background of the person concerned and the issue of whether he was a civilian and the circumstance of his death. The fact that it is unknown whether the victims are civilian or Taliban is partly the result of failing to register or investigate the fatal incident.

In a similar argument, military organisations often state that it is hard to tell whether the victims were killed by them, another country or the enemy themselves.

It is true that almost every Dutch military operation abroad takes place in the context of an international mission. The Dutch military in Afghanistan operates in the context of ISAF, which is operationally led by NATO. In the field, the Dutch usually support military operations that are being conducted by other countries. On the other side, there are the Taliban insurgents. The violence therefore emanates from various sides.

The fact that allies are also responsible, however, cannot be a reason for not registering deaths. One should be able to rely on agreements being made within NATO on the registration of victims (or a decision to deliberately not register victims). In a collective mission, collective responsibility is taken. The deaths caused by the United States or the United Kingdom are also deaths caused by the Dutch. The Netherlands should not hide behind the screen of NATO in order to justify its ignorance about the dead. Aside from the issue as to whether it is relevant for legal liability, it is not a morally convincing argument.

Call for Action

So what should be done? What can one do himself?

When I spoke on the phone to Sabar Gul in Afghanistan, I explained that he should not have high expectations of his legal action. The law is slow and complex. Whether it will provide him with any redress is unclear. He answered: 'even if you can attract attention to the case, if I could be given a face and my story could be regarded as a genuine story, that would be a huge help. We are left behind, we are living with the mess; but nobody knows about it. I have

51 Art. 32 and Art. 33 Supplementary Protocol to the Treaties of Geneva of 12 August 1949, concerning the protection of victims of international armed conflicts (Protocol I), Bern 8 June 1977, *Trb.* 1978, 41, entered into force on 7 December 1978.

definitely had to deal with your army but your army has not really had to deal with me'.

The Netherlands is familiar with the price of war when it comes to its own military. However, civilian victims are consistently downplayed, mistakenly represented and hidden from the people. As a result, the price of war is underestimated and not sufficiently understood.

The story of Sabar Gul only came to light by chance; he contacted a journalist. The messages the Dutch public receive here usually concern its own soldiers. They sometimes involve enemy deaths. They very rarely concern civilian victims. When it comes to civilian victims, they are usually anonymous reports. The military reports do not give the victims a face. And as long as the victims are not given a face, one cannot identify with them. They are unable to speak.

Alongside the story of Sabar Gul, there are many others. These victims have also been denied a face. Someone must take responsibility for this. And, by this, I do not mean legal responsibility per se and I certainly don't mean that they should all be compensated in cash. I simply mean that one must be aware of who these people are and what led to their deaths. We must account for ourselves by knowing who these people are.

You and I do not know the people our army has killed or their surviving relatives. We were not there. It starts with registration in the field. The violence must not be hidden from us, so that responsibility can be allocated and we can fulfil our roles as citizens in a democracy and thus make an informed decision about the true price of war, whether or not we want our army to fight in a particular conflict. Registration also means standing up for the victims concerned and making sure that their rights are respected. We not only have to care for them by providing food and medication, they also have a right to rights. We can articulate these by giving them a face, by connecting them to us.