

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

*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.

**SUMMARY**

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.<sup>1</sup> 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

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<sup>1</sup> 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 armed opposition groups. 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.

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.

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.<sup>2</sup> 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

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<sup>2</sup> Bianca Hall, "Australian troops accused of mutilating body of Afghan man," *Sydney Morning Herald*, 30 August 2013.

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.<sup>3</sup> 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.

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<sup>3</sup> The majority of interviews were conducted directly by a Dari and Pashto-speaking Amnesty International staff member, while an interpreter was used for some.

## 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.<sup>4</sup>

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.

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.

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<sup>4</sup> 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.

## **BACKGROUND: STRUCTURE OF INTERNATIONAL FORCES OPERATING IN AFGHANISTAN**

The armed conflict in Afghanistan pits Afghan, US and other international forces against Taliban insurgents and a number of loosely allied armed groups.<sup>5</sup> The Afghan National Security Forces (ANSF) are now more than 338,000 strong—made up of some 186,000 soldiers and 152,000 Ministry of Interior forces—having more than doubled in size in five years.<sup>6</sup> While the size of Taliban forces is not known with certainty, and estimates vary significantly, most experts believe the Taliban fields at least 25,000 or 30,000 full-time fighters, plus tens of thousands of part-time local fighters and facilitators.<sup>7</sup> The Taliban is by far the largest of the country's armed opposition groups.

The intensity and severity of the violence in Afghanistan has risen significantly over the past decade. In first quarter of 2013, for example, the Taliban and other armed opposition groups carried out some 2,331 attacks, about one-and-a-half times the number for the same period in 2012.<sup>8</sup>

At present, although the majority of Afghanistan's territory and population remains under some degree of Afghan government control, many districts are believed to be under the effective control of the Taliban, or are heavily contested by it.<sup>9</sup> Areas with a heavy Taliban presence, like Helmand, Logar, Nuristan and Kunar Provinces, tend to be where military operations are most intense, and where civilians are most likely to be killed or injured.

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<sup>5</sup> The armed groups operating in Afghanistan make up a complex and fluid network whose relationships change over time. While the Taliban is the core insurgent group, other important factions include the so-called Haqqani network and Hizb-e-Islami Afghanistan (HIA), founded by, respectively, former mujahedin commanders Jalaludin Haqqani and Gulbuddin Hekmatyar. See, for example, Antonio Giustozzi, "Taliban Networks in Afghanistan," Case Study Series, Center for Irregular Warfare and Armed Groups, United States Naval War College (2012); Jeffrey A. Dressler, "The Haqqani Network: From Pakistan to Afghanistan," Institute for the Study of War, October 2010.

<sup>6</sup> Ian S. Livingston and Michael O'Hanlon, Afghanistan Index, Brookings Institute, 14 May 2014, p. 6; Brian Bradley and Jonathan Owen, "Nato alarm over Afghan army crisis: loss of recruits threatens security as handover looms," *The Independent*, 31 March 2013.

<sup>7</sup> Antonio Giustozzi, "Taliban Networks in Afghanistan," Case Study Series, Center on Irregular Warfare and Armed Groups, United States Naval War College (2012), p. 23; Rod Nordland, "Study Finds Sharp Rise in Attacks by Taliban," *New York Times*, 19 April 2013.

<sup>8</sup> Rod Nordland, Study Finds Sharp Rise in Attacks by Taliban, *New York Times*, 19 April 2013.

<sup>9</sup> There are no fixed boundaries separating Taliban-controlled areas from areas under the control of the Afghan government, and the situation changes over time. It is clear, however, that the Taliban has a substantial presence in many rural areas. See Azam Ahmed, "Taliban Making Military Gains in Afghanistan," *New York Times*, 26 July 2014; Bill Roggio, "Taliban seize district in central Afghanistan, launch suicide assault in Kandahar," *Long War Journal*, 9 July 2014; Alissa J. Rubin, "In Old Taliban Strongholds, Qualms About What Lies Ahead," *New York Times*, 8 January 2013; Mohammad Stanekzai, "Afghans battle for strategic Helmand after U.S. troops pull out," Reuters, 30 June 2014; Bill Roggio, "Jihadists create 'no-go zones' in northern Afghanistan," *Long War Journal*, 18 February 2014; Fazelminallah Qazizai and Chris Sands, "Afghanistan: Another province goes to the Taliban," *GlobalPost*, 26 November 2012; Bill Roggio, "Taliban step up cross-border attacks in Afghanistan and Pakistan," *Long War Journal*, 7 July 2011.

## Composition of International Forces in Afghanistan

Most international troops in Afghanistan are under the command of the NATO-led International Security Assistance Force (ISAF). Nearly 50,000 international troops are currently under ISAF command, the large majority of which are from the US.<sup>10</sup> Although as of June 2014 there were a total of 48 countries that contributed troops to ISAF, most provided fewer than 500 troops. Indeed, several countries, like Austria, Ireland and New Zealand, provided fewer than 10 troops. The UK, with over 5,000 soldiers in Afghanistan, had the second largest troop concentration in the country.

ISAF's creation was authorized by the UN Security Council in December 2001, two months after the United States initiated military operations in Afghanistan.<sup>11</sup> It is charged with overseeing security in the country and training the ANSF; it came under NATO control in August 2003.

The United States currently has some 32,000 troops in Afghanistan under ISAF command. For more than a decade, US forces in Afghanistan were divided between those under the ISAF umbrella, and those that were carrying out counterterrorism and counterinsurgency operations under the rubric of Operation Enduring Freedom (OEF).<sup>12</sup> The latter set of forces, which consisted primarily of US Special Operations Forces, operated independently of NATO/ISAF command. In July 2012, however, the NATO Special Operations Component Command-Afghanistan (NSOCC-A) was established, putting all special operations forces involved in counterterrorism operations under the control of the commander of ISAF forces, who is also the head of US forces in Afghanistan.<sup>13</sup> The ISAF/US commander at the time of NSOCC-A's creation was John Allen; the current commander is Gen. Joseph F. Dunford.<sup>14</sup>

US conventional forces in Afghanistan—all but the special operations forces—belong to the United States Central Command (USCENTCOM or CENTCOM), one of US military's nine unified commands. CENTCOM's area of responsibility extends to the Middle East, North Africa, and Central Asia, covering a total of 20 countries, including

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<sup>10</sup> NATO, Troop numbers and contributions, 1 June 2014. NATO/ISAF claims that as of 1 June 2014 the international coalition in Afghanistan consists of 49,902 troops, including 32,800 US forces, 5,200 UK forces, and smaller numbers from other countries.

<sup>11</sup> See UN Security Council Resolution 1386 (2001). The Security Council has extended ISAF's mandate on an annual basis since 2001, most recently in October 2013. See UN Security Council Resolutions 1413, 1444, 1510, 1563, 1623, 1707, 1776, 1833, 1890, 1943, 2011, 2069 and 2120.

<sup>12</sup> See Human Rights Watch, "Troops in Contact": Airstrikes and Civilian Deaths in Afghanistan, September 2008, p. 10. As of mid-2008, for example, the United States had some 23,000 troops in Afghanistan as part of ISAF, and another 19,000 troops operating under the banner of OEF.

<sup>13</sup> See "Discussion on Afghanistan with General John Allen," Brookings Institution, March 25, 2013, pp. 13-14.

<sup>14</sup> In June 2014, General Dunford was nominated to be the next commandant of the US Marine Corps. He will likely begin his new duties in the fall. David S. Joachim, "Dunford, Commander in Afghanistan, Is Picked to Lead Marine Corps," *New York Times*, 5 June 2014. On 24 June 2014, President Obama nominated Army Gen. John Campbell as Dunford's successor in Afghanistan. Paul McLeary, "New Leaders Tapped for ISAF, SOCOM and NORAD," *DefenseNews*, 24 June 2014.



Afghanistan and Pakistan. Based at MacDill Air Force Base, in Florida, CENTCOM has command authority over forces from the Army, Navy, Air Force and Marines.<sup>15</sup>

In addition to official military forces, extremely large numbers of private security contractors operate in Afghanistan; indeed, they outnumber foreign troops. As of 2013, the US military was employing more than 100,000 private contractors in Afghanistan, using them in a broad range of roles, including for traditional military functions.<sup>16</sup> As many have noted, the level of privatization seen in US military operations in Afghanistan—and, until recently, in US military operations in Iraq—is unprecedented in modern warfare.<sup>17</sup> It is unclear to what degree private security contractors have been involved in military operations that lead to civilian casualties, perhaps because Afghan civilians have little means of ascertaining whether the personnel carrying out any given attack are soldiers or contractors. One known case of abuse, however, involved the summary killings by a private security contractor of a handcuffed Afghan detainee. In that instance, the perpetrator was prosecuted in US federal court, with the court imposing a sentence of five years' probation.<sup>18</sup>

### **Special Operations Forces**

Since the US-led military intervention in Afghanistan in 2001, many thousands of special operations forces have operated in Afghanistan. US forces make up the largest number, but also French, Australian, Jordanian and UAE special operations forces, among others, have carried out operations in the country.

For most of the past decade, US special operations forces operated under a separate command structure from ISAF forces, as well as a separate command from CENTCOM. This independent command, the US Special Operations Command (USSOCOM or SOCOM), is currently headed by Admiral William H. McRaven and brings together four service components (from the Army, Air Force, Navy and Marines).<sup>19</sup> The Joint Special Operations Command (JSOC), SOCOM's subunified

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<sup>15</sup> The component commands are the US Army Forces Central Command (USARCENT or ARCENT, also known as the Third Army), the US Naval Forces Central Command (USNAVCENT or NAVCENT), the US Air Forces Central Command (USAFCENT or AFCENT), and the US Marine Forces Central Command (USMARCENT or MARCENT). United States Central Command, "About CENTCOM," undated.

<sup>16</sup> See Congressional Research Service, Department of Defense's Use of Contractors to Support Military Operations: Background, Analysis, and Issues for Congress, 17 May 2013, p. 2. According to the Congressional Research Service, approximately 108,000 private contractors were employed by the US Department of Defense in Afghanistan as of March 2013.

<sup>17</sup> See, for example, Molly Dunigan, "A lesson from Iraq war: How to outsource war to private contractors," *Christian Science Monitor*, 19 March 2013. See also Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights, 30 December 2011, para. 544.

<sup>18</sup> "American gets probation in revenge killing," Associated Press, 8 May 2009. The defendant, Don Ayala, was initially charged with second-degree murder, but later pleaded guilty to voluntary manslaughter. He faced a possible sentence of 15 years.

<sup>19</sup> SOCOM forces currently consist of some 66,000 personnel, including military and civilian staff. Posture Statement of Admiral William H. McRaven before the House Armed Services Committee, 113<sup>th</sup> Congress (March 6, 2013); Linda Robinson, The Future of U.S. Special Operations Forces, Council Special Report No. 66, April 2013, pp. 8-9. Admiral McRaven is to be replaced by Army Gen. Joseph

command, includes elite units such as Delta Force and the SEALs, known for their commando operations. Special Operations Command Central (SOCCENT), the subordinate regional command that extends to Afghanistan, is SOCOM's largest regional command.<sup>20</sup>

Since late 2012, US special operations forces in Afghanistan have been part of the Special Operations Joint Task Force-Afghanistan (SOJTF-A). The commander of SOJTF-A, currently Maj. Gen. Edward M. Reeder Jr., is also the head of the NATO Special Operations Component Command-Afghanistan (NSOCC-A), a dual-hat arrangement that creates an integrated command.<sup>21</sup> As of mid-2013, SOJTF-A/NSOCC-A consisted of some 13,000 special operators and support personnel.<sup>22</sup>

Special operations forces have 11 "core operations and activities," including reconnaissance, counterinsurgency, unconventional warfare, and "direct action."<sup>23</sup> They are best known for manhunts and commando operations such as the 2011 raid on Osama bin Laden's compound in Abbottabad, Pakistan. As Gen. Hugh Shelton, one of SOCOM's former commanders, described them: "[I]f you need someone that can sky dive from thirty miles away, and go down the chimney of the castle, and blow it up from the inside—those are the guys you want to call on."<sup>24</sup> They are reputed to be much more aggressive and unrestrained than conventional forces, with much more secretive operations, and to operate in the grey zone between military operations and covert action.

### **Transition to Afghan Control**

NATO/ISAF's military mission in Afghanistan is scheduled to conclude at the end of 2014. As that date draws nearer, the number of international troops in Afghanistan has been shrinking, and the number of Afghan national forces has been growing. International troop levels peaked at about 140,000 in 2011, when the US was implementing its "surge" strategy. Since that time, the US has greatly scaled back its troop levels, as have other troop-contributing countries. Five years ago there were three times as many international troops as Afghan troops; now that ratio has practically been reversed.

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Votel in August. Zack Peterson, "Votel to succeed McRaven as SOCom commander at MacDill," *Tampa Bay Times*, 27 July 2014.

<sup>20</sup> Howard Altman, "McRaven tells Congress his goals remain on track despite budget woes," *Tampa Tribune*, 14 February 2014.

<sup>21</sup> General Reeder's full title as head of special operations forces in Afghanistan is commander, Special Operations Joint Task Force-Afghanistan/North Atlantic Treaty Organization Special Operations Component Command-Afghanistan, Operation Enduring Freedom, Afghanistan. Department of Defense, News Release: General Officer Assignments, 18 March 2014. General Reeder has been deployed to Afghanistan at least twice in the past, in 2009 and 2010. The previous commander was Maj. Gen. Austin S. Miller (June 2013 – June 2014); before him, the commander was Maj. Gen. Tony Thomas (June 2012 – June 2013). Thomas now works at the CIA.

<sup>22</sup> Karen Parrish, "Special Ops Task Force Helps Shift Afghanistan Trend Line," American Forces Press Service, 15 May 2013.

<sup>23</sup> Joint Publication 3-05, Joint Special Operations, 18 April 2011.

<sup>24</sup> Jeremy Scahill, *Dirty Wars: The World Is a Battlefield* (2013), pp. 52-53.

At present, ISAF forces are still responsible for air support as well as some combat operations, although they claim to participate in them in a support role.

ISAF's mandate under UN Security Council resolution 2120 ends on 31 December 2014. It is still unclear what, if any, international military presence will remain in Afghanistan beyond the end of the year. NATO officials have spoken of maintaining a mission in Afghanistan, to be called Resolute Support, focused on training and advising the Afghan military.<sup>25</sup> In late May 2014, President Barack Obama announced that the US would keep 9,800 troops in Afghanistan through 2015, saying that by the end of 2015 that number would halved, and that nearly all US troops would be withdrawn by the end of 2016.<sup>26</sup>

Kelly E. Magsamen, Acting Assistant Secretary of Defense for Asian and Pacific Security Affairs, testified before Congress recently about the future role of US forces in Afghanistan. "A post-2014 US military presence will have two objectives," she said, "training, advising and assisting the Afghan National Security Forces as part of a NATO-led Resolute Support mission, and supporting counterterrorism operations against the remnants of al-Qaida."<sup>27</sup> Senior officials in Washington had previously indicated that any US counterterrorism force that remained after 2014 would consist primarily of CIA and special operations forces.<sup>28</sup>

As in Iraq, however, the continuation of the US troop presence is contingent upon the negotiation of a bilateral security agreement with Afghanistan, and a failure of those negotiations could result in a more rapid and abrupt troop withdrawal.<sup>29</sup> To date, discussion of the terms of the agreement—especially regarding the issue of immunity of US troops—has been extremely contentious. Led by President Hamid Karzai, the Afghan government has pressed for US troops to be subject to prosecution in the Afghan courts. US officials have made clear that they will not compromise on this point.<sup>30</sup> Both of the presidential candidates—Abdullah Abdullah and Ashraf Ghani—have indicated that they will sign the agreement.

## **KILLINGS OF CIVILIANS DURING INTERNATIONAL MILITARY OPERATIONS**

Many thousands of Afghan civilians have been killed in international military operations since 2001, with at least 1,800 of the deaths occurring during the five-

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<sup>25</sup> Adrian Croft and Phil Stewart, "NATO chief still hopes to salvage new Afghan mission," Reuters, 26 February 2014.

<sup>26</sup> Karen DeYoung, "Obama to leave 9,800 U.S. troops in Afghanistan," Washington Post, 27 May 2009.

<sup>27</sup> Terri Moon Cronk, "U.S. to Continue Support of Antiterror Efforts in Afghanistan," American Forces Press Service, 19 June 2014.

<sup>28</sup> "Spec-Ops and CIA First In, Last Out of Afghanistan," AP, 8 October 2011; Greg Miller, "CIA digs in as Americans withdraw from Iraq, Afghanistan," *Washington Post*, 8 February 2012.

<sup>29</sup> Presently at issue are bilateral security agreements with both NATO and the United States. NATO Secretary General Anders Fogh Rasmussen recently warned the Afghan government that the two agreements would need to be signed before the September 2014 NATO summit. "NATO chief warns Afghanistan must sign security pact by early September," AFP, 8 July 2014.

<sup>30</sup> See, for example, Vanda Felbab-Brown, "The Stakes, Politics, and Implications of the U.S.-Afghanistan Bilateral Security Agreement," Brookings Institution, 17 November 2013; Krista Mahr, "Karzai Refuses to Budge on Security Pact," *Time*, 14 December 2013.

year period from 2009 to 2013.<sup>31</sup> Although the available data has gaps and weaknesses, it appears that the frequency and magnitude of civilian casualties caused by international forces in Afghanistan have dropped substantially since 2009. This welcome development is due in part to the fact that international forces are involved in fewer military operations overall, but it also reflects important changes in military tactics. Guided by tactical directives and other protocols, international forces have limited the use of force against residential compounds, improved the intelligence used for targeting operations, and taken other steps that have had a positive impact on the protection of civilian life.<sup>32</sup>

Especially in recent years, the vast majority of civilian deaths in Afghanistan have been the result of attacks by the Taliban and other armed opposition groups. 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.<sup>33</sup>

The proportion of civilian deaths caused by armed opposition groups in Afghanistan, as compared to Afghan government and international forces, has changed significantly over time. In the first eight months of 2007, the first year that United Nations Assistance Mission in Afghanistan (UNAMA) investigated civilian casualty systematically, “pro-government forces” comprised of both Afghan government and

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<sup>31</sup> See the annual reports on protection of civilians in armed conflict published by the United Nations Assistance Mission in Afghanistan (UNAMA) since 2007; John Bohannon, “Counting the Dead in Afghanistan,” *Science*, 11 March 2011 (noting that only a small proportion of the civilian deaths caused by “pro-government” forces in UNAMA’s 2009 and 2010 reports were caused by Afghans, the remainder being caused by international forces); Neta C. Crawford, *Accountability for Killing: Moral Responsibility for Collateral Damage in America’s Post-9/11 Wars* (2013), pp. 103-08. It should be emphasized that UNAMA’s figures are very likely undercounts, although the extent to which they underestimate civilian casualties is unclear. See Robert Dreyfuss and Nick Turse, “America’s Afghan Victims,” *The Nation*, 19 September 2013.

It is unknown with any certainty how many Afghan civilians were killed in the first years of the war in Afghanistan, let alone how many were killed by international forces during that period. In late 2013, *The Nation* magazine published an important article that tried, to the extent allowed by limited and imperfect data, to give a comprehensive accounting of civilian deaths in Afghanistan. The article estimated that “many thousands” of civilians had been killed since 2001 by US and other international forces, while acknowledging the paucity of reliable and comprehensive sources for deaths that occurred during the early part of the conflict. Robert Dreyfuss and Nick Turse, “America’s Afghan Victims,” *The Nation*, 19 September 2013.

Amnesty International uses the term “civilian” in this report to refer to individuals who are not members of the armed forces, and are not taking a direct part in hostilities.

<sup>32</sup> See ISAF HQ, memorandum regarding Tactical Directive, 2 July 2009; ISAF HQ, memorandum regarding Tactical Directive, 30 November 2011; ISAF/USFOR-A, COMISAF Night Operations Tactical Directive, 1 December 2011; ISAF, Standard Operating Procedure (SOP) 373, Direction and Guidance on Escalation of Force, 17 September 2012; Eric Schmitt, “Allies Restrict Airstrikes on Taliban in Civilian Homes,” *New York Times*, 10 June 2012. According to the Army’s *Afghanistan Civilian Casualty Prevention Handbook*, it was in 2005 that civilian casualties “became a key operational issue” in Afghanistan. *Afghanistan Civilian Casualties Prevention Handbook*, No. 12-16, June 2012. It was not until several years later, however, that meaningful steps were taken to mitigate the problem.

<sup>33</sup> See, for example, United Nations Assistance Mission in Afghanistan, *Annual Report on Protection of Civilians in Armed Conflict: 2013*, February 2014, pp. 23-25; Amnesty International, *All who are not friends, are enemies: Taleban abuses against civilians*, ASA 11/001/2007, April 2007, pp. 11-30; Human Rights Watch, “Troops in Contact”: Airstrikes and Civilian Deaths in Afghanistan, September 2008, pp. 25-28.

international forces were responsible for 44 percent of civilian deaths, approximately the same proportion as insurgent forces.<sup>34</sup> (UNAMA's reporting did not, at that time, separate out casualties caused by Afghan government forces from those caused by international forces, but international forces were more heavily engaged in combat than Afghan forces.) Since that time, the proportion of civilian deaths caused by international forces has dropped steadily. In 2013, according to UNAMA, insurgents were responsible for more than three-quarters of civilian deaths, while international forces were responsible for just 5 percent of them.<sup>35</sup>

It should be emphasized that civilian deaths do not in themselves demonstrate that the laws of war have been violated. In carrying out lawful attacks against insurgents, international forces may cause incidental loss of civilian life. But while civilian casualties in any given military operation may not necessarily be unlawful, any loss of civilian life can have a profoundly negative effect on the local population. Indeed, military forces have a strong policy interest in limiting the impact of war on the civilian population. If civilian casualties mount, the legitimacy of military operations is likely to be called into question.<sup>36</sup>

Civilians in Afghanistan have been killed in a variety of different circumstances, by both ground troops and airpower. Three scenarios, however, have been shown to be especially hazardous over the years: air strikes—including those carried out by unmanned aerial vehicles (drones)—night raids, and escalation of force incidents.

### **Air Strikes**

Air strikes alone have claimed the lives of thousands of civilians in Afghanistan.<sup>37</sup> From 2009 to 2013, UNAMA counted approximately 1,000 civilian deaths due to air strikes, more than half of the total number of deaths attributable to international forces during that period. All of the largest incidents of civilian casualties, those in which 50 or more people have been killed, have involved air strikes. Among the worst were the 2009 attack on Granai village, Farah province, in which at least 86 were killed, and the 2009 attack near Omar Kheil village, Kunduz province (discussed below), in which many scores were killed.

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<sup>34</sup> United Nations Assistance Mission in Afghanistan, *Armed Conflict and Civilian Casualties, Afghanistan Trends and Developments 01 January - 31 August 2008*, 2008, p. 2.

<sup>35</sup> United Nations Assistance Mission in Afghanistan, *Annual Report on Protection of Civilians in Armed Conflict: 2013*, February 2014, pp. 1, 3 and 7. Out of a total of 2,959 civilians killed, UNAMA found that 2,311 deaths were attributable to “anti-government elements,” primarily the Taliban, and 147 were attributable to international forces.

<sup>36</sup> See, for example, US Department of the Army, *Civilian Casualty Mitigation*, ATTP 3-37.31, 18 July 2012, p. 1-5.

<sup>37</sup> *The Nation* magazine, which compiled an extensive database of combat-related civilian deaths in Afghanistan, attributed 5,622 civilian deaths between 2001 and 2012 to air attacks. See *The Nation*, *The Deaths of Afghans: Civilian Fatalities in Afghanistan, 2001–2012* (available at: <http://www.thenation.com/afghanistan-database>). Deaths due to air strikes spiked in 2001 and again in 2008. Given the precarious state, until recently, of the Afghan Air Force, it is fair to attribute nearly all of these deaths to the actions of international forces.

In 2013, 118 civilians, including 37 children, were killed in air strikes.<sup>38</sup>

In recent years, President Karzai has put increasing pressure on international forces to limit or even discontinue air strikes, emphasizing the need to protect the civilian population. In June 2012, he called for an absolute halt to aerial bombings, saying that international forces would be barred from using them “even when they are under attack.”<sup>39</sup> While air strikes have continued, nonetheless, it appears that international forces are using smaller munitions than in the past. Most recent allegations of civilian deaths attributable to air strikes have involved incidents in which fewer than 10 people were killed.

Another way in which air strikes have changed is a marked transition to reliance on unmanned aerial vehicles, or drones. In 2013, UNAMA documented 19 incidents involving air strikes from drones that resulted in 45 civilian deaths, a substantial increase over the figures from 2012.<sup>40</sup>

### **Night Raids/Special Operations Forces**

No military tactic has caused more controversy in Afghanistan than night raids. Frequently carried out by US special operations forces—possibly, in some cases, with elements of the intelligence services—night raids involve late night, surprise attacks on residential compounds.

US special operations forces maintain a Joint Prioritized Effects List (JPEL), better known as the “kill/capture list,” that includes the names of people the forces are authorized to try to kill or capture. Over the years, in seeking to find these people, US special operations forces have carried out countless night raids on Afghan homes; many see these night raids as the signature tactic of special operations forces.

Such raids are carried out at night because they are aimed at surprising the targeted individuals when they are at home asleep. But given that the Afghan family compounds hit in these raids often house large extended families, including parents, siblings, cousins, and children, the risk of civilian casualties is high. As the UN Special Rapporteur on extrajudicial, summary or arbitrary executions emphasized in a 2009 report, “Night raids are always dangerous for civilians.”<sup>41</sup> And even when raids do not result in civilian deaths or injuries, they engender enormous resentment among

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<sup>38</sup> United Nations Assistance Mission in Afghanistan, *Annual Report on Protection of Civilians in Armed Conflict: 2013*, February 2014, p. 7; “UNICEF Reports Increase In Afghan Children Casualties,” Radio Free Europe, 3 July 2014.

<sup>39</sup> Sangar Rahimi and Alissa J. Rubin, “Days After an Order to Restrict Them, Afghanistan Calls for Airstrikes to End,” *New York Times*, 12 June 2012.

<sup>40</sup> United Nations Assistance Mission in Afghanistan, *Annual Report on Protection of Civilians in Armed Conflict: 2013*, February 2014, p. 8.

<sup>41</sup> 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), p. 9.

Afghans, who feel angered and humiliated when their homes are invaded and their privacy is violated.<sup>42</sup>

There are no comprehensive data on the number of civilians who have been killed in night raids, and UNAMA has acknowledged that its annual counts may be underestimates.<sup>43</sup> It is clear, however, that night raids by US special operations forces have included some of the most egregious killings of civilians in recent years, including four incidents discussed below.

### **Escalation of Force Incidents**

Escalation of force incidents, when civilians are fired on at checkpoints or near military convoys, are another key source of civilian casualties.<sup>44</sup> Sometimes civilians do not hear or disregard troops' warnings to stop, though troops are generally supposed to employ an escalating series of less-lethal measures before resorting to deadly force. Amnesty International interviewed several people who lost family members in escalation of force incidents; in each case, however, there was not sufficient information to allow for a basic assessment of the lawfulness of the killing.<sup>45</sup>

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<sup>42</sup> See Open Society Foundations and the Liaison Office, *The Cost of Kill/Capture: Impact of the Night Raid Surge on Afghan Civilians*, September 2011. Traditional Afghan religious and cultural values also come into play. Sensitive about protecting women in their families from contact with outsiders, Afghans often perceive night raids as an egregious form of disrespect. See Afghanistan Independent Human Rights Commission, *From Hope to Fear: An Afghan Perspective on Operations of Pro-Government Forces in Afghanistan*, December 2008, p. 28.

<sup>43</sup> United Nations Assistance Mission in Afghanistan, *Annual Report on Protection of Civilians in Armed Conflict: 2011*, February 2012, p. 4, fn 28.

<sup>44</sup> UNAMA documented 31 civilian deaths from escalation of force incidents in 2013, though its numbers do not distinguish between those caused by international and Afghan forces. United Nations Assistance Mission in Afghanistan, *Annual Report on Protection of Civilians in Armed Conflict: 2013*, February 2014, p. 8.

<sup>45</sup> Most of the people whom the Amnesty International delegation interviewed regarding escalation of force incidents were not physically present where the killing occurred; they were relatives of the victim.

## CASE STUDIES

The following case studies all occurred between 2009 and 2013. They involve ten incidents 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 in 2010, and enforced disappearance, torture, and killings in Nerkh and Maidan Shahr districts in November 2012 to February 2013—involve abundant and compelling evidence of war crimes.

### **US Air Strikes near Omar Kheil village, Char Dara District, Kunduz Province, 4 September 2009**

*We are still waiting for justice to be done.*

Haji Karim Gul, whose two brothers were killed in US air strikes in Kunduz province in September 2009.

US air strikes called in by German ground troops hit two fuel tankers on 4 September 2009, killing many scores of Afghan civilians, as well as an unknown number of Taliban. The exact number of victims is still disputed, but there is no doubt that an extremely large number of civilians died in the attack, which took place in Char Dara district, Kunduz province, near the village of Omar Kheil.

#### *The Air Strikes*

The basic circumstances of the incident have been widely reported.<sup>46</sup> On the day of 3 September 2009, Taliban militants commandeered two fuel tankers on the main road leading into Afghanistan from Tajikistan, killing one of the drivers. While driving the tankers to a place where the cargo could be offloaded, they tried to cross the Kunduz River, near the village of Omar Kheil, but the hijacked vehicles got stuck in the mud and sand. Rather than abandon the vehicles, the militants opened the tanks to siphon off the fuel. They also encouraged local villagers to take away free fuel.

An Omar Kheil resident described the scene to Amnesty International:

Dozens of men and boys rushed to the area; people were doing what they could to bring free fuel home. Some of our relatives in Omar Kheil informed people in Waziri village and other villages about the free fuel, so many people from the surrounding villages came. I went twice but then I got tired. It was almost midnight when I stopped bringing fuel home; I changed my clothes and went to bed.

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<sup>46</sup> See Rajiv Chandrasekaran, "NATO Orders Probe of Afghan Airstrike Alleged to Have Killed Many Civilians," *Washington Post*, 5 September 2009; "Dozens Dead in Afghanistan: UN Calls for Investigation into Air Strikes," *Der Spiegel Online*, 4 September 2009.



Another villager gave a similar account: “People were coming from all the villages near the river to take the free fuel; they were bringing buckets, gallon containers, and anything that could be used as container ... I went twice.”

Villagers told Amnesty International that the offloading of fuel went on for hours. During this time, it was later reported, a US B-1B bomber carrying out an overflight of the area spotted the vehicles.<sup>47</sup> German troops based in the area then called in US fighter jets, reportedly out of fear that the Taliban was planning to use the tankers to mount a large-scale suicide attack against their base.

Two F-15Es jet fighters arrived in the area at approximately 1:20 am. Some villagers told Amnesty International that they heard the sound of planes well before the bombing took place. Having reportedly received firm instructions from a German targeter, the planes dropped two 500-pound guided bombs, one on each truck, half an hour later. According to voice recordings later submitted as evidence in trial proceedings in a civil lawsuit in Germany, one of the US fighter pilots was extremely hesitant about the operation, saying that “something doesn’t feel right.” His qualms were overruled by the German team, which called for immediate strikes, reporting that the people on the ground posed an “imminent threat.”<sup>48</sup> Video footage of the strikes taken from one of the fighter planes shows a large number of people swarming around the tankers—they look like moving black dots—and then an enormous blast that envelopes the whole area.<sup>49</sup>

A villager who arrived on the scene just after the air strike described the immediate aftermath:

There were people everywhere: someone’s limb was missing; someone’s hand was missing; many people were buried under the mud; it looked like the Day of Judgment. People were crying, calling names, shouting and running around; I pray that no one experiences such a situation.

Another told Amnesty International:

People who had been killed and injured were everywhere. They were in the river, by the river bank, in the fields ... The wounded were screaming and crying. Some people were burned and it was difficult to identify them; some people were missing body parts, including their head. I have never seen such a horror in my entire life; it was a nightmare.

Amnesty International spoke to 13 local villagers who lost family members that day, including some who lost relatives as young as 12 years old. “I found my son and grandson far from each other,” one man said. “Their names were Dawood and

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<sup>47</sup> Chandrasekaran, “NATO Orders Probe.”

<sup>48</sup> Jörg Diehl and Matthias Gebauer, “Kunduz Trial: New Scrutiny for Deadly Afghanistan Attack,” Spiegel Online, 30 October 2013.

<sup>49</sup> The footage has been posted online at <http://www.bild.de/politik/2009/wahrheit/verschwiegen-minister-jung-die-wahrheit-ueber-diebombardierung-10583034.bild.html>.

Ahmad Shah. It was difficult to identify them because of the burns. To be honest, in some cases we just guessed who people were and took them to the village.” His son was 30 years old; his grandson was 13.

Scores of bodies were carried back to their home villages for burial, while the wounded were taken to Kunduz Hospital to receive medical care.

### *The Aftermath*

That morning, while announcing that the incident would be investigated, NATO’s immediate response to reports of civilian casualties was to express confidence that nearly all the dead were militants. In Berlin, a German government spokesman took an even stronger line, reportedly telling journalists that accounts of civilian casualties were “enemy propaganda.”<sup>50</sup>

President Karzai, in contrast, expressed strong public dismay. Saying that he was “deeply saddened” by the incident, he emphasized that “targeting civilian men and women is not acceptable.”<sup>51</sup> As in the past, his public statements of concern helped put pressure on other actors to respond.

The day after the attack, Gen. Stanley McChrystal, head of US and NATO forces in Afghanistan, visited the hospital where many of the injured villagers had been taken; he then said that it was clear to him from the visit “that there were some civilians that were harmed at that site.”<sup>52</sup> He did not specify whether any civilians had died, but other NATO officials acknowledged that civilian deaths had probably occurred.

Several independent investigations were carried out in the wake of the incident. In assessing the attack’s legality under international humanitarian law, the key question was whether the German or US troops knew or should have known that civilians were present at the site of the bombings, or should have taken greater precautions to assess whether they were present. Other important questions were the nature of the threat to the German troops, as they could reasonably have perceived it, and whether a warning could have been given before the strike was carried out.

The first independent group to issue an estimate of the civilian death toll was the Afghanistan Rights Monitor (ARM), which issued a press release on 7 September based on interviews with local Afghan residents stating that as many as 70 civilians had been killed in the attack.<sup>53</sup> UNAMA, which also sent a team to the region

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<sup>50</sup> “Many die in Afghan tanker blasts,” BBC News, 4 September 2009; M. Karim Faiez and Laura King, “Civilian deaths reported after NATO airstrikes kill up to 90 in Afghanistan,” *Los Angeles Times*, 5 September 2009; Ben Farmer, “David Miliband: Civilian deaths risk undermining Afghan support for Nato,” *The Telegraph*, 4 September 2009.

<sup>51</sup> Stephen Farrell and Richard A. Opiel, Jr., “NATO Strike Magnifies Divide on Afghan War,” *New York Times*, 4 September 2009.

<sup>52</sup> Jason Straziuso, “McChrystal inspects tanker airstrike site,” AP, 5 September 2009.

<sup>53</sup> Afghanistan Rights Monitor, “NATO must go beyond politics in investigating,” 7 September 2009.

immediately, concluded that 74 civilians were killed, including numerous children.<sup>54</sup> Village elders told Amnesty International that a total of 142 people had been killed in the attack, at least 83 of whom were civilians.<sup>55</sup>

ISAF sent two investigative teams to review the incident: a Joint Incident Assessment Team (JIAT) and an Operational Investigation Team.<sup>56</sup> In mid-September, the JIAT, led by Canadian Maj. Gen. C.S. Sullivan, announced its preliminary finding that the airstrikes had killed 70 Taliban and 30 civilians.<sup>57</sup> Because the bulk of the team's finding and recommendations were not made public, however, it is not known if the team found the strikes to be legal, or if its findings had an impact on the decisions of national criminal justice authorities as to whether or not to pursue the cases.

The Kunduz attack had significant political repercussions in Germany. In November 2009 evidence came to light that the defence ministry had withheld information about civilian casualties in the incident, leading several high officials to resign from their positions. Called the country's "biggest military shake-up in more than two decades," the resignations fed the growing debate over the German military presence in Afghanistan.<sup>58</sup>

The controversy in Germany continued in April 2010, when the German Federal Public Prosecutor dropped its criminal investigation of Col. Georg Klein, the officer who had ordered the attack on the tankers, and a sergeant who worked together with him.<sup>59</sup> This was the first time since World War II that German troops had been under investigation on war crimes charges. In justifying their decision to abandon the investigation, prosecutors claimed that the Kunduz attack fell within the scope of "armed hostilities permissible under international law."<sup>60</sup> After the investigation was ended, a claim was brought before the Higher Regional Court of Düsseldorf to compel the prosecutorial authorities to reinstate the case. When that petition failed, a constitutional complaint was lodged; it was still pending as of June 2014.<sup>61</sup> Besides requesting review of the prosecutors' decision to discontinue the case, the petition alleges a violation of the state's obligation to carry out an effective investigation of deaths resulting from the actions of state agents.

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<sup>54</sup> United Nations Assistance Mission in Afghanistan, Annual Report on Protection of Civilians in Armed Conflict, 2009, p. 25.

<sup>55</sup> Amnesty International, "Afghanistan: German government must investigate deadly Kunduz airstrikes," 30 October 2009; Amnesty International, "Afghanistan: Background to the Kunduz airstrike of 4 September 2009," 30 October 2009.

<sup>56</sup> Ibid., p. 29; ISAF press release, "International Security Assistance Force Commander Appoints Board to Lead Investigation into Kunduz Air Strike," 8 September 2009 (calling the team a "Joint Investigation Board" and noting that the results of the investigation would be shared with the Afghan and German authorities).

<sup>57</sup> Yochi J. Dreazen, "NATO Says U.S. Airstrike in Kunduz Killed 30 Civilians," *Wall Street Journal*, 17 September 2009.

<sup>58</sup> Roger Boyes, "Germany's top soldier Wolfgang Schneiderhan quits over airstrike blunder," *The Times*, 26 November 2009.

<sup>59</sup> Cathrin Schaer, "The World From Berlin: 'Truth Is Often The First Casualty Of War,'" *Der Spiegel Online*, 21 April 2010.

<sup>60</sup> Ibid.

<sup>61</sup> See the website of the European Center for Constitutional and Human Rights, <http://www.ecchr.de>.

Also in 2010, the German Defence Ministry announced that it was dropping its inquiry into Klein's actions. The ministry had reportedly conducted a preliminary investigation into whether Klein had breached ISAF rules, concluding that he had not.<sup>62</sup>

The failure of criminal justice remedies in Germany left open the option of a civil suit, which a German-Afghan lawyer, Karim Popal, filed in March 2013. Representing 79 Afghan plaintiffs who are family members of the 137 civilians that they claim died in the attack, Popal asked the court to grant between €20,000 and €75,000 (\$26,000-\$98,000) in compensation for each of them. The suit targeted the German government as a defendant; two relatives of the victims were lead plaintiffs. (Earlier, the German government had provided \$5,000 in compensation for each of the deaths.<sup>63</sup>) The case was dismissed in December 2013.<sup>64</sup>

In the United States, in contrast to developments in Germany, there was no outward sign of a criminal investigation into the incident, nor any notable congressional or governmental attention to the many civilians who were killed.

[BEGIN BOXED TEXT]

### **International Law and Attacks on Civilians**

International humanitarian law (IHL), which applies only in situations of armed conflict, regulates the conduct of hostilities.<sup>65</sup> Its central purpose is to limit, to the extent feasible, human suffering in times of armed conflict. Serious violations of the rules of international humanitarian law may amount to war crimes.

According to international humanitarian law, the warring parties in Afghanistan must take all feasible precautions to minimize harm to civilians. They must refrain from carrying out deliberate attacks on civilians, indiscriminate attacks, and attacks in which the harm to civilians is disproportionate to the expected military gain.<sup>66</sup>

A fundamental rule of international humanitarian law, known as the principle of distinction, requires parties to the conflict to at all times "distinguish between civilians and combatants."<sup>67</sup> In particular, "attacks may only be directed against

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<sup>62</sup> Richard Connor, "German military drops case against Kunduz airstrike colonel," DW.de, 19 August 2010.

<sup>63</sup> "Germany to compensate Afghan victims," Deutsche Welle, 6 August 2010. Several family members interviewed by Amnesty International said that they had received the money.

<sup>64</sup> "Kunduz Bombing: German Court Drops Case Over Civilian Deaths," Der Spiegel Online, 11 December 2013.

<sup>65</sup> International humanitarian law can be found in treaties—including the four Geneva Conventions of 1949 and their two Additional Protocols—and in customary international law.

<sup>66</sup> See generally International Review of the Red Cross, No. 880, Conflict in Afghanistan (I), 2010; International Review of the Red Cross, No. 881, Conflict in Afghanistan (II), 2011.

<sup>67</sup> ICRC Customary IHL Study, Rule 1; see also Protocol I, article 48, and Protocol II, article 12(2) of the 1977 Protocols Additional to the Geneva Convention.

combatants” and “must not be directed against civilians.” A similar rule requires parties to distinguish between civilian objects and military objectives.

Indiscriminate attacks are those of a nature to strike military objectives and civilians or civilian objects without distinction, either because the attack is not directed at a specific military objective, or because it employs a method or means of combat that cannot be directed at a specific military objective or has effects that cannot be limited as required by international humanitarian law.<sup>68</sup> Disproportionate attacks are those attacks that “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>69</sup>

Intentionally launching an indiscriminate or disproportionate attack resulting in death or injury to civilians (that is, knowing that the attack will not distinguish between military objectives and civilian objects, or that it will cause excessive incidental civilian loss, injury or damage) is a war crime. In addition, intentionally directing attacks against civilians not taking direct part in hostilities, or against civilian objects, is a war crime.

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### **US Special Operations Forces Raid on a House in Khataba Village, Paktia Province, 12 February 2010**

Two pregnant women, two criminal justice officials, and a teenage girl were killed by US special operations forces during a late-night raid on a civilian home in Khataba village, near Gardez. The raid took place on the night of a family celebration.

#### *The Raid*

It was a traditional party, held by family patriarch Haji Sharabuddin to celebrate the birth of a grandson. On the night of 12 February 2010, Sharabuddin’s house was full of family and friends, some 20 to 30 people, including his sons Mohammed Dawood, a police investigator, and Mohammed Zahir Saranwal, a government prosecutor, and his granddaughter’s fiancé Mansur Mal, a local official. Other prominent guests included Sayed Mohammed Mal, the vice-chancellor of Gardez University, and staff from the Ministry of Rural Development.

The attack took place sometime after 3 am, after Haji Sharabuddin, aged 70, had gone to bed, as had some of the older guests. Younger family members were still enjoying themselves; video from the event shows a happy crowd, singing, dancing and clapping their hands. One of the musicians who had been hired for the event went outside to relieve himself; when he returned, he was frightened. He told the guests that someone had shone a torch at him.

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<sup>68</sup> ICRC Customary IHL Study, Rules 11 (Indiscriminate Attacks) and 12 (Definition of Indiscriminate Attacks).

<sup>69</sup> ICRC Customary IHL Study, Rule 14 (Proportionality in Attack).

Mansur Mal told Amnesty International what happened next:

Someone outside yelled, in Pashto, “Raise your hands!” We were afraid it was the Taliban because so many high-profile officials were at the house, and their cars were parked outside. Commander Dawood told everyone not to go outside, saying he would go to see what was happening. People outside were yelling, in Pashto, “Open up!”

When Dawood went outside into the courtyard he was shot, and he collapsed, screaming in pain. Mansur Mal told Amnesty International that Dawood’s son Siddiqula, age 16, who had run out into the yard to help his father, was also shot. A group of women tried to stop Zahir, Dawood’s brother, from leaving the house, but Zahir pushed his way to the doorway. Not only was he shot, but the women were also shot.

Sayed Mohammed Mal, aged 53, was in another room sleeping; he woke up when the shooting started. He told Amnesty International:

I heard screams and shots, women screaming, and another shot, and more screams. People were shouting that Dawood was shot. “Dawood, Dawood!”, they yelled. Zahir ran out and shouted his brother’s name, then another shot—one, two, three of them—and the women screaming! It was shot, scream, shot, scream, and only after the fifth person fell did the Americans announce on a loud speaker, “This is Special Forces, don’t move! No one move!” Screams and screams and the moaning of the injured.

Three members of the family had been shot and killed: one of the brothers, Mohammed Saranwal Zahir, his sister, Bibi Saleha, and his sister-in-law Bibi Shirin. Both of the dead women were pregnant; one was a mother of 10 children and the other was a mother of six.

Other family members were badly injured. Mohammed Dawood, the first person to have been shot, was moaning in pain, but, according to family members, he was still alive, and the same was true of one of his nieces, Gulalai, aged 17. Siddiqullah, Dawood’s son, had been shot in the shoulder, but the wound was not deadly.

The shots were fired by snipers positioned on a nearby rooftop. According to all the Afghan witnesses, there was no exchange of fire, just a one-sided barrage. When the shooting ended, Special Forces troops blasted open the gate to the house’s yard. Most of the guests were hiding in the salon, terrified, but Haji Sharabuddin, who had also been jolted awake by the gunfire, had run outside.

He told Amnesty International: “I went to help my son Dawood, but an American soldier hit me with his gun and pushed me aside. I cried that Dawood is injured but alive; let me take my son to the hospital, but they beat me again and tied my hands.”

Mansur Mal, who was hiding with his brother in a small room in the house, feared they were all going to be killed. “The first thing I saw was the gun,” he said. “It entered the room first. Next the troops entered with their translator, a big strong guy. He insulted us in Dari, calling us faggots, and told us to raise our hands and face the wall.”

The soldiers went through the house methodically, bringing all of the guests to the main salon. “They kicked and punched the men,” said Mansur Mal. “Then they told us to leave the house one by one.”

It was a very cold night, but the male guests were not allowed to put on their jackets, or even their shoes. They were forced to stand in the snow, with black sacks on their heads, wearing only socks on their feet.

“We had to wait outside for hours,” said Mansur Mal. “They made us hold our hands on our head. If we put our hands down they would kick us. My hands and feet went totally numb, and then my legs; I couldn’t feel them anymore.”

Haji Sharabuddin claims that he continued to beg the soldiers to let him take his injured family members to the hospital. “I could hear my son Dawood and my granddaughter,” he said, “they were still alive.” He believes that they died sometime near morning.

Syed Mohammed Mal told Amnesty International that the soldiers ignored Sharabuddin’s pleas. “They shouted at him to shut up. They shouted at the women and children too; they told them to stop crying.”

The soldiers brought the bodies into the house. Haji Sharabuddin, who was nearby, said that he saw them doing something strange to the bodies, using a knife or a piece of metal to remove the bullets. “I begged them not to touch the bodies of the women,” he said, “but they didn’t listen.”

At about 10 am, Mansur Mal said, the soldiers brought the men back inside the compound, taking fingerprints and retinal scans of each of them. “There were 10 soldiers in a room,” he said, “and they asked me, ‘who killed these people?’ I said, ‘you.’ They got angry; they wanted me to say that they had been killed by someone else. ‘They were already dead,’ they told me.”

Several dozen US troops took part in the operation, family members said, aided by Afghan translators. They used several armoured vehicles and two helicopters. At around 11 am, after the troops had spent hours searching the house, they left. They took eight people from the house with them—including Haji Sharabuddin’s youngest son, Mohammed Sabir, aged 26—flying them to a nearby air base for questioning, but leaving the dead bodies and injured family members behind. Several days later the detained men were all released.

Haji Sharabuddin said that after the troops left he found that his house had been ransacked. He said that documents had been taken; valuables were missing, and substantial sums of money belonging to his son Dawood were gone. He also found that the bullets used in the sniper attack had been dug out of the walls of the house.

He and his remaining family members found medical care for the injured, and obtained coffins for the bodies of their five dead relatives. Distraught and angry, they staged a protest in front of the governor's office, which thousands of local people joined. They buried their relatives at the end of the day.

### *The Aftermath*

ISAF issued a press release on the incident that same day, which has since been taken down from ISAF's website. Entitled "Joint force operating in Gardez makes gruesome discovery," it gave a lurid and inaccurate account of events.<sup>70</sup> Rather than acknowledging that three women were killed in the operation, it said that the joint Afghan-international security force that carried out the raid "found" the "bound and gagged bodies" of three women in the house. It also portrayed the slain men as armed "insurgents" who were killed after a fire fight.

In interviews with journalists, unnamed US military officials elaborated further on this theme. On 12 February, a senior US official told the press that bodies found at the house appeared to be victims of a "traditional honor killing."<sup>71</sup> The men and women had been shot "execution-style," he said, and had been discovered during the Afghan/US raid. According to CNN, "the U.S. official said it isn't clear whether the dishonor in this case stemmed from accusations of acts such as adultery or even cooperating with NATO forces." The official also reportedly suggested that the victims might have been killed by the Taliban.

At the same time as US officials were relaying this false information to journalists, a local representative of the Afghan Independent Human Rights Commission (AIHRC) was investigating the attack. Visiting the village the day after the raid took place, he interviewed nearly 20 people, including family members, local police officials, medical staff, and numerous eyewitnesses to the events. He did not see the bodies, which had already been buried, but he saw the five fresh graves laid out in a line. His findings, he emphasized to Amnesty International, entirely confirmed the villagers' account of an unprovoked assault. He also found indications of evidence tampering—that bullets had been dug out of the walls near where the women were killed. An investigation carried out by the Criminal Investigations Department of the Afghan Ministry of the Interior reportedly reached the same conclusions.<sup>72</sup>

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<sup>70</sup> ISAF Joint Command, "Joint force operating in Gardez makes gruesome discovery," 12 February 2010.

<sup>71</sup> "Bodies found gagged, bound after Afghan 'honor killing,'" CNN.com, 12 February 2010.

<sup>72</sup> See Gareth Porter and Ahmed Walid Fazly, "McChrystal Probe of SOF Killings Excluded Key Eyewitnesses," Inter Press Service, 6 July 2010.



Intrigued by accounts of the incident, freelance reporter Jerome Starkey visited the village nearly a month after the killings took place. On 13 March 2010, *The Times* of London published his story about the incident, titled “Nato ‘covered up’ botched night raid in Afghanistan that killed five.” The article described the attack in detail and cast serious doubt on the veracity of the official ISAF narrative. It suggested that ISAF’s account of events was “either wilfully false or, at best, misleading.”<sup>73</sup>

ISAF’s response was quick and aggressive. Calling the cover-up allegation “categorically false,” ISAF issued a press release accusing Starkey of misquoting one of his official sources.<sup>74</sup> It was a clear attempt to discredit Starkey and impugn the integrity of his findings. The press release also provided yet another false account of the raid. Trying to explain why their original 12 February press release had wrongly described the dead women as being bound and gagged, the 13 March press release blamed the troops’ unfamiliarity with Afghan cultural practices. It explained: “The women’s feet had been tied, and they had cloth straps that immobilized their jaws, evidently in preparation for burial.” This explanation again, however, was fictional: the women were alive when the raid occurred, and were killed during the raid; their bodies were not in the house awaiting burial.

It was not until 4 April that NATO finally admitted responsibility for all five deaths.<sup>75</sup> In an interview with journalists that day, a NATO official also reportedly said that an Afghan-led team of investigators had found signs of evidence tampering in the house, including indications that bullets had been extracted from the house’s walls. The following day, a senior NATO official denied that any evidence tampering had taken place.<sup>76</sup>

The 4 April release had said that ISAF planned to provide compensation “in accordance with local customs.” In a dramatic move, a few days later Vice Admiral William McRaven—the commander of Joint Special Operations Command—visited Khataba village with two sheep, some money, and an Afghan military entourage, making a contrite apology for the killings. (The sheep were said to be part of a Pashtun formula for asking forgiveness.) Haji Sharabuddin accepted the apology and the compensation, but said that what he really wanted was to see the killers in court.

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<sup>73</sup> Jerome Starkey, “Nato ‘covered up’ botched night raid in Afghanistan that killed five,” *The Times*, 13 March 2010.

<sup>74</sup> ISAF Joint Command, “ISAF Rejects Cover Up Allegation,” 13 March 2010. Starkey described his back and forth with ISAF: “They claimed to have a recording of my conversation which contradicted my shorthand record. When I asked to hear it, they ignored me. When I pressed them, they said there had been a misunderstanding. When they said recording, they meant someone had taken notes. The tapes, they said, do not exist.” Jerome Starkey, “U.S.-led forces in Afghanistan are committing atrocities, lying, and getting away with it,” *Nieman Watchdog*, 22 March 2010.

<sup>75</sup> ISAF, “Gardez Investigation Concludes,” 4 April 2010. The press release reiterated that the mistakes made in previous press releases were based on a lack of cultural understanding. It explained the claims made in those releases “were based on a lack of cultural understanding by the joint force and the chain of command. The statement noted the women had been bound and gagged, but this information was taken from an initial report by the international members of the joint force who were not familiar with Islamic burial customs.”

<sup>76</sup> Richard A. Opiel, “U.S. Admits Role in February Killing of Afghan Women,” *New York Times*, 4 April 2010.

He later told Amnesty International: “I want justice. I want the US government to prosecute those responsible for what was done to me. They have taken away our happiness.” Sharabuddin said that he believed that an informer gave the US military false information about militant activity at his house; he wants to see the informer prosecuted, as well as the soldiers who carried out the attack.

According to Sharabuddin and others who were present at the house during the attack, the US military never interviewed them to investigate the circumstances of the attack. There was an official investigation by the Criminal Investigation Department of the Afghan Ministry of the Interior, but it could not lead to full accountability for the incident, given that the Afghan authorities have no power to prosecute US soldiers. Since that time, Sharabuddin has received no indication that anyone involved in the attack was ever punished, or even subject to non-criminal sanctions.

### **Special Operations Force Raid on the Kashkaki family compound, Surkh Rod district, Nangarhar province, 14 May 2010**

*I want to know, why did they do this? Whom should I ask? That's the only thing I want. I want to know why this happened: why did I lose my brother and my son?*

Rafiuddin Kashkaki, reflecting on a night raid on his family compound by US special operations forces on 14 May 2010

A late night US special operations forces raid on a large walled civilian compound in Nangarhar province in May 2010 resulted in nine deaths. The compound was home to 13 families, or over 100 people, including small children and a six-month-old baby.

#### *The Raid*

The compound, which lies in the midst of farmland not far from the city of Jalalabad, belongs to the Kashkaki family. Three Kashkaki brothers were living there at the time of the raid, together with a large number of family members, including sisters, cousins, and distant cousins—from very old men to very young children—as well as some farmers and a couple of guards. According to Asomeddin Kashkaki, one of the two surviving brothers, he and one of his brothers made a living as drivers and car dealers. Because their cars were parked outside of the compound, they had a guard armed with a pistol assigned to watch them. The family also openly acknowledged keeping automatic weapons in the compound for protection, something that the local police confirmed is a normal practice in the region.

The layout of the compound is complicated: within a large, roughly rectangular area, enclosed by a set of tall, mud-covered walls, are several small one-, two- and three-story buildings, and several connected courtyards. The compound has also two large wooden gates, one at each end.

The raid took place at approximately at 12:45 am, when everyone was asleep. Zarmina Kashkaki, Asomeddin's sister, described what happened when she woke up:

Suddenly I heard shouting from the farmers' quarters. The farmers were shouting my brother's name—"Hafiz Khana, Hafiz Khana"<sup>77</sup>—and then I heard gunfire ... I heard my brother shouting that armed robbers were breaking in ... I believe he took his gun and went up to check, but I don't know if he managed to shoot or not, because I was inside, and there was too much shooting going on ... When my brother Hafizuddin rushed outside we heard shooting—probably a single shot—but I don't know—and then a big thud. His wife rushed outside and started crying and calling his name—"Hafizuddin, Hafizuddin, can you hear me? Hafizuddin, please answer, can you hear me?"—then she screamed and said that Hafizuddin had been shot. I rushed to him as well; he was making a noise like massive snoring. Then my nephew Habibuddin shouted to his dad to call the police. He said that he'd bring the car inside the compound to take his uncle to the hospital. I was crying and my children were crying and Hafizuddin's wife was holding his head. When Habibuddin went outside we heard another big bang ... [and then we heard] Habibuddin crying, saying, "dad, I've been hit."

Rafiuddin Kashkaki, the brother of Zarmina, Asomeddin and Hafizuddin, was also asleep when the shooting started. He did not know who was attacking the compound, but he immediately called the local police commander to try to get help, as well as a friend who knew people in the police. The police later confirmed to Amnesty International that they had received the calls, and that the family seemed not to know who the attackers were. The police themselves did not know either, as they were not informed in advance of the planned raid.

After calling the police, Rafiuddin said that he shot his Kalashnikov in the air a few times to show that people in the compound were armed. "I didn't know that they were US forces," he said, "I just knew we were under attack."

Rafiuddin Kashkaki surmises that the shooting may have begun as a confrontation between US troops and the guards outside, who may have thought that the soldiers were thieves. Nobody in the compound actually saw the killings occur; they just heard the shooting. Rafiuddin did not see his 16-year-old son Habibuddin get shot, but he and the other family members believe that Habibuddin had run outside to try to get one of the cars so that he could drive his dying uncle Hafizuddin to the hospital.

Right after Habibuddin was shot he crawled to the door of his father's room. "He said to his mother, 'I'm going to die,'" Rafiuddin recalled. "My wife and my other son brought Habibuddin into the room. Then I heard an announcement saying if you want to live, come out with your hands up." Habibuddin died shortly after.

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<sup>77</sup> Hafiz Khana is a respectful way of referring to Hafizuddin.

The timing of the US forces' announcement is one of the major points of disagreement between the Kashkaki family and US forces. Amnesty International interviewed several family members, all of whom claimed that the US forces did not announce who they were until the shooting was over. US military representatives have said just the opposite: that US troops used bullhorns to announce their presence and to call out the people they were seeking to arrest.<sup>78</sup> An ISAF press release issued on the day of the raid said: "As the joint force approached the compound they received automatic gunfire. During the firefight the security force attempted several callouts without success."<sup>79</sup>

Another major point of contention is whether there were militants in the compound. The ISAF press release asserted that no civilians were harmed in the operation, and that the dead consisted of a "Taliban subcommander and other insurgents." The family admits being armed and shooting in the air, but claims that no one in the compound—including those killed—belonged to the Taliban or other anti-government groups. "We have no Taliban sympathies," Rafiuddin told Amnesty International. "My brother was a car dealer, not a militant. My son was in the 10<sup>th</sup> grade—he was studying English and listening to music—how could anyone even imagine he could be a Talib?"

In all, nine men and boys were killed that night: Hafizuddin Kashkaki, aged 28; Habibuddin Kashkaki, aged 16; Gulalai (the guard), aged about 40; Mohammed Yunus, aged 28, a friend of Hafizuddin; Sayed Rahim, an older farmer, and Rahim's four sons—Shafi, aged 40; Shams ul Rahman, aged 24; Zukruddin, aged 20, and Rasul Khan, aged 16.

According to the Kashkaki family and local police, the suspicions of the US military mostly seemed to centre around Shams ul Rahman, one of the farmer's sons. Shams ul Rahman was an imam who, according to family members, spent most of his time reading the Qur'an and other Islamic books.<sup>80</sup> A couple of family members who were detained and questioned by US forces after the raid said that their questions focused on two topics: weapons and Shams ul Rahman. Many believed that it was a case of mistaken identity. In a press account of the raid, two US officials who briefed National Public Radio about its details said that the target of the raid, named Shamsuddin, was positively identified at the site.<sup>81</sup> The local police commander told Amnesty International that he had no information to confirm or contradict any US intelligence about Shams ul Rahman, but that he knew of a Taliban commander named Shamsuddin operating in the area, and that the man was still alive and active. He did say, however, that when he and other police were able to enter the compound on the night of the attack, a couple of hours after the shooting had stopped, they found that Shams ul Rahman and his brother were both armed, as was Hafizuddin.

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<sup>78</sup> Quil Lawrence, "Raid Reignites Afghans' Outrage over Civilian Deaths," NPR, 24 May 2010.

<sup>79</sup> ISAF, "Afghan-ISAF Operations in Eastern, Southern Afghanistan," 14 May 2010.

<sup>80</sup> He was known by the honorific "Qari," indicating that he had memorized the Qur'an.

<sup>81</sup> Lawrence, "Raid Reignites Afghans' Outrage."

In assessing ISAF's claims of militant activity, it is worth noting that the ISAF press release claimed that "two insurgents" were captured in the raid. The two people who were detained, though, were Asomeddin, one of the two surviving brothers, and Sayed Jaffar, age 17, the farmer's surviving son. Both were released very quickly. Jaffar had been injured—he had been shot in the foot—and Asomeddin said that Jaffar was released that same day. Asomeddin said that he himself was held for four days and then released.

The final set of contradictory claims involves military hardware that US forces claim that they found at the compound. ISAF's original press release states that US troops found automatic rifles and other firearms, a claim that family does not dispute. But in later interviews with journalists, US officials said that they also found mortar sighting equipment.<sup>82</sup> Rafiuddin Kashkaki said that this claim was disingenuous. He said that a destroyed room on the third floor of one of the buildings had some old hardware dating from the mujahedin era, but that no one could honestly believe it was functional; it had not been touched in decades.

In addition to the killings, some of the male family members claim that the US forces mistreated them while conducting a search of the house. Asomeddin Kashkaki told Amnesty International that after taking full control of the compound, the soldiers took him and his brother Rafiuddin back inside. "They asked us to show them the rockets and weapons that they believed were hidden there," he said. "Our hands were tied behind our backs but we were beaten and pushed all the time with gun butts."

### *The Aftermath*

In the morning, after the US forces had left the compound via two helicopters, the remaining male family members decided to stage a protest. Bringing the bodies of their dead relatives to the local district administration offices, they were joined by hundreds of other villagers. The group chanted anti-Karzai and anti-US slogans, and wanted to continue on to the provincial capital, Jalalabad, but were blocked by government troops. In the violence that ensued, another person was reportedly killed: a nephew of the farmer who had been killed in the previous night's raid.

Over the next few months, the Kashkakis tried to bring their case to several different fora. The two surviving brothers met with officials from the Afghan Ministry of the Interior and Ministry of Justice, who reportedly told them that nothing could be done. Asomeddin Kashkaki said that some people suggested that he visit the local Provincial Reconstruction Team (PRT) of the US forces, but he did not feel that it was safe to go on his own, and he did not know any Afghan government officials who could take him there. No US or ISAF investigators ever came to interview them, members of the family insisted, only journalists, human rights groups, and the ICRC.

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<sup>82</sup> Ibid.

“Before this raid occurred, I was afraid of the Taliban, not the US,” Rafiuddin Kashkaki told Amnesty International. “Now the US has labelled us as Taliban.” When asked what he was seeking in going to the authorities for help, the first thing that Asomeddin Kashkaki said was that he wanted a full investigation to clear his family’s name and prove that they were not linked to the Taliban.

The brothers said that they had not received any compensation for the loss of their family members or the other damages that they incurred. An organization based in Jalalabad, whose name they could not remember, had provided them with rickshaws and stationery. Both brothers said that they wanted real compensation, and, most of all, they wanted answers.

### **Helicopter Strikes near Nangalam village, Darah-Ye Pech district, Kunar province, March 2011**

*We were shouting, ‘What did they do wrong? Why would you kill innocent children?’*

Guljan, age 60, describing a demonstration that his village held to protest the killing of his grandson and eight other village boys in a US helicopter strike.

A US helicopter strike in Kunar province, on 1 March 2011, killed nine boys from a single village.

#### *The Air Strikes*

The inhabitants of Nangalam village, in Kunar province, told Amnesty International that they see military helicopters and other aircraft flying in their area regularly; nobody was alarmed when they heard the sound of helicopters on the morning of 1 March 2011. “I was working that day and I heard the helicopters, then the sound of bombing,” said Rahmanullah. “I assumed that NATO was going after the Taliban.”

At some point later in the day American troops came to the village market, apparently telling some of the local shopkeepers that their forces had killed a group of militants in the mountains. Soon after, news arrived that children had been killed, and nearly everyone from the village headed up to the mountains to find out what happened.

Jahanullah, a shopkeeper, said that he began to worry about his oldest son, Ehsanullah, aged 7:

I heard from someone that some boys from the village had gone into the mountains to fetch wood, and I started to worry about my son. When my younger son showed up, he told me Ehsanullah had gone into the mountains along with his friends. I asked when, and he said in the morning. Then I started to panic. I kept hoping that my son was safe and that nothing bad had happened to him.

When the villagers arrived at the site of the bombing, they found a scene of carnage. Nine village boys were dead, including Ehsanullah; some of their bodies had been blown to pieces.

“My son Wahidullah’s head was missing,” said Haji Bismillah, a farmer. “I only recognized him from his clothes.”

The villagers picked up all of the pieces of their children and brought them back to the village for burial. There was only a single survivor from the group of boys who had gone to search for firewood: Hemad, aged 9.

Masbahuddin, a day labourer, is Hemad’s uncle; he described how Hemad was sent to Pakistan for intensive medical care. “His right arm was broken and his whole right side was hurt,” Masbahuddin said. “He was hit by lots of little bits of shrapnel. At first he couldn’t walk; now he can walk slowly, with a cane.”

According to Masbahuddin and others, Hemad told everyone that the attack was carried out by two helicopters, which hunted the boys down, shooting and firing rockets. On the day after the attack, Hemad reportedly told journalists: “The helicopters hovered over us, scanned us and we saw a green flash from the helicopters. Then they flew back high up, and in a second round they hovered over us and started shooting. They fired a rocket which landed on a tree. The tree branches fell over me and shrapnel hit my right hand and my side.”<sup>83</sup>

### *The Aftermath*

Villagers said that the day after the children were killed, everyone left the village and participated in an enormous protest. “We went to the US base and blocked the roads for two days,” Guljan, the grandfather of one of the dead boys, said. “Even the elders took part. We wanted to know why they killed our children.”

“We were shouting, ‘What did they do wrong? Why would you kill innocent children?’”

All eight of the villagers with whom Amnesty International spoke were convinced that the children had been killed deliberately. Expressing awe at US technological prowess, they believed the killings could not have been a mistake. “They have special glasses so that they can see everything in detail,” one man told Amnesty International. “They say they can even see underground.”

ISAF was quick to recognize its error. The day after the attack—while the villagers were holding their protest—ISAF issued a statement apologizing for the deaths. The statement said that there had been an insurgent rocket attack on a nearby military base, and that an error was made “in the hand-off between identifying the location

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<sup>83</sup> Alissa J. Rubin and Sangar Rahimi, “Nine Afghan Boys Collecting Firewood Killed by NATO Helicopters,” *New York Times*, 2 March 2011.

of the insurgents and the attack helicopters that carried out subsequent operations.”<sup>84</sup> It included a personal apology from ISAF commander Gen. David H. Petraeus, who emphasized that the deaths “should have never happened.” Importantly, ISAF promised to “thoroughly investigate” the incident, stating that if the facts warranted it, disciplinary action would be taken.

The local NATO forces also held a meeting with the families of the victims in the immediate wake of the incident, giving the villagers an opportunity to express their concerns. Guljan, who attended the meeting, said that the military spokesperson expressed sorrow for the deaths. “We told them sorry wasn’t enough,” he said. “We said we wanted the pilot to be brought to court so that we could ask him why he did what he did, and then we wanted him to be hung.” Since that time, however, the villagers have received no information about any prosecutory or disciplinary action taken in the case. They believe that nothing has been done.

President Karzai also visited Nangalam village during that period, providing the families with compensation and some household goods.<sup>85</sup> “Karzai was very angry,” one of the villagers told Amnesty International. “He said the killings were illegal.” Karzai was equally vocal in condemning the attack in public. A few days after the incident, his office issued a statement calling the US expression of regret insufficient. “The continuation of such incidents is not tolerable and not acceptable for the Afghan people and government,” the statement said.<sup>86</sup>

### **Air Strikes in Noorlam Sahib Valley, Alingar District, Laghman Province, 16 September 2012**

US air strikes carried out in the Noorlam Sahib valley, Laghman province, killed seven women and girls and injured another seven, four of them seriously. Amnesty International interviewed 15 people regarding the incident: injured survivors, eyewitnesses, and family members of the victims.

#### *The Air Strikes*

At around midnight on 16 September 2012, a large group of women from several neighboring villages—Dak Mali, Munj Qilla, Laj Darek, and Serwat—set out to collect firewood in the nearby mountains. In the early hours of the morning, at around 3 am, US planes dropped a series of bombs on them.

The women were walking together in small clusters of three or four when the attack began. Aqel Bibi, a 17-year-old girl who was walking with a few others, described what happened:

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<sup>84</sup> ISAF, “International Security Assistance Force apologizes, accepts responsibility for civilian casualties,” 2 March 2011.

<sup>85</sup> Each of the victim’s families received about \$2,000 (100 Lakh Afghani [convert]); the family of the injured boy reportedly received 50 Lakh Afghani.

<sup>86</sup> Patrick Quinn, “Karzai rejects U.S. apology in killing of Afghan boys,” AP, 6 March 2011.



We reached a spring, where some of the women in our group suggested that we drink some water and wash before we start fetching wood. We heard the planes, then a big explosion, as a bomb fell on the first group who were half a kilometre ahead of us. The noise was deafening in the mountain, and we fled. The plane came a second time and dropped another bomb, and we kept running toward the mountain to find a cave where we could hide. As we were running, the plane came again, and this time it hit us.

She continued, "When the bomb was dropped on my group, three of us were injured, including to our neck, hand and chest. I and another lost sight in one eye. I could feel the burns: they were like hot needles in my body and my eye. Then I felt warm and noticed something warm and thick moving on me ... I touched my neck and realized it was blood."

The three women walking with her were killed on the spot.

Mitalam Bibi, who was aged 16 at the time, was also badly injured in the attack. She told Amnesty International:

I was walking with my two sisters. Three other girls were a short distance away from us, maybe 25 meters; they were hit by the first bomb. We saw the bomb hit them and heard them screaming. Two of the girls were killed and the third was badly injured. She shouted: "help me, I'm dying." We ran away because we were terrified, looking for a hole or another place to hide, and the second bomb hit us. There were a couple of minutes between the two bombs.

The second bomb killed my two sisters and the girl who had been injured, and also badly injured me. Blood was flowing out of my ears. I could feel the mountain shaking. I couldn't hear the bombing but I could feel it.

Mitalam Bibi's eardrums were blown out and she lost sight in her right eye. "At first the doctors thought she had lost her eyes," her father said. "Her face was totally black and burned."

In all, seven women and girls were killed, and another seven were injured, four of them seriously. Three girls lost sight in at least one eye.

Villagers had heard the attack from their villages, and came to help as soon as they felt able. One told Amnesty International, "We heard the explosions and saw the fire, but we could not do anything at that time except watch from our rooftops." Fearful of being killed themselves, they waited until the jets had gone and helicopters had arrived before rushing up to find the women. "Nearly the whole village came," the husband of one of the dead women recalled. Some of the villagers reached the site just as the sun was beginning to rise.

One villager, Mullah Bashir, told Amnesty International, "When I saw the bodies and injured everywhere I started searching for my daughter. Finally I found her. Her face was covered with blood and her body was shattered. I took her chador and wrapped her body in it, and tried to bring it to the village." Gradually, the villagers brought the dead and injured back to the village.

Haji Shir Mohammad from Dak Mali village said he lost three female members of his family.

One of the women who was killed in the air strikes was pregnant. Her father told Amnesty International, "My daughter Khan Bibi was only 18 years old, and was recently married and pregnant. The shrapnel went straight through her and out the other side, and killed both the baby and the mother."

Some of the wounded were taken to Laghman hospital, while the most seriously injured were transferred to Jalalabad. One of the villagers expressed anger at having to carry the victims away from the mountain while helicopters circled overhead.

### *The Aftermath*

Once they had collected the injured and the dead, angry villagers contacted the district governor about the incident. He reportedly contacted the provincial governor, who, after asking a US military contact about the incident, told the district governor that the US had attacked and killed Taliban commander Anzar Gul. US forces had apparently received reports that Gul and his men were passing through the mountains that night; they were meant to be the targets of the strikes. ISAF initially told the media that air strikes had been called in against some 45 insurgents, "after positively identifying hostile intent," and that "a large number of the insurgents" had been killed.<sup>87</sup>

Villagers responded by bringing proof of the women's deaths to the provincial capital, Mihtarlam. As Mullah Bashir reported, "We were outraged and we took the bodies to the governor's office to show that NATO actually hit women, not insurgents." They held a demonstration in the town. "We asked for the trial of those responsible," said Bashir. "We chanted, 'Down with the Americans and down with Karzai.' The Americans came promising to bring peace and security but instead they brought misery."

In the face of press inquiries, ISAF responded quickly with a public apology.<sup>88</sup> On 16 September, the day of the attack, it issued a press release extending its "deepest regrets and sympathies to the families and loved ones of civilians who died or were injured during coalition airstrikes." The press release stated that ISAF could confirm "that a number of Afghan civilians were unintentionally killed or injured during this

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<sup>87</sup> "NATO air strike kills 8 Afghan women," AFP, 16 September 2012.

<sup>88</sup> "Afghanistan: Nato air strike 'kills eight women' in Laghman," BBC News, 16 September 2012; "Nato airstrike 'kills eight women and girls' in Afghanistan," AP, 16 September 2012.

mission which was undertaken solely with the intent of countering known insurgents.”<sup>89</sup>

The following day, ISAF issued a press release stating that it had already begun investigating the attack.<sup>90</sup> “Coalition forces take civilian casualties seriously,” the press release advised, “and will conduct a complete assessment of the incident.” According to UNAMA, both ISAF and the US Government carried out extensive investigations of the attack, including a policy review.<sup>91</sup> But the results of the investigations were never made public, leaving the families of the victims unaware if the strikes had been found to be legal. Family members—and two of the women who survived the strikes—also told Amnesty International that they were not interviewed by military investigators. Nor did they believe that investigators had visited either their villages, which are in a remote area beyond government control, or the location of the airstrike.

Just a few days after the attack, a group of villagers met President Karzai, who expressed his condolences. According to Mullah Bashir, “He told us to bring pressure on the Americans for justice and accountability, otherwise nothing would happen.” Karzai gave the villagers compensation, and reportedly advised them not to accept any money from US personnel.

A US delegation met some of the villagers to apologise for the civilian casualties in the attack. Haji Shir Mohammad said, “The American commander apologised for killing women and asked whether we wanted compensation, but we said, ‘No, we will not sell the blood of our martyrs.’ Then the Americans didn’t give us anything.” Haji Zahir, another villager, added, “We don’t want any apology. We want revenge.”

Ghulam Noor, an old man whose 16-year-old daughter Bibi Halima was killed in the attack, expressed frustration with his inability to press for justice in the case: “I think an investigation should take place. But I don’t have any power. I can’t ask international security forces why they made this mistake. I don’t have the power to put pressure on them. I can’t bring them to court.”

### **US Special Operations Forces killings, Nerkh and Maidan Shahr districts, Wardak province, November 2012 to February 2013**

*My brother’s body was found after six months and 24 days, on 30 May 2013, at 4pm. He was buried about 60 meters from the base, together with the remains of another person. We recognized him from his shoe, his underwear, and his plastic watch.*

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<sup>89</sup> ISAF Headquarters Public Affairs, “News: Coalition regrets civilian casualties,” 16 September 2012.

<sup>90</sup> ISAF Joint Command, “News: Joint team assesses civilian casualties in eastern Afghanistan,” 17 September 2012.

<sup>91</sup> United Nations Assistance Mission in Afghanistan, *Annual Report on Protection of Civilians in Armed Conflict: 2013*, February 2014, p. 32.

Jihadyar, whose brother Mohammad Hassan was arrested by US Special Forces in Maidan Shahr in late November 2012.

A US special operations forces unit was responsible for extrajudicial killings, torture and enforced disappearances during the period of December 2012 to February 2013. Up to 18 people were killed by the unit in Nerkh and Maidan Shahr districts, Wardak province.

Amnesty International interviewed ten eyewitnesses to the crimes, including four people who were detained by the unit.<sup>92</sup>

### *The Crimes*

The Special Forces unit implicated in the crimes reportedly arrived in the region in the autumn of 2012 and was stationed at a small base called Combat Outpost Nerkh.<sup>93</sup> An Operational Detachment Alpha (ODA), or “A-Team,” it was an elite unit known as ODA 3124, reportedly consisting of 12 US soldiers who worked closely with Afghan Special Forces operatives.<sup>94</sup> Allegations of killing by the unit first surfaced in November. Among the victims were several people from Ibrahim Kheil and Amar Kheil villages in Maidan Shahr district.

Amnesty International interviewed a former prisoner named Qandi Agha, who claimed that he was detained by the unit for 45 days. He was arrested in early November 2012, held at the base in Nerkh, then transferred to Bagram in late December, and held there for approximately a year.

Agha, aged 51, was a petty employee at the Ministry of Culture in Maidan Shahr. He told Amnesty International that he returned from work one afternoon and was met by a Special Forces team, who broke into his house without knocking. The group consisted of two US soldiers and an Afghan translator named Zikriya. “They had come to my house on motorcycles, as my house is far off the street,” he said. “They carried me on their motorcycles to their armoured vehicles, and then brought me to the base.”

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<sup>92</sup> Both UNAMA and the news media have previously reported on these events, with *Rolling Stone* magazine publishing a detailed, award-winning expose of the unit’s crimes. See Matthieu Aikins, “The A-Team Killings,” *Rolling Stone*, 6 November 2013. Matthieu Aikins won the 2014 Medill Medal for Courage in Journalism for his work on the article. The crimes were also referenced in UNAMA’s 2013 mid-year report. United Nations Assistance Mission in Afghanistan, *Mid-year Report on Protection of Civilians in Armed Conflict: 2013*, pp. 47-48 (stating that UNAMA had documented “two incidents of torture, three incidents of killings, and 10 incidents of forced disappearances” in the two districts during the three-month period, and that victims and witnesses had ascribed the abuses to US soldiers).

<sup>93</sup> See Matthieu Aikins, “The A-Team Killings,” *Rolling Stone*, 6 November 2013, for a detailed description of the unit and its history.

<sup>94</sup> Matthieu Aikins, “The A-Team Killings,” *Rolling Stone*, 6 November 2013; Rod Nordland, “Afghans Say an American Tortured Civilians,” *New York Times*, 12 May 2013.

Agha said that he and other prisoners were held separately in dark wooden cells. "On the first night," he told Amnesty International, "Zikria and the Americans told me they were going to try 14 different types of torture on me. If I survived, they said, they'd let me go."

The torture he described was horrific:

First they took off my clothes. Then they tied a thin plastic cord around my penis so I couldn't pee. Then they forced me to lie down face down on the floor. Four people beat me with cables. They tied my legs together and beat the soles of my feet with a wooden stick. They punched me in the face and kicked me. They hit my head on the floor. They tied laces around my neck to strangle me.

During the day they'd leave me in the cell with my arms pulled out to the side, stretched out. During the night, they'd hang me from the ceiling from my hands. I have scars on my hands. My feet would be tied together. They'd barely touch the ground. My eyes were blindfolded. They'd pour cold water over my head. They'd do this from about 9 pm until 10 or 11 pm.

They did this for 4 nights in a row.

They were questioning me all the time. Whenever they tortured me, they had someone with a pen and notebook. They'd ask, "Where are the weapons? Where are you hiding them?" I'd tell them that I worked as a cashier for the Ministry of Culture: "Ask them about me," I'd say.

They left the string around my penis for 4 days. My abdomen was bulging. I wasn't able to pee for those 4 days.

Agha said that both US Special Forces and Afghans participated in the torture. While they were doing it, he said, they would often smoke hashish.

Another form of torture he described was similar to techniques used at CIA "black sites":<sup>95</sup>

They would dunk me in a large barrel of water. The tank was made of metal and was round; it was a fuel barrel. It was about one-and-a-half meters tall and a half meter across. They'd dunk me in the tank head first, with just my legs and feet sticking out of the water. My feet would be tied together, and my arms would be tied to my side. They would hold me there until I was unconscious. I'd breathe in water. They did that to me two times, on about the seventh or eighth night I was held. The Americans gave the orders and the Afghans did it.

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<sup>95</sup> See, for example, Greg Miller, Adam Goldman and Ellen Nakashima, "CIA misled on interrogation program, Senate report says," *Washington Post*, 31 March 2014.

He also described two other types of torture:

They had a gun that would give electric shocks. It hurt so much. They would shoot me in the shoulder and the top of the head, and it would make my entire body hurt. The electricity would shoot through my entire body.

They also had a hole in the ground outside. They put me in it, half buried, and put all the dirt back in. Then they added water. They left me in it all night long, until the early morning. My hands were tied to my legs. I could see the stars. It hurt a lot. It was winter and I was freezing. I went numb all over. This happened to me before I was put in the cell with the other prisoners.

Agha said that after 18 days held alone, he was put in a cell with eight other men. All of the others told him that they had endured the same kinds of torture. At night, he told Amnesty International, some of those prisoners would be taken out of the cell and killed. "Four of the eight prisoners were killed while I was there," he said.

I don't remember their names, but I know their faces. They were from neighboring villages, all from the same province. They were all young men; I was the only old man. Most were government employees for the municipality of Maidan Wardak. While I was in Bagram I was interviewed by the ICRC, and they showed me their photos. I was able to tell the ICRC when they were killed.

Agha told Amnesty International that he witnessed the death of one of the men he was held with:

One of the prisoners was killed in front of my eyes. His name was Sayed Muhammed. He was beaten to death. Only one guy beat him, an American. It happened in the afternoon during prayer time. I don't remember what day it was, but it was sometime between the 18th and 45th day of my captivity. I don't know the name of the American who did it: he was a big guy with a big, bushy red beard, and green eyes. Big strong arms. He wasn't young — probably middle-aged, about 40.

Agha said that he heard the others get killed; he didn't see it happen. "They were beaten to death, all of them, with cables and sticks."

Agha told Amnesty International that after being held for 45 days at the US base, he was transferred to Bagram. Before he left the base, he was told that "if I opened my mouth about the torture, they would kill all of my family members."

Agha was finally released after more than a year in custody, without ever being charged with a crime. He was brought to court one day, he told Amnesty International, and two judges ordered his release.

Reinforcing Agha's story of the killing of detainees are numerous eyewitness accounts describing how people were detained by Special Forces teams during the same period and never seen again.

Naimatullah, aged 36, gave Amnesty International a detailed account of one such incident. On the morning of 20 November 2012, a Special Forces unit broke into his family compound in Amar Kheil village, near the Nerkh river.

In the compound that morning were Naimatullah, his mother, his four brothers, and several other family members. Two of his brothers, Siddiqullah, aged 27, and Esmatullah, aged 25, lived in Shamali province but were visiting Amar Kheil on vacation. His other two brothers, Hekmatullah, age 18, and Safiullah, aged 16, lived at home.

The noise of vehicles woke Naimatullah before dawn. A group of uniformed men had surrounded the compound and were banging on the door.

I said, "Stop, I'm coming." By the time I got there they had broken the door down. There were lots of them. They were on the walls, on the roof, all over. About 12 of them came inside. They got inside the compound and said, "Where are your brothers?" I said they were sleeping in their rooms. They went inside each of the rooms, and took each and every person outside.

The Special Forces troops were wearing uniforms, with a US flag on the shoulder, Naimatullah said, adding that several of the men "had long yellow beards and long yellow hair." One man, the translator, had both a US and Afghan flag on his uniform.

Naimatullah said that the Americans brought two of his brothers, Esmatullah and Siddiqullah, into two separate rooms, and started beating them. They also beat Hekmatullah in the yard. "I could hear them beating the others," Naimatullah said, "and when I saw them they were in terrible shape."

Hekmatullah told Amnesty International that the Special Forces operatives "dragged me from my room by the back of my collar, and then threw me down the stairs. While I fell my shoulder and buttocks were fractured. Even now I have problem walking: it is painful and I can't stand straight."

The Special Forces troops brought the four oldest brothers, all but Safiullah, to another nearby compound that was being used as a holding point. About 13 other prisoners were being held there, at first, but more were rounded up. A total of about 39 men were then transported to Nerkh, and held in the yard in front of the district governor's office.

"They sat us in a line," Naimatullah said. "Then they took eight people away and sat them in the snow. Hekmatullah and Siddiqullah were among the eight. Also in that group were Atiq, a cleaner in the Ministry of Education, and Ajmal, a teacher."

Naimatulla described how the men were questioned, fingerprinted, and photographed, and how their hands were sprayed to check for explosive residue. He said:

Then the US forces said that all of us except the eight people who had been separated were free to leave. We started leaving, but then a US soldier with a long yellow beard stopped my brother Esmatullah, and told him to join the eight people who were staying. This was at about 2 pm.

When I got out of the district governor's yard, I went to a shop to wait for my three brothers. The shop keeper said, "Do you want to stay alive? Get out of here; they'll kill you." I told him that my brothers were still there. He told me to leave, and to bring the village elders back there the next day. As I was leaving, I saw the Americans put the nine people in a truck and bring them to their camp.

Of the three brothers who were forced to stay by the Special Forces, only one of them—Hekmatullah—returned home. He was held for two days and then released. The other two were never seen alive by their families again.

One of the first people whose death was confirmed was Aziz Rehman, a married, 38-year-old transporter of goods. He was reportedly stopped on the road by Special Forces operatives on 29 November 2012, beaten severely, and left for dead in a dry riverbed. His brother Zabiullah received a phone call that evening telling him that Rehman was in Maidan Shahr hospital. He went to the hospital and found his brother in a coma, near death. Although the hospital provided an ambulance to transport Rehman to a better equipped hospital in Kabul, Rehman died later that evening, just as the ambulance was reaching its destination.

The Special Forces team carried out a large-scale raid on a bazaar in the village of Deh Afghanan on 6 December 2012, detaining many people for the day, and bringing approximately ten of them back to the Nerkh base. Some of those people were never seen again.

The raid took place during the day. Attiqullah, a 38-year-old former demining technician who ran a shop at the bazaar, was at his shop with his elderly father, Sayed Rasoul. Both he and his father were rounded up during the raid, along with an estimated 60 to 70 other people, a mix of shopkeepers and customers. The detainees also included three brothers: Mohammed Omar, aged 16, Abdullah, aged 18, and Mohammed Hassan, aged 32.

Mohammed Hassan was picked up at a bus stop not far from the bazaar. A disabled man with a bad leg, he was about to get on a bus for Kabul with his mother, his wife, and his four children, of whom the youngest was 45 days old. When the Special Forces operatives took him away with them, he told his family that he would meet them in Kabul, but they decided not to leave. They waited at the bus stop for a long



time, hoping he would return, then went home to wait for him. They never saw him alive again.

The majority of the detainees, including Sayed Rasoul, Mohammed Omar and Abdullah, were released at about 8 pm that night. When Mohammed Omar was released, he asked a Special Forces operative where his brother Mohammed Hassan was being taken, and the operative reportedly responded, "Forget about your brother and think of yourself."

Another Special Forces raid took place on 14 February 2013 in Ibrahim Kheil village. Shukrullah, a 22-year-old labourer, described how members of the Special Forces unit broke into his family compound that night and abducted his 19-year-old brother, Nasratullah. A student at Nangarhar University, Nasratullah was studying veterinary medicine; he was home on a brief visit when the raid occurred.

Shukrullah told Amnesty International that the Special Forces team arrived late at night, near midnight. Everyone in the home was asleep. He said that there were four uniformed men, dressed in khaki, including one who spoke Pashto. He explained:

In our home we have two rooms and a corridor in between. My mother was sleeping in the corridor that night. When the Special Forces entered our home they first pulled the blanket off my mother. My mum screamed because she was scared, and we all woke up ... They beat my mother with the butt of a gun when she shouted, "Who are you and what do you want?" Then they broke into the room where my two brothers were sleeping—my elder brother Awal Khan, whose wife and kids were not at home, and Nasratullah, who had come from Nangarhar to get his passport. They asked, "Who is Nasratullah?" My brother replied back, "I am Nasratullah," and then they asked my brother Awal Khan, "Who is he?" When my elder brother confirmed that he was Nasratullah, they took Nasratullah away.

Shukrullah said that the team handcuffed Nasratullah and put him in a 4 x 4 vehicle. "When they took my brother away, my mother started crying and tried to run after the car," he said. "I told her not to run or shout, otherwise they would kill us all." Seeing which way the vehicle was headed, Shukrullah called an uncle who lived on the road to Nerhk. The uncle said that a 4 x 4 had driven by, appearing to head toward the Special Forces base. Just after the raid, members of Nasratullah's family, including his brother Shukrullah, went to the Afghan police for help; the police reportedly told them that they had no power to control the actions of the Special Forces. Two days later, Nasratullah's body was found under a bridge near the base.

Nazifullah, aged 22, had a similar account of a Special Forces raid on his family compound, which took place late at night on 31 January 2013. The Special Forces operatives, including both US and Afghan forces, reportedly arrived in a green Datsun 4 x 4, a Ranger, and four armoured vehicles. After beating several family members and killing two of the family's cows, they detained Nazifullah's brother Nawab Shah, a 26-year-old truck driver. His family never saw him alive again.

Several detainees picked during the period from November 2012 to February 2013, when these raids were taking place, were transferred to the US detention center at Parwan, formerly known as Bagram. But 10 men were never seen again, and eight others, like Aziz Rehman, were reportedly killed by Special Forces while they were out on patrol.

### *Efforts to investigate*

Family members of those who were detained during this period went to extraordinary lengths to try to rescue their relatives, despite fears that they, too, could be killed or forcibly disappeared. They went from government office to government office, including to the police, the Afghan parliament, ISAF, and the Special Forces themselves. Help was slow, partial and insufficient.

Nazifullah, the brother of Nawab Shah, described his family's efforts: "We went everywhere to ask for help. We asked if we could meet Nawab and find out what were the charges against him, but we never got an answer."

He described the fear that family members felt as they searched for their missing relatives. "We never dared to go as one person; we always went in a group. We would take as many elders as possible with us so that we would not be disappeared by the Special Forces. We were scared if we went on our own they would arrest and and no one would know what had happened to us."

Sadequllah, a 44-year-old employee of a demining company, described his search for his 38-year-old brother Attiqullah, who had been picked up by Special Forces operatives in the December 2012 bazaar raid.

We went around and around searching for my brother for months; no one gave us any information about his whereabouts or his condition ... We were accused of lying and fabricating stories. We provided evidence and witnesses came forward and testified about what they had seen but still no one believed us. I went to the police, the ANA, the ISAF coordination centre, the president's office, parliament, the governor's office and the Maidan Wardak provincial council. What I was asking for was not that my brother be released, but just that I find out where he was, and on what charges he was being held ... The Special Forces denied that they had my brother with them.

Beginning in December, President Karzai's office set up at least three fact-finding inquiries to investigate the families' allegations, but their findings were not made public.<sup>96</sup> In 16 February 2013, before the inquiries had made concrete progress, the horrendously abused body of Nasratullah was found. Nasratullah's brother Shukrullah told Amnesty International:

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<sup>96</sup> United Nations Assistance Mission in Afghanistan, *Mid-year Report on Protection of Civilians in Armed Conflict: 2013*, p. 48, fn. 179.

Someone called and said that the body of my brother had been found under a bridge near the Special Forces base. We went there and found his body; he had been tortured mercilessly. His left hand had been cut off and the index finger of his right hand was missing. His throat was cut and he had bruises and signs of torture all over his body ... His chest had several little holes in it; they seemed like marks from being stabbed. His hand had the same kind of injuries.

That same month, President Karzai ordered US Special Forces to leave Wardak province within two weeks. The decision was taken at a meeting of Afghanistan's National Security Council, after input from the provincial governor. In a statement, the president's office accused Special Forces of "harassing, annoying, torturing and even murdering innocent people," citing the enforced disappearance of nine people and the torture and killing of Nasratullah.<sup>97</sup>

ISAF officials responded immediately, denying the allegations. The day after Karzai's decision was issued they said that they had found "no evidence connecting US troops to allegations of abuse, torture, harassment and murder of innocent Afghans in the region."<sup>98</sup> An ISAF spokesman later clarified that the coalition had been aware of the abuse allegations since December 2012.<sup>99</sup> He emphasized, however, that "after thorough investigation, there was no credible evidence to substantiate misconduct by U.S. or ISAF forces relating to the detainees or deaths in Nerkh."<sup>100</sup>

Debate over who was responsible for the killings continued for several months, but by the end of March the Special Forces team was gone. Its departure gave Afghan families and police the possibility of searching the Special Forces compound and the surrounding area for the remains of the missing men. Over a two-month period, from early April to early June, the families found what they believed were the remains of ten people, most of them in terrible condition. Many of the bodies were identifiable only by the clothing and personal effects found with them.

Nazifullah, whose brother Nawab Shah was arrested by Special Forces in Maidan Shahr in January 2013, told Amnesty International that his brother's body was one of the first to be discovered:

Two months [after my brother's abduction], when the Special Forces left Nerkh district, we visited the base with the ICRC. We only found the front of my brother's skull and pieces of his clothing inside the base. It seemed like

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<sup>97</sup> Office of the President of the Islamic Republic of Afghanistan, "National Security Council Meeting Discusses Situation in Wardak and Logar Provinces," 24 February 2013.

<sup>98</sup> John Wendle, "Did U.S. Special Forces Commit Atrocities in a Key Afghan Province?" *Time*, 28 February 2013.

<sup>99</sup> Cid Standifer, "ISAF Denies Afghan Claims of SF Abuses," *Stars and Stripes*, 14 May 2013. According to journalist Mattieu Aikins, US forces were informed of allegations of abuse in November 2012. Amy Goodman and Juan Gonzalez, "War Crimes in Afghanistan? Ten Bodies of Abducted Villagers Found Outside US Special Forces Base," *Democracy Now!* 8 November 2013.

<sup>100</sup> *Ibid.*

the clothing had been burned by acid ... We buried his skull with some pieces of his clothing; that was all.

Jihadyar, whose brother Mohammad Hassan was arrested by Special Forces in Maidan Shahr in late November 2012, recovered his brother's body in May:

My brother's body was found after six months and 24 days, on 30 May 2013, at 4pm. He had been buried about 60 meters from the base, together with the remains of another person. We recognized him from his shoe, his underwear, and his plastic watch. His right leg was missing; only his left leg had a shoe and a sock.

Other bodies were identified as Sayed Mohammed, Atiqullah, Mehrabuddin, Mohammed Mansor, and Mohammed Qasim.<sup>101</sup> Angered by the discovery of the mutilated bodies, several hundred Afghans protested in Maidan Shahr in early June, blocking a highway and calling for the arrest of the Special Forces team.

Despite the mounting evidence, US officials continued to deny the involvement of US forces.<sup>102</sup> An Afghan investigation into the crimes led to the arrest in July 2013 of Zikria Noorzai (aka Zikria Kandahari), an Afghan interpreter named by several former detainees as having participated in abuses. In interviews with Afghan military investigators and with *Rolling Stone* magazine, Noorzai insisted that while he worked for the Special Forces team, it was the Special Forces operators themselves who were responsible for the killings.<sup>103</sup> Noorzai appeared on video abusing one suspect, however, and another translator reportedly said that Noorzai himself was responsible at least certain killings. Yet even if that was the case, it is extremely unlikely that Noorzai could have carried out those crimes without the acquiescence of the US forces to whom he reported. Moreover, former detainees and other eyewitnesses have testified to the direct involvement of US forces in torture, enforced disappearances, and killings. Both direct participation in killings and knowing acquiescence in them are grounds for criminal liability.

The Afghan investigation into the crimes has reportedly been hobbled by the failure of the US military to grant investigators access to interview members of the Special Forces team. They reportedly requested to speak to three Special Forces operatives and four Afghan translators who worked with them, but the request was denied.<sup>104</sup>

Under pressure from the UN and others, the US military finally opened its own criminal investigation into the killings in July.<sup>105</sup> Yet it is far from clear whether the

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<sup>101</sup> Matthieu Aikins, "The A-Team Killings," *Rolling Stone*, 6 November 2013; Sangar Rahimi and Rod Norland, "Afghans Say New Bodies Have Been Found Near a Former U.S. Base," 4 June 2014.

<sup>102</sup> Ibid (citing US officials who said they were confident no US forces were involved).

<sup>103</sup> Hamid Shalizi, "Afghan translator links U.S. forces to civilian killings," Reuters, 16 July 2013 (citing records of Afghan military investigators); Matthieu Aikins, "The A-Team Killings," *Rolling Stone*, 6 November 2013.

<sup>104</sup> Hamid Shalizi and Dylan Welch, "'Lack of U.S. cooperation' halts Afghan probe into civilian killings," Reuters, 12 November 2013.

<sup>105</sup> United Nations Assistance Mission in Afghanistan, *Mid-year Report on Protection of Civilians in Armed Conflict: 2013*, p. 48. The investigation was reportedly being handled by the Army Criminal

investigation is serious. Numerous witnesses and family members said that, as of November 2013, they had not been interviewed.<sup>106</sup> Nor had the military interviewed journalist Matthieu Aikins, who spend five months gathering evidence about the killings for his *Rolling Stone* article. As of March 2014, only two of the ten eyewitnesses and former detainees whom Amnesty International spoke to had been interviewed by US military investigators. One former detainee, who was interviewed in approximately late January 2014, said that the interviewer “wrote down what I said, and at the end gave me a thumbs up and said goodbye ... I haven’t heard from her since.”

The family members of those who were killed have not abandoned their efforts to have the perpetrators prosecuted. Nazifullah, the brother of Nawab Shah, insisted: “We want people who killed my brother to be brought to justice, and to answer for what they did.”

### **Drone strike near Dam Gulek village, Waygal district, Nuristan province, on 5 December 2012**

*We’d like the people responsible for this attack to go to jail. They need to pay for what they did.*

Abdul Manan, speaking of a drone strike that killed his father, his four uncles, and a cousin.

A drone-fired missile killed five members of a single extended family—four men and a boy—near Dam Gulek village in Nuristan province on 5 December 2012. Amnesty International interviewed five relatives of the victims.

#### *The Drone Strike*

The whole family lived in Shailam village, in Kunar province, not far from the border with Nuristan. The area had some Taliban activity and a near-permanent presence of drones.

“We haven’t seen planes in a long while,” one villager told Amnesty International, explaining how drones had taken over the skies in the past few years. “We used to see helicopters sometimes, and they carried out attacks, but now we only see drones. Over past three years, only drones.”

“We see drones all the time,” another explained, “often three or four in a day. They stay for a long time, for hours. They’re small and they’re high up in the air. We can hear them: they make a buzzing sound like an insect.”

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Investigation Command. Amy Goodman and Juan Gonzalez, “War Crimes in Afghanistan? Ten Bodies of Abducted Villagers Found Outside US Special Forces Base,” Democracy Now! 8 November 2013 (quoting ISAF spokesperson).

<sup>106</sup> Ibid.

The attack that took the lives of the five family members occurred on a sunny day at about 11 am. Ziawullah, aged 22, told Amnesty International what happened:

My father and uncles were going to congratulate someone who had gone on the Hajj [pilgrimage to Mecca]—a livestock merchant named Mohammed Ghani. He lived in Dam Gulek village. They brought a calf with them to give him as a gift. They were hit when they were walking on a footpath to his house.

Zabiullah, aged 23, the son of another of the victims, was on his way home when he heard the strike. “The explosion was loud,” he said, “it echoed to the mountains.”

Ziawullah’s cousin Abdul Manan, aged 18, was about a half hour’s walk from the site of the strike; he also heard it.

I heard the sound of the drone strike ... I called my cousin who works on the mountain; he said the strike wasn’t near the mountain; it was near the village. We called the village of Dam Gulek, they said there were five bodies and a cow. They said the bodies were in bad shape and they couldn’t recognize them. We were afraid it was my father, because of the cow, so we went over there on a motorcycle. Before we got there someone picked up the bodies with an ambulance. The ambulance brought the bodies to our compound. My father’s body was in terrible shape. Only two of the bodies were recognizable.

Ziawullah, who was at school when the strike took place, said that his cousin called him to tell him to come home. When he got home he saw the body of his dead father, Mawlawi Abdul Raouf:

My father’s stomach was badly injured; half of his face was destroyed. His body wasn’t burned, but it had lots of small cuts on it. The other bodies were really badly damaged, except one of them. We buried them the same day.

The drone strike had taken place in Nuristan province near the border with Kunar. The five victims were Mawlawi Abdul Raouf, a 40-year-old teacher, Mawlawi Abdul Akbar, an approximately 35-year-old teacher, Karimullah, an approximately 50-year-old farmer, Dost Muhammed, a 42-year-old farmer, and Sulaiman, a 15-year-old student.

Abdul Manan said that he and other family members visited the site of the attack a month later. “There was a hole in the ground, with lots of pieces of metal shrapnel around it.”

### *The Aftermath*

A day or two after the drone strike, a group of elders from the village visited the district governor’s office to complain about what happened. No one had any idea

how to contact the international forces responsible for the attack. No investigation into the incident ever resulted, but family members were given condolence payments by the Afghan government.

The family remembers the period with bitterness. Ziawullah told Amnesty International: “What happened to us shouldn’t happen to anyone else. The government should have a law that requires prosecution of these cases. The people who made the decision to kill my father should be in jail.”

Yasir, the 15-year-old son of Mawlawi Abdul Akbar, said simply that he is scared whenever he hears a drone.

### **US Air Strikes and Night Raid on Hassan Kheil Village, Sayed Abad District, Maidan Wardak Province, 13 January 2013**

A night raid on the village of Hassan Kheil was accompanied by air strikes. Although the facts are contested, at least 12 people were killed in the bombing, including a 62-year-old woman; another woman miscarried due to injuries she sustained in the attack. Amnesty International interviewed 11 people from the village, including victims, eyewitnesses and family members of victims.

#### *The Air Strikes*

The attack took place in Hassan Kheil village, Wardak province, an area under effective Taliban control. Villagers testified that Taliban were frequently present in the village, and that drones flew over the area regularly.

Villagers complained that members of the Taliban had, on a number of occasions in the past, broken into various of the village’s mosques and slept in them. “There’s no particular schedule of when they do this,” one villager said, “sometimes it’s once a month, sometimes once a week.”

There are wildly conflicting accounts of what happened on the night of 13 January 2013. One point of agreement is that there was a raid by a joint team of US and Afghan Special Operations Forces at approximately 2 to 3 am. According to Afghan officials who spoke to reporters after the attack, the team came under fire from Taliban gunmen who were hiding in one of the village’s mosques.<sup>107</sup> Villagers deny that Taliban were in the mosque that night, although they acknowledge that there was fighting.

Villagers claim that air strikes were conducted at the beginning of the attack. Interviewed individually, they spoke in compelling detail about the bombing.

“I was asleep when the attack started,” one man said. “I woke up to the sound of planes and bombing. It was incredibly loud, with lots of vibration. All of the window

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<sup>107</sup> Alissa J. Rubin and Sharifullah Sahak, “Afghans Killed After Allies Target Taliban,” *New York Times*, 13 January 2013.

panes in our house broke. I didn't count the number of bombs, but there were several of them."

Kamila, a 25-year-old mother of two, who was nine months pregnant at the time, described the scene:

I had seen night raids a number of times, and I knew the planes were there to support the raid. When they dropped some bombs, we were so scared. My children woke up from the explosions and started crying, and I hugged them hard and pressed them to my chest. I tried to move us to another room where my father- and mother-in-law were, but another bomb was dropped and my father-in-law shouted, "Don't move! If they see you from the plane they will kill you!" I stayed with my children, who kept crying out of fear. Then the bombing stopped and our home was full of dust and shattered glass.

Shooting continued after the bombing stopped, and the villagers stayed in their houses. At around 5 am, after the fighting ended, someone used a loudspeaker to summon the villagers to collect the dead and injured.

Ahmed Hassani, a twenty-four-year-old who lived near the mosque, said that he and his brother walked over to the mosque, which had been completely destroyed in the bombing. His uncle's house, next door to the mosque, was also seriously damaged.

"We were walking around the mosque when another air strike occurred," he told Amnesty International. "We didn't hear the plane coming. We had thought that the air strikes were over. But suddenly a bomb hit. I didn't see the plane; I just felt the blast of the bomb, and heard my brother shouting. He said, 'come and help me; I've lost my leg.'" Hassani, whose brother survived, later learned that two of his uncles were killed in the blast.

Kamila, the pregnant woman, was also among those who went outside at 5 am. She described what happened:

I was just going to turn back when I heard a big explosion; I knew nothing more. I don't remember anything until two days later, when I was in the hospital in Kabul. I was hit by the bomb and injured, but others said I dragged myself almost 10 metres to the door. My four-year-old son was also injured.

Another victim, Qurisha, aged approximately 60, lost her husband Mozamil and her two sons in the early morning air strike. "My husband was a head teacher for nearly 30 years and everyone knew him," she said. "He never touched a gun in his life, and this is why all my children got educated. My two sons were killed: one had graduated from university and the other was in university and had come home for the winter holidays to visit his family."



Amir Khan, aged 45, told Amnesty International that he witnessed the second air strike:

A large group of people were gathered in a triangular area next to the mosque, talking, and they were hit by the missile. I was in my house; I saw it happen through a window. There's an airplane that flies over the village very high; it was that plane. It wasn't a drone—I know drones very well, and it wasn't one of them.

Afghan and ISAF spokespersons interviewed by the media in the immediate wake of the incident gave a very different version of events. They claimed that it was a ground operation, with no air support, and the explosions may have been the result of suicide vests worn by Taliban insurgents.<sup>108</sup> An ISAF spokesman, Lt. Col. Hagen Messer, specifically denied villagers' claims of air strikes. While acknowledging reports that civilians had been killed, he said that if those reports were true, the killings had occurred "after the operation."<sup>109</sup>

At least 12 villagers were killed that night, and many others were injured. Most of the dead were civilians, but at least one of them appeared to be an insurgent. Eleven of the 12 were men; the one woman was Hajrabo, aged 62. It is unclear how many people were killed in the first set of air strikes, as opposed to later on in the night, but villagers believed that nearly all the casualties occurred in the early morning strike.

Kamila, the pregnant woman, miscarried after the attack. She told Amnesty International:

When I opened my eyes I found myself in a hospital bed. I touched my abdomen but found that it was empty and heavily bandaged. I asked, "Where is my baby?" but was told that it was in intensive care.

Three days later she was informed that she had lost the foetus. "My whole life has changed," she said. "I feel very weak and fragile and I am suffering from a lot of pain. I want to have a normal life, to look after my kids and manage my home and have more children ... These are simple things but impossible for me."

### *The Aftermath*

That morning, villagers said that they discussed carrying out a protest by bringing the bodies of the victims to the governor's office. "But the elders told us this would be useless," one man said, "as we have no power."

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<sup>108</sup> Alexandra Zavis and Hashmat Baktash, "Afghan civilians killed in mosque blast after deadly night raid," *Los Angeles Times*, 13 January 2013; Alissa J. Rubin and Sharifullah Sahak, "Afghans Killed After Allies Target Taliban," *New York Times*, 13 January 2013.

<sup>109</sup> *Ibid.*

In the week or so that followed, the elders of the village met with several provincial officials to describe the attack, including the district governor. Five elders met with President Karzai, whose office provided compensation for those who were killed and injured.

Villagers said that no international forces came to the village to investigate the incident, which angered them, although some acknowledged that the fact that the area was under Taliban control made it difficult for the government or international organizations to visit there. Qurisha told Amnesty International that only a local television station and Gen. Anwar Shah from the Office of Administrative Affairs came to interview villagers. “No one from ISAF or the US forces came to us so that we could tell them our side of the story.”

One villager explained the frustration people felt: “When there are Taliban casualties, people don’t cry or demonstrate, but when civilians are killed like this then it makes everyone very angry.”

Haji Jaweed, husband of Kamila, gave vent to that frustration:

Were my sisters, my mother and my wife Taliban? Were they involved in any anti-US activity? I will keep asking this question to the USA: is this the freedom you promised to give us?

### **Night Raid and Air Strikes on Sajawand village, Baraki Barak District, Logar Province, 26 March 2013**

A night raid and air strike on Sajawand village killed some 20-30 people, including at least a dozen civilians, of which at least five were children. Amnesty International interviewed six people from the village about the attack.

#### *The Attack*

Sajawand village, in Logar province, is located in an insecure area with a heavy Taliban presence. A joint Afghan-ISAF raid on the village was carried out on 26 March 2013, beginning at 9:30 or 10 pm, and continuing through the night.

A group of Taliban who were staying in the village engaged in an extended firefight with Afghan-ISAF forces. Villagers recalled heavy aerial bombardment and gunfire. 60-year-old farmer Mohammad Sadiq recalled:

The fighting was so heavy that no one could go out. Many bombs were dropped by planes and there was firing from machine guns and AK-47s all over the place. My brother was trying to go from one room to another to tell his wife and kids to come to safety when he was hit. He received bullets to his head, hand and heart, and we collected some shrapnel and bullets the next day. I live 50 metres away and did not know that my brother had been

killed, but when the planes were gone we heard his wife screaming and crying that her husband was dead.

Several children were also among the dead. After the attack, Mohammad Yar, aged 25, went to the compound of his cousin, who had been hosting a number of guests. "The first thing I saw as I entered the compound was a little child of maybe three years, whose chest was torn apart; you could see inside her body. The house was turned into a pile of mud and poles and there was nothing left. When we were taking out the bodies we didn't see any Taliban among the dead, and we didn't know why they were hit or killed."

Galub Shah, a forty-one-year-old farmer, was at home with his wife and eight children when the air strikes began. His twelve-year-old son, Samiullah, was killed in the attack, and his wife and other children were injured, four of them seriously. He told Amnesty International that he had just fallen asleep when the attack started. When his house was hit, all of his family members were in a single room. He said:

My house was hit by four bombs. The first one hit the ground about 10 meters away from the house. The second was even closer. Two other bombs hit the hallway, making the ceiling collapse. We couldn't get out. The third bomb injured my son. I shouted at him to come to me, and then the fourth bomb hit, killing my son and injuring the rest of my family. There was less than 30 seconds between the third and fourth bomb. The total time of the bombing of my house was about a minute.

Because the fighting continued all night, Shah was unable to leave the house to get medical care for his family. Over the course of the night he and his wife tried to keep their children alive:

My son died at 8 am. He was seriously injured, hit by shrapnel all over his body. His head was bleeding and his nose was bleeding. We brought him into the other room. Everyone was bleeding. Finally the international troops came at 10 am. The soldiers were American, wearing uniforms and carrying weapons.

I came out of my house and said, "help me, help me." They said, "halt!" I was covered in blood. I told them what had happened, and they came in the house and provided medical care.

After the assault was over, Afghan soldiers rounded up a number of villagers and took them for questioning. 72-year-old Shinwari, whose son was killed, said, "They didn't beat the elderly people but they were beating the young ones. They didn't let us ask any questions. Only later in the afternoon were we allowed to go home. Then we took the injured to the hospital and started preparing to bury the dead."

Villagers said that about 10 Taliban were killed in the attack, but that most of the dead were civilians.

### *The Aftermath*

Later that same day, villagers held a demonstration to protest the killings, hiring a minibus to take them to the district centre so that they could complain to local government officials. In interviews with the press that day, local officials claimed that the operation had killed more than 20 insurgents. While they also acknowledged civilian casualties, they reportedly said that only two civilians were killed.<sup>110</sup>

A few days after the attack, the media reported that the Afghan government was sending a delegation to investigate reports of civilian casualties during the attack.<sup>111</sup> One villager told Amnesty International, however, “When the Taliban found out [we had gone to the government to make a complaint] they started threatening people not to seek compensation from the government or they would see the consequences. The team that came from Kabul could not investigate the case because people were too scared to meet with them.” There was no sign of an investigation by international military forces.

### **Air Strikes near Jalalabad Airport, Bihsud District, Nangarhar Province, 4 October 2013**

Four young men and one boy hunting birds with air guns near Jalalabad airport were killed on 4 October 2013 in a targeted attack by two Cobra helicopters, when they were seemingly misidentified as armed insurgents.<sup>112</sup> Amnesty International interviewed five people about the attack, including family members of the victims and eyewitnesses.

### *The Air Strike*

Mohammad Qasim, a 55-year-old farmer, was hosting relatives from Khogyani district at his home. After dinner and tea, his two sons—15-year-old Wasiwullah and 22-year-old Amanullah—and their cousins decided to go hunting for birds. They took their air guns to a piece of land near the airport, which served as a US military base. “The area is full of birds,” Qasim said, “we used to go out to shoot them every night.”

Qasim continued: “I don’t know exactly what time it was when I heard the gunshots. It sounded like machine-gun fire and I heard helicopters. It was so near my children started screaming from fear ... We didn’t hear any warning and the shooting started all of a sudden.”

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<sup>110</sup> Rahim Faiez, “Afghan, NATO forces kill more than 20 militants,” AP, 27 March 2013.

<sup>111</sup> Ghanizada, “Afghanistan probes civilian casualties in Afghan-NATO operation,” Khaama Press, 30 March 2013.

<sup>112</sup> “Afghan civilians reportedly killed in NATO airstrike,” AFP, 5 October 2013; United Nations Assistance Mission in Afghanistan, *Annual Report on Protection of Civilians in Armed Conflict: 2013*, February 2014, p. 48.

Nadir Shah, a brother of the one of the victims, witnessed the attack: “It was around 9:20 pm when I heard the helicopters. They were Cobra helicopters, the big ones, and I saw they were coming and then they started shooting and I sensed something bad could have happened to the boys.” He called his brother, who called a district official, who promised to call Jalalabad airport to inform them about the boys who had gone bird-hunting.

Mohammed Nabi, the brother of another of the youths, was working nearby when he heard the shooting. He begged some Afghan police who were guarding the area to let him enter; they finally let him enter together with them. He told Amnesty International:

When we arrived, American ground troops weren't there yet. I walked around. I found the five bodies, in a place with lit flashlights, tea, and cups. I was the first person to find the bodies. I didn't recognize my brother: his body was badly burned and badly injured. Some of the boys had lost their legs; their chests were badly injured. I couldn't recognize any of them. They were covered in dust.

When Nadir Shah and Mohammad Qasim arrived on the scene, soldiers would not let them get close to the bodies. Qasim said:

Someone shouted to us, your sons have died ... I pulled away and ran to the Ranger and pulled up a leg and saw the plastic boots of my older son. I was shocked. From 2 am until morning, I didn't know what was going on; I was hysterical. I passed out and lost consciousness; they poured water over my head.

Four young men and a boy had been killed: in addition to Mohammad Qasim's two sons, Amanullah and Wassiwullah, they were Sahibullah, aged 19, Sassadullah, aged 20, and Gul Nabi, aged 20.

The troops took the bodies to the hospital in Jalalabad, before they were released to be taken home.

### *The Aftermath*

The day after the incident, the family made complaints to a number of offices, including the AIHRC in Jalalabad and the governor's office. They also organised a demonstration, which was covered by numerous television and radio stations.

Four days later, provincial council members Abdul Qahar Ludina and Lala Mohammad Duranni came to the family home and took Qasim to the governor's house, where he met an investigation team from the president's office and some foreigners. Soon afterwards, he met representatives of the US forces at Jalalabad airport. They reportedly explained that they carried out the attack having taken a

decision that the young men were armed and posed a threat, and that their intelligence-gathering equipment was insufficiently accurate or sophisticated.

They also reportedly said that the ground team that investigated afterwards had established that the weapons carried by the men were insufficiently powerful to kill humans, and that they were carrying birds they had killed. They apologised and asked for forgiveness, and offered to bring a more senior commander to apologise, but when Qasim asked for a written apology or acknowledgement of the error, they refused.

Qasim said that he told them:

You killed our loved ones and said that it was a mistake, and you want to escape responsibility by saying only “I am sorry”? How about if I kill your son and then apologise; I wonder how you would react to that? We want justice; we want those responsible to be brought in front of a court to answer for what they have done. We are not selling the blood of our loved ones to Americans, and we want accountability.

All of the family members said that no investigators interviewed them about the incident, and that they had no indication that any investigation was ever initiated. They said that their goal was justice. As Nabi explained:

We want all of those responsible to be prosecuted: whoever is involved, whoever gave the order. Even if Obama is responsible, I want him to be prosecuted, because my brother was killed. We want there to be justice.

## **INVESTIGATION AND PROSECUTION OF KILLINGS OF CIVILIANS**

Very few cases involving alleged unlawful killings of civilians in international military operations have led to prosecutions. Afghans whose relatives are killed face numerous obstacles to justice, both structural and practical.

The first obstacle for the family members of victims is the lack of jurisdiction of courts in Afghanistan. Under the terms of ISAF’s status of forces agreement with the Afghan government, international military forces in Afghanistan are immune from prosecution under Afghan law.<sup>113</sup> In addition, while ISAF plays some role in investigating questionable military operations, NATO does not have a justice system as such.

Instead, it is each troop-contributing country’s national justice system that is responsible for investigating and prosecuting crimes committed by that country’s

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<sup>113</sup> Military Technical Agreement Between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan, 1 April 2002. In addition, the United States has a bilateral agreement with Afghanistan that ensures that US personnel are immune from the jurisdiction of the Afghan courts. Exchange of notes between the Afghan ministry of foreign affairs and the US embassy in Afghanistan, 26 September and 12 December 2002, and 28 May 2003.

troops in Afghanistan. Given that US troops have been implicated in the large majority of cases of civilian deaths caused by international troops, this chapter will focus on the US justice system, in particular, the US military justice system. That system places significant obstacles in the way of the meaningful investigation and effective prosecution of crimes perpetrated by US military forces against civilians.

### **Role of ISAF**

ISAF's role in investigating civilian deaths is limited, yet in 2009, in a step toward greater engagement with these issues, ISAF began deploying *ad hoc* bodies called Joint Incident Assessment Teams (JIATs) to assess reports of civilian casualties. In formal terms, these teams do not have an investigative function; they assess cases rather than investigate them. Nonetheless, their findings can lead to the initiation of real investigations. According to UNAMA, JIATs are mainly deployed for incidents that have resulted in a high number of civilian casualties or that have received political attention.<sup>114</sup>

JIATs typically comprise both ISAF and Afghan forces, including a team leader of at least a one-star general (brigadier) rank, an executive officer, a public affairs officer, a legal officer, a medical adviser, and other subject matter experts. They are assembled on an *ad hoc* basis and their membership is not stable. In carrying out their fact-finding function, they are supposed to be dispatched to the field rapidly, in theory within 48 hours of the military operations at issue. They often interview local police and other local authorities, as well as review video and other evidence, and draft first impression reports on an immediate basis. More thorough civilian casualty assessment reports are due within six days.<sup>115</sup>

The JIAT's reports are provided to the "battle space owner"—the military force responsible for the alleged civilian casualties—which is supposed to report back to ISAF regarding any action taken to investigate or prosecute the incident. However, Amnesty International has learned that such reporting is quite rare: in the vast majority of cases, ISAF is unaware of whether national investigations have taken place.

A serious problem with JIATs as an accountability mechanism is the secrecy with which they operate. ISAF does not publicly release the results of JIAT assessments, limiting the value of these reports. While ISAF will frequently acknowledge that civilians were killed in a given incident, information regarding the potential unlawfulness of military actions is never made known. As UNAMA has pointed out, the prompt release of JIAT findings would promote transparency and accountability, and help improve relations with conflict-affected Afghan communities.<sup>116</sup>

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<sup>114</sup> United Nations Assistance Mission in Afghanistan, *Annual Report on Protection of Civilians in Armed Conflict: 2011*, February 2012, p. 27.

<sup>115</sup> Id.; Defense Legal Policy Review Board, Report of the Subcommittee on Military Justice in Combat Zones, Final Report, 30 May 2013, p. 72.

<sup>116</sup> In addition to the JIATs, ISAF also created a Civilian Casualties Tracking Cell in mid-2008, which later became the Civilian Casualties Mitigation Team (CCMT). The purpose of the team is to analyse

Besides fact-finding, ISAF has an important role as a first responder with the media. Called upon to comment when reports of civilian casualties hit the news, ISAF spokespersons have in some instances been quick to deny them, even—as with the February 2010 killings of five civilians in Gardez district—providing false information to the media.<sup>117</sup> In recent years, however, ISAF press comments and news releases have generally tended to be more neutral, often stressing that investigations into allegations of civilian casualties are being conducted. Still, ISAF sometimes issues immediate denials of civilian casualties, only to have to rescind them when the facts are unearthed. Reacting to reports of civilian casualties caused by a drone strike last September, for example, ISAF initially said that it killed “10 enemy forces” and that there were “no signs of civilians in the vicinity.” ISAF later acknowledged that three civilians were killed; a UNAMA investigation found that 10 civilians were killed.<sup>118</sup>

### Challenges to Overseas Prosecutions

The immunity of US troops to criminal prosecution in Afghanistan, a condition of military operations in Afghanistan that the US government has insisted on in the past and continues to insist on, raises sensitive issues of state sovereignty and national pride. Some Afghans believe that US soldiers implicated in killings of civilians should be prosecuted in the Afghan courts; they mistrust the US justice system and think that allowing US troops to be immune from prosecution in Afghanistan undermines the country’s sovereignty.<sup>119</sup> Their calls for local trials have been especially pronounced in the wake of horrific incidents involving foreign troops.<sup>120</sup> However, the deep weaknesses of the Afghan justice system suggest it would not be fair or effective to prosecute these cases in Afghanistan, even if it were politically feasible.

Yet overseas prosecutions bring a set of real challenges. Even beyond the structural problems of the US military justice system, discussed below, these prosecutions face serious political and logistical hurdles.

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the causes of civilian casualties, identify best practices for avoiding them, and make forward-looking recommendations to ISAF. It is not an investigative body, however, and plays no role in accountability processes. An Amnesty International delegation met with two members of the CCMT in Kabul on 10 July 2014. The team members made it very clear that they did not investigate individual cases, did not interview Afghan victims, and had no accountability function.

<sup>117</sup> International Security Assistance Force Joint Command, “General Calls Civilian Casualty Reports ‘Groundless,’” 12 March 2010. The Gardez case is discussed in the case studies section, above.

<sup>118</sup> United Nations Assistance Mission in Afghanistan, *Annual Report on Protection of Civilians in Armed Conflict: 2013*, February 2014, pp. 36, 46-47; Dylan Welch and Ahmad Sultan, “NATO to investigate drone strike after Afghans say civilians died,” Reuters, 19 September 2013. UNAMA also raised concerns that the failure of international forces to identify the presence of women and children in the targeted vehicle was indicative of negligence.

<sup>119</sup> See, for example, Yaroslav Trofimov and Nathan Hodge, “Kabul Prepares for U.S. Talks,” *Wall Street Journal*, 9 October 2012 (quoting Afghan National Security Adviser Rangin Dadfar Spanta describing Afghan public opinion on the issue of immunity).

<sup>120</sup> See, for example, Tom A. Peter, “Afghans seek new pact to try U.S. soldier in killings,” *USA Today*, 13 March 2012.



To begin with, there are few political advantages in the United States to prosecuting crimes in which Afghan civilians are the victims, and many disadvantages. While Afghan President Karzai has pressed for the prosecution of cases of civilian casualties, his appeals find scant traction in the United States. Not matter how serious the crimes in which they are implicated, US soldiers have a vocal domestic constituency that monitors prosecutions closely and complains loudly about perceived irregularities.<sup>121</sup> In the US political environment, ubiquitous pressure to “support the troops” narrows the space for questioning the conduct of military forces. Indeed, in one case in which soldiers were charged with killing an unarmed Afghan, there was an aggressive political backlash against the commanding officer who brought the case forward. At the request of several members of Congress, the Pentagon’s Inspector General carried out a full investigation of the officer’s conduct, assessing whether he had abused his authority in bringing charges against the defendants. While the officer, Lt. Gen. Francis H. Kearny III, was eventually exonerated of all wrongdoing, he spent nearly seven months under investigation, long enough to underscore the risks of his actions.

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#### *The Political Costs of Pressing for Accountability*

The case that was investigated by the Inspector General involved a US special operations team called Operational Detachment Alpha 374. Two members of the unit were prosecuted for the October 2006 killing of an Afghan man named Nawab Buntangyar, whose name was on the Special Forces “kill-or-capture list” but who was unarmed and posed no danger to the unit at the time he was shot. According to an Army lawyer who testified in support of the defendants, the special operations team could have easily captured the suspect instead of killing him.<sup>122</sup> The legal controversy involved whether, under those conditions, they should have done so. In Amnesty International’s view, an arrest in those circumstances was required.<sup>123</sup>

Based on concern that the troops’ actions violated the laws of war, Lt. Gen. Kearney, who was serving as commander of SOCCENT at the time, directed that charges of premeditated murder be brought against the two men. He did so despite a finding that the two did not violate the applicable rules of engagement, because the rules of

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<sup>121</sup> Critics of military prosecutions of soldiers implicated in abuses are active on the internet, including via social media. With websites like United American Patriots ([www.unitedpatriots.org](http://www.unitedpatriots.org)), petitions on Change.org, and pages on Facebook, supporters of charged or convicted service members are able to mobilize US public support. The family members of Afghans who have been killed, lacking access to the internet and English-language writing ability, are not able to make their side of the story known to the US public.

<sup>122</sup> Paul von Zielbauer, “Green Beret Hearing Focuses on How Charges Came About,” *New York Times*, 19 September 2007.

<sup>123</sup> Given that the suspect could have been put out of action via capture, there was no need to kill him, and no military advantage in doing so. See International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (2009), p. 77; Ryan Goodman, “The Power to Capture or Kill Enemy Combatants,” *European Journal of International Law*, vol. 24, no. 3 (2013).

engagement did not necessarily track the laws of war. At an Article 32 hearing held in September 2007, the hearing officer concluded that the killing was intentional but not unlawful. At his recommendation, the charges against the men were dismissed.<sup>124</sup>

Media coverage of the story was extremely unbalanced. The defendants' lawyers received enormous press coverage for each of their claims, and were quoted abundantly, but there was not a word from Buntangyar's family or from any other Afghan.<sup>125</sup> Popular conservative columnist Bill O'Reilly covered the case on his syndicated television show and wrote a column excoriating Lt. General Kearney for his decision to prosecute. "There is no way the USA will win the war on terror if this nonsense continues," O'Reilly complained.<sup>126</sup>

In October, in the wake of the prosecution's dismissal, Rep. Walter Jones of North Carolina called for Kearney's investigation. Jones, a member of the Armed Services Committee of the US House of Representatives, sent a letter to the Secretary of Defense, citing "improper command influence and poor decision-making" by the officer in question and "demand[ing] that a thorough investigation of Lt. Gen. Kearney be initiated immediately by the Inspector General."<sup>127</sup> By December, when the Inspector General announced that an investigation was being initiated, three other members of Congress had joined Jones' call.<sup>128</sup> Besides challenging Kearney's decision to pursue the prosecution of the two Special Forces operatives, they also questioned a later decision he had made to redeploy a Marine unit implicated in the killings of civilians in Nangarhar province.

In a lengthy and detailed report, the Inspector General concluded that Kearney had acted reasonably in making both of those decisions.<sup>129</sup> In response to the report, Rep. Walter Jones, the congressman who had requested the investigation, declared that he was still not satisfied and would ask the Pentagon for more answers.<sup>130</sup>

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The political obstacles to bringing forward prosecutions of civilian casualties in Afghanistan are heightened by the difficulty of obtaining fair coverage in the media.

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<sup>124</sup> See Inspector General, Department of Defense, *Alleged Misconduct: Lieutenant General Francis H. Kearney III, U.S. Army Deputy Commander, U.S. Special Operations Command*, 10 July 2008, pp. 11-12.

<sup>125</sup> See, for example, Paul von Zielbauer, "Green Berets Face Hearing on Killing of Suspect in Afghan Village," *New York Times*, 18 September 2007; Henry Cuningham, "Special Forces soldiers cleared," *Fayetteville Observer*, 29 September 2007.

<sup>126</sup> Bill O'Reilly, "Rules of Engagement," 4 October 2007.

<sup>127</sup> Press release, "Jones urges investigation of command influence in charges against Green Berets, decision to expel MARSOC Marines," 3 October 2007.

<sup>128</sup> Sarah A. Carter, "General accused of overreach on killings," *Washington Times*, 19 December 2007; Inspector General, Department of Defense, *Alleged Misconduct: Lieutenant General Francis H. Kearney III, U.S. Army Deputy Commander, U.S. Special Operations Command*, 10 July 2008, p. 4.

<sup>129</sup> Inspector General, Department of Defense, *Alleged Misconduct: Lieutenant General Francis H. Kearney III, U.S. Army Deputy Commander, U.S. Special Operations Command*, 10 July 2008.

<sup>130</sup> Sean D. Naylor, "IG: 3-star acted properly in spec ops incidents," *Army Times*, 17 September 2008.

A review of news stories about prosecutions of US troops for alleged crimes against Afghans reveals a marked bias in favour of quotes from the defendants' lawyers and family members, fellow soldiers, and sympathetic observers; the Afghan side of the story typically gets short shrift.<sup>131</sup>

One obvious challenge for media who would like to give fair coverage to Afghan views is the inaccessibility of Afghan victims, family members and witnesses. As will be discussed below, Afghans are almost never brought to the USA to participate in pre-trial and trial proceedings. No Afghan witnesses, for example, testified at any of the courts-martial of the Stryker Brigade soldiers who killed three civilians in Kandahar province, even though that was a high-profile case with multiple defendants and heavy charges. Not being present at hearings, they are not represented in news coverage of prosecutions.

### **Investigations and Prosecutions in the US Military Justice System**

The immunity of US troops to prosecution in the Afghan justice system is not, in theory, supposed to prevent them from being held accountable for crimes committed in Afghanistan. As US Ambassador to Afghanistan James Cunningham stated at a November 2013 press conference: "Our approach ... is not that American military personnel have immunity from punishment if they do something wrong; it's that they will be punished, if it's required that they will be punished, under American law by the American legal authority."<sup>132</sup>

For all active-duty soldiers, punishment under US law means punishment under the military justice system.<sup>133</sup> How that system functions—its capacity to carry out meaningful investigations and fair and effective prosecutions—will be examined next.

### ***Overview of the US Military Justice System***

All active-duty US military personnel are subject to the jurisdiction of the military justice system, and are, in particular, amenable to trial before a court-martial.

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<sup>131</sup> See, for example, "Wife of Robert Bales, soldier accused in Afghan massacre, speaks out," CBS News, 2 July 2012; David McCormack and Helen Pow, "Army officer gets 20 years' jail for murder after he ordered troops to open fire on Afghan men approaching their checkpoint - but his lawyers say he was protecting platoon," *Daily Mail*, 2 August 2013; Ernesto Londoño, "Army officer convicted in shooting deaths of 2 Afghans," *Washington Post*, 2 August 2013.

<sup>132</sup> Kate Clark, "The Nerkh Killings: The problem with 'immunity' for US soldiers," 14 November 2013.

<sup>133</sup> The legal regime applicable to private security contractors is somewhat more complicated. In theory, serious crimes that they commit can be prosecuted by the Department of Justice under the Military Extraterritoriality Jurisdiction Act (MEJA), passed in 2000. In addition, under the 2007 Defense Authorization Act, the Uniform Code of Military Justice (UCMJ) was broadened to cover private security contractors "[i]n time of declared war or a contingency operation," bringing them into the military justice system. To date, however, very few prosecutions of private security contractors have taken place. Moreover, the UCMJ option raises serious constitutional questions. See Ingrid L. Price, "Note: Criminal Liability of Civilian Contractors in Iraq and Afghanistan," *Stanford Journal of International Law*, vol. 49 (summer 2013), p. 491. The flaws and gaps in the legal regime applicable to private security contractors are worthy of serious attention, but are beyond the scope of this report.

Although service members are, in theory, also covered by federal criminal law, the US Department of Defense and Department of Justice have agreed that criminal offenses committed by serving military personnel will be prosecuted within the military justice system.<sup>134</sup>

### *Substantive Law*

The foundation of the US military justice system is the Uniform Code of Military Justice (UCMJ), a federal law that was enacted in 1950 and amended numerous times since. The UCMJ is, in essence, a complete criminal code that covers all active-duty military personnel, including members of all of the armed services. It sets out a range of crimes, from familiar civilian crimes like robbery, assault and murder, to specifically military offenses like failure to obey orders, insubordinate conduct, and desertion.<sup>135</sup> The statute has no territorial limits; it covers members of the military both in the United States and abroad.

Surprisingly, the UCMJ does not include a specific category of war crimes.<sup>136</sup> It makes no reference to the Geneva Conventions, nor do its substantive criminal provisions track international law definitions of war crimes. This does not mean that war crimes cannot be punished under the UCMJ—the underlying conduct is likely to violate at least one of the UCMJ’s existing provisions—but it does mean that such acts are not treated as war crimes and may not be adequately punished.<sup>137</sup>

Judging by the available information, nearly all of the cases of killings of civilians by US military personnel in Afghanistan that have gone to trial have been charged as cases of murder. These cases have nearly all involved deliberate killings, fitting the statutory definition of murder.<sup>138</sup> In theory, other crimes against Afghan civilians—for example, indiscriminate or disproportionate attacks that kill civilians—could be charged either as murder, manslaughter, or negligent homicide.<sup>139</sup>

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<sup>134</sup> See Memorandum of Understanding between the Department of Justice and the Department of Defense Relating to the Investigation and Prosecution of Crimes, August 1981. The memorandum makes an exception for certain kinds of bribery or corruption cases, which may be prosecuted by the Justice Department in the civilian courts.

<sup>135</sup> The UCMJ’s substantive criminal provisions are set out in articles 77-134, known as its “punitive articles.”

<sup>136</sup> While the UCMJ has a “catch all” provision, article 134, that allows the military to import federal crimes and try them before courts-martial, the provision’s application is severely restricted. See Maj. Myndia G. Ohman, “Integrating Title 18 War Crimes into Title 10: A Proposal to Amend the Uniform Code of Military Justice,” *Air Force Law Review*, vol. 57 (2005).

<sup>137</sup> John Sifton, “United States Military and Central Intelligence Agency Personnel Abroad: Plugging the Prosecutorial Gaps,” *Harvard Journal on Legislation*, Vol. 43 (Summer 2006), pp. 492-93.

<sup>138</sup> The statute defines murder as the unlawful killing of a human being by someone who has “a premeditated design to kill,” who “intends to kill or inflict great bodily harm,” who “is engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life,” or who “is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson.” Article 118, UCMJ.

<sup>139</sup> An indiscriminate attack could constitute murder if the perpetrator demonstrated a “wanton disregard of human life.” Article 118, UCMJ. It could constitute manslaughter under the UCMJ if the perpetrator carried out the killing “by culpable negligence.” Article 119, UCMJ. It could be tried as

An important gap in the UCMJ's substantive provisions is the lack of a provision for prosecuting command responsibility. The doctrine of command responsibility reflects the notion that military commanders "have an affirmative duty to act in preventing violations of [international humanitarian law] by their subordinates."<sup>140</sup> Yet under the UCMJ, prosecutors intent on holding a commander criminally accountable for his command failings must rely on Article 92, which prohibits dereliction of duty. As scholar Victor Hansen has noted, this standard is far too narrow.<sup>141</sup> Hansen states that: "Under Article 92, all that is required of a commander is to avoid willful failures and achieve a level of competency that is somewhere above simple negligence or culpable inefficiency." A commander cannot be held accountable under this provision where he did not take reasonable steps to investigate, prevent or punish a crime.

The UCMJ has extremely loose sentencing rules, particularly in comparison to the tight sentencing rules that exist under US federal law. For nearly every crime, the sentencing authority enjoys unfettered discretion to impose anything from "no punishment" to the statutorily authorized maximum. The maximum penalty for premeditated murder and felony murder (murder committed while engaging in another serious crime) is the death penalty, which Amnesty International opposes in all circumstances.<sup>142</sup> Those two crimes also have mandatory minimum sentences, which is unusual under the UCMJ: they impose imprisonment for life with eligibility for parole.

The maximum penalty for other types of murder is life in prison without possibility of parole, and the maximum penalties for voluntary homicide, involuntary homicide, and negligent homicide are 15, 10 and three years of imprisonment, respectively.<sup>143</sup>

### *Investigations*

The different military services each have somewhat different rules and procedures for carrying out investigations. There are both administrative and criminal investigations, as well as different types of preliminary fact-finding inquiries, which are not considered investigations.

The first responsibility for reporting civilian casualties, and potentially unlawful conduct, is with the military unit responsible for an incident. Via battle damage

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negligent homicide if it was an unlawful killing that was "the result of simple negligence." Article 134, UCMJ.

<sup>140</sup> Jamie Allan Williamson, "Some considerations on command responsibility and criminal liability," *International Review of the Red Cross*, vol. 90, no. 870, June 2008, p. 304.

<sup>141</sup> Written Statement of Professor Victor Hansen for the U.S. Commission on Civil Rights Briefing on Sexual Assault in the Military, 11 January 2013, p. 3.

<sup>142</sup> The Manual for Courts Martial imposes several requirements before the death penalty can be imposed, including a requirement that aggravating factors exist. *Manual for Courts Martial*, Rule 1004.

<sup>143</sup> Article 56, UCMJ; *Manual for Courts Martial*, Rule 1003. Courts martial can also impose forfeiture or reductions in pay, dishonourable discharges, bad conduct discharges, and other such penalties.

assessments, significant action (SIGACT) reports, situational reports (SITREPs) and other forms of documentation, units are supposed to flag questionable actions up the chain of command. Military commanders, in particular, have a significant responsibility for policing the conduct of their command by, for example, carrying out preliminary inquiries and other investigations into allegations of criminal behaviour by their troops. Under Army Regulation (AR) 15-6, for example, Army commanders may appoint an investigating officer to gather evidence and make findings of fact and recommendations as to the appropriate disposition of a case.

In addition, each military service has a military criminal investigative organization (MCIO) with independent authority to pursue criminal investigations. The MCIOs include the Army Criminal Investigation Command (CID), the Naval Criminal Investigative Service (NCIS), which covers both the Navy and the Marine Corps, and the Air Force Office of Special Investigations (AFOSI). Because MCIOs do not fall under the operational chain of command, they are not directly subject to the authority of commanders, although they are known to show deference to commanders' views. Commanders are supposed to report all "reportable incidents"—defined as "possible, suspected, or alleged violations of the law of war for which credible information exists"—to the appropriate MCIO.

In the end, though, it is the commander who makes the decision as to whether criminal charges should be brought. It is only with the commander's preferal of charges against the defendant that the court-martial process begins. If the commander decides against a court-martial, he or she can pursue administrative action (such as docking the person's pay), or take no action at all.

### *Courts-martial and Article 32 hearings*

The UCMJ establishes three types of courts-martial: summary, special and general. Summary courts-martial are for minor forms of misconduct; special courts-martial, while for more serious crimes than summary courts-martial, can impose no more than a year's imprisonment. The crimes of murder and manslaughter are tried before general courts-martial, which consist of a military judge and a military jury consisting of at least five members (known as the members of the court).<sup>144</sup>

These courts are not permanent bodies; instead they are convened on an ad hoc basis by commanders at different levels of authority. General courts-martial—unlike summary and special courts-martial—could be convened by commanders of divisions or separate brigades or an officer of higher rank and could impose unlimited sentences.

The UCMJ also establishes that each branch of the military only has jurisdiction over its service members. This means, for example, that it takes an Army court-martial to try Army soldiers, a Navy court-martial for sailors, and so on.

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<sup>144</sup> If the case involves capital charges, a 12-member jury is used.

The judges in all of these types of proceedings are drawn from the military itself, and lack protections on tenure. They are embedded in the military hierarchy, part of a chain of command that leads up to the US president, and they can be removed or reassigned at will. The same is true for service members who make up the military jury. Furthermore, both the judge and the members of the jury are hand picked by the convening authority—the commanding officer who oversees the trial. Under Rule 104 of the Manual for Courts-Martial, however, the commander is prohibited from telling the jurors how to vote or from retaliating against them after the trial.

Before a general court-martial is held, a pre-trial hearing must be held under Article 32 of the UCMJ. The Article 32 procedure, which has long included an important investigative component, was radically altered by legislation passed in December 2013.<sup>145</sup> The purpose of the change, which will go into effect at the end of 2014, was to curb the abusive questioning of witnesses (particularly sexual assault victims), by limiting the scope of the proceedings to the narrow question of probable cause. In the past, important cases such as the 2008 special operations team prosecution failed to survive the Article 32 hearing stage; that may not be true in the future, after the scheduled changes come into effect.

Under the traditional Article 32 procedures, which continue until the reform goes into effect, the investigating officer who takes testimony at the Article 32 hearing then makes a recommendation either for or against taking the case forward to a court-martial. That recommendation goes to a senior commander, who can then dismiss the case or forward it to a higher commander with a recommendation that the court-martial go forward.

When the court-martial returns its verdict and sentence to the convening authority—the military commander who convened the court-martial—the convening authority has absolute discretion to set aside a finding of guilt.<sup>146</sup> While the convening authority may not substitute a guilty verdict for an acquittal, if the court-martial returns a verdict of guilty the convening authority is free to dismiss the charges or to substitute a conviction for a lesser included offense.

The rulings of a court-martial can be appealed to the military courts of appeal, and from there to the US Court of Appeals for the Armed Forces, and, in theory, to the US Supreme Court.<sup>147</sup>

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<sup>145</sup> National Defense Authorization Act for Fiscal Year 2014, signed into law by President Obama on 26 December 2013. The reform to the article 32 process will take effect on 26 December 2014.

<sup>146</sup> Article 60, UCMJ.

<sup>147</sup> The military courts of appeal consist of the Army Court of Criminal Appeals, the Air Force Court of Criminal Appeals, the Navy-Marine Corps Court of Criminal Appeals, and the Coast Guard Court of Criminal Appeals. Their rulings can be appealed to the US Court of Appeals for the Armed Services. Unlike the courts whose rulings it reviews, the Court of Appeals for the Armed Forces is a civilian court comprised of civilian judges. It is not, however, part of the judicial branch of the US government: its judges do not enjoy constitutional protections on tenure or exemption from salary reductions.

In 2013, the Court of Appeals for the Armed Forces overturned the murder conviction of a Marine sergeant who had been found guilty of killing a bound and gagged Iraqi civilian. Alex

### *Non-judicial punishments*

Non-judicial punishments, also known as Article 15 punishments, are permitted under the UCMJ as an alternative to trial by court-martial. They include such penalties as reduction in rank, reprimands, forfeiture of pay and restriction to base. Agreeing to non-judicial punishments is not an admission of guilt.

It is unknown to what extent non-judicial punishments have played a role in cases of civilian casualties, as information about the imposition of non-judicial punishments is not made public. Only in rare cases, such as the March 2007 case of a Marine special operations unit that was accused of indiscriminately firing on and killing some 19 Afghans, is any public reference to non-judicial punishments made.<sup>148</sup> After acknowledging “shortcomings” relating to extremely controversial February 2010 air strikes in Uruzgan province in which at least 23 Afghan civilians were killed, including children, the US military made the unusual decision to announce that several officers in the decision-making chain had been formally reprimanded.<sup>149</sup>

### ***Prosecutions to Date***

Having thoroughly reviewed the available information, Amnesty International has identified six incidents since 2009 in which troops allegedly responsible for unlawful killings of Afghan civilians were criminally prosecuted. Because the US Department of Defense denied Amnesty International’s request for information about such prosecutions, the organization cannot be entirely certain that these are the only such cases; however, no one whom the organization interviewed knew of others, and media or documentary evidence of others could not be found.

Of these cases, which involved a total of 17 defendants, 10 defendants were found guilty of serious crimes, and six of the 10 were still in prison as of July 2014.

The six cases are the following:<sup>150</sup>

- Twelve members of the Army’s 5th Stryker Combat Brigade, known informally as the “Kill Team,” were prosecuted for killing three unarmed civilians in Kandahar province between January and May 2010. Using planted evidence, soldiers from the unit set up the incidents to look as if they had

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Dobuzinskis, “U.S. military court overturns Marine’s conviction in Iraqi’s death,” Reuters, 27 June 2013. The court found that the judge at the court-martial had erred in admitting a damaging statement from the defendant that was made without the presence of counsel.

<sup>148</sup> See Estes Thompson, “No charges for 2 Marines accused in Afghan deaths,” AP, 24 May 2008.

<sup>149</sup> US Forces Afghanistan, “News: U.S. releases Uruzgan Investigation Findings,” May 29, 2010.

<sup>150</sup> An earlier case, from 2008, was the prosecution of Master Sgt. Robert Newell for killing an Afghan civilian and mutilating the corpse by cutting off an ear. Newell was charged with murder and related offenses, and was found not guilty by a court-martial on 26 February 2009. “Green Beret: Afghan man lunged before shooting,” AP, 23 February 2009; “Green Beret not guilty of murder in Afghan’s death,” AP, 26 February 2009.



come under attack. One of the perpetrators, Sgt. Calvin Gibbs, used medical shears to cut the fingers off dead Afghans, which he kept as “trophies.”

Spc. Adam Winfield, another member of the group, sent urgent Facebook messages to his father, former Marine Christopher Winfield, during the period that the killings were taking place. Depressed and anxious, he told his father that he needed help to stop the killings. “There are people in my platoon that can get away with ‘murder,’” he wrote. “I want to do something about it, the only problem is I don’t feel safe here telling anyone.”<sup>151</sup>

Winfield’s father made repeated phone calls to the military hierarchy, trying to report the crimes, but was unable to get anyone to intervene. “I point-blank told them that my son is saying murders are being done out there by his own guys ... and he needs help,” he later recounted in court. “I tried to get the Army to do something. They did nothing. Absolutely nothing.”

In the end, the killings came to light because members of the unit violently retaliated against another soldier—one who had not been involved in the killings—who had reported some of the perpetrators for hashish use. That attack led to an investigation, which resulted in five of the soldiers being charged with premeditated murder, and seven others being charged with such crimes as assault, seeking to destroy evidence, hashish use, and obstruction of justice. The case received an enormous amount of media attention, with *Der Spiegel*, a German news magazine, publishing photos that the defendants had taken of themselves posing with the bodies of Afghans they had killed, as well as photos of dismembered body parts.

The first court-martial, of one of the lesser defendants, took place in December 2010; several others took place in 2011. In all, 11 of the 12 defendants were convicted of a crime, including seven who were sentenced to terms of imprisonment. The charges against the final defendant were dismissed when he accepted an administrative discharge in lieu of a court-martial.

Of those who were sentenced to imprisonment, one defendant, Sgt. Calvin Gibbs, convicted of murder and other crimes, received a life sentence with the possibility of parole after conviction at a court-martial; a second, Spc. Jeremy Morlock, also convicted of murder and other crimes, was sentenced to 24 years of imprisonment via a plea agreement (with a possibility of parole after approximately eight years); a third, Pfc. Andrew Holmes, convicted of one count of murder, was sentenced to seven years of imprisonment via a plea agreement; a fourth, Sgt. David Bram, convicted of solicitation to commit murder, two counts of conspiracy to commit assault and trying to impede an investigation, was sentenced to five years of imprisonment at a court-martial; a fifth, Spc. Adam Winfield, convicted of manslaughter, was

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<sup>151</sup> Kim Murphy, “Soldier pleads guilty to manslaughter in Afghan’s killing,” *Los Angeles Times*, 5 August 2011.

sentenced to three years of imprisonment via a plea agreement; a sixth, Sgt. Robert Stevens, convicted of lying to investigators and other crimes, was sentenced to nine months of imprisonment via a plea agreement, and a seventh, Sgt. Darren Jones, convicted of assault, was sentenced to seven months of imprisonment at a court-martial. The military rejected Gibbs' bid for clemency in November 2013.

As of July 2014, nearly all of the defendants in the case were free: only Gibbs, Morlock, Holmes and Bram were still in prison.

- 1<sup>st</sup> Lt. Shawn Blair, a member of the Marine Corps, was prosecuted for attempted murder in 2012. Very little information is available about the case, but he apparently shot an Afghan man at Salaam Bazaar in Helmand province on 29 April 2010, and, some time earlier, shot at and missed another Afghan who was riding a motorcycle. He was charged with two counts of attempted murder, two counts of aggravated assault with a deadly weapon, and one count of making a false official statement. At his court-martial, which lasted two weeks, he was found not guilty of attempted murder and aggravated assault, and guilty of making a false official statement. He was sentenced to a letter of reprimand, and did not serve any time in prison.
- Sgt. Derrick Anthony Miller, a member of a Connecticut National Guard unit that was attached to the Army's 101st Airborne Division, was prosecuted for killing an unarmed Afghan civilian in Laghman province on 26 September 2010. Miller, who shot the victim in the head at close range, was found guilty of premeditated murder. After conviction at a court-martial, he was sentenced on 28 July 2011 to a life sentence with possibility of parole in 10 years. His appeal of the conviction to the Army Court of Criminal Appeals was denied in February 2014.
- Army Sgt. Walter Taylor was prosecuted for killing an Afghan doctor in Wardak province on 21 July 2011. The shooting occurred when the doctor, Aqilah Hikmat, and her family were traveling from a wedding party to Kabul and inadvertently drove into an area in which US soldiers were fighting Taliban insurgents. Soldiers shot at the car, killing and injuring some of the passengers, and causing the car to stop. After a few minutes went by, and no one got out of the car, Taylor and a few other soldiers approached it. At that moment, Hikmat got out of the car and Taylor shot her (her 18-year-old son and 16-year-old niece had already been killed in the initial shooting, and her husband had been wounded). Military prosecutors, who said that Taylor broke Army rules of engagement that required soldiers to positively identify targets as non-civilians before shooting, charged Taylor with negligent homicide and dereliction of duty, for which he would face a three-year sentence.

The case was dismissed on the recommendation of an investigating officer after a three-day Article 32 hearing held in Germany; it did not get as far as the court-martial stage.

- Sgt. Robert Bales, an Army Staff Sergeant serving with the Joint Base Lewis-McChord Stryker Brigade, was prosecuted for killing 16 Afghan villagers and injuring several others in Kandahar province on 11 March 2012. After an evening spent drinking, Sergeant Bales slipped out of his military camp and attacked a nearby village called Alkozai. Returning a few hours later, he woke up a fellow soldier to describe what he had done. When that soldier fell back to sleep, not believing Bales, Bales left to attack a second local village called Najiban. The villagers whom he killed were mostly women and children; the youngest victim was two years old. After killing the victims, he set some of their bodies on fire.

Bales was charged with 16 counts of premeditated murder, six counts of attempted murder and seven counts of assault. In June 2013 he pleaded guilty to the charges via an agreement that allowed him to avoid the death penalty. He was sentenced to life in prison without parole on 23 August 2013. Several family members of the victims testified at his sentencing hearing. One of them was Haji Mohammad Wazir, who lost 11 members of his family in the attacks, including his mother, wife, and six of his seven children.

As of late June 2014, Bales' case was still considered open, as his appeal for clemency was still pending.

- First Lt. Clint Lorance, who was serving in the Army's 82nd Airborne Division, was prosecuted for ordering his men to open fire on three Afghan civilians, two of whom were killed, in Kandahar province on 2 July 2012. The shooting violated the Army's rules of engagement, which require soldiers to hold fire unless they have evidence of hostile action or hostile intent.

In January 2013 Lt. Lorance was charged with two counts of murder and related charges. He was found guilty of the two murders and sentenced to 20 years of imprisonment at a court-martial on 1 August 2013. His case is currently with the Commanding General of the Army's 82<sup>nd</sup> Airborne Division, who could reduce or overturn the sentence.

### ***Where the Military Justice System Fails***

The US military justice system fails civilian victims of military crimes in several ways.

First, as evident from the description above, the military justice system is a "commander-driven" system that lacks independence from the chain of command. The commander has a key role in choosing whether to initiate an investigation, and at multiple stages of the investigation and prosecution, the commander has the

power to terminate it. The victim's family, in contrast, has very little access to the system and little or no influence on a case's progress.

The commander's central decision-making role in the system reflects the fact that one of the key purposes of military justice is "to assist in maintaining good order and discipline in the armed forces."<sup>152</sup> While the promotion of justice is also supposed to be a key purpose of the system, the system's structure subordinates justice to these competing demands. Putting so much decision-making power in the hands of commanders—who may have an inherent conflict of interest in investigating such matters—undermines the interests of the victims of violations.

In overlapping ways, the military justice system relies on self-policing. It is a system in which, in most cases, there are no real incentives to report crimes against Afghan civilians, or to push forward an investigation or prosecution or such crimes, and many disincentives to doing so.

### *Investigations*

A serious hindrance to justice is the practical inability of most Afghans to make a complaint about unlawful civilian deaths. Investigations of possible military crimes are initiated in a very different way from investigations in the civilian justice system. In contrast to normal crimes, which a victim or family member would be able to report to the police, Afghans who believe that their family members were killed unlawfully have no direct access to US military justice mechanisms. They are rarely able to report the killings directly; they can only try to draw attention to the incident by holding public protests and trying to meet with Afghan officials. In numerous cases, both to prove the civilian nature of the deaths and to demonstrate the intensity of their distress, Afghans have brought the bodies of their killed relatives to the offices of Afghan leaders.<sup>153</sup> When seven women were killed in an air strike in Laghman province in September 2012, for example, the families brought the bodies to the provincial capital, Mihtarlam, in protest.

"We laid their bodies out in front of the governor's house," the father of one of the victims told Amnesty International. "The Americans had announced that they had killed a group of Taliban, and we showed the governor proof of the opposite: they didn't kill Taliban; they killed women." The group of family members who had brought the bodies demanded a full investigation of the killings and the trial of the perpetrators.

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<sup>152</sup> Manual for Courts-Martial, Preamble, Section 3, Nature and Purpose of Military Law.

<sup>153</sup> See, for example, "Protesters say NATO attack killed Afghan civilians," AP, 14 May 2010 (describing how protesters displayed the dead bodies of several civilians in Surkh Rod district, Nangahar province); "Afghans protest against alleged killing of civilians by NATO," Xinhua, 18 May 2011 (describing how protesters brought the dead bodies of four civilians, including two women, to the governor's office in the city of Taluqan, in Takhar province); "17 civilians dead in NATO airstrike," PAN News Service, 6 June 2012 (describing how protesters brought the dead bodies of 18 civilians, mostly women and children, to the governor's office in Pul-i-Alam, Logar province).

Particularly in recent years, with increasing Afghan political attention to the question of civilian casualties, such public protests have in some cases been sufficient to cause ISAF to announce the initiation of an investigation. But in other cases where family members have not been brave enough to protest, or where security conditions do not allow for such travel, the catalyst for an investigation must come from the military itself.

Within the military, investigations largely rely on a system of self-reporting. It is the members of a unit that carried out a given operation who are responsible for describing any possible misconduct or civilian casualties that took place. When the self-reporting mechanisms fail, an investigation may never occur, or it may be seriously handicapped. Successful prosecutions generally require that allegations of civilian casualties be recorded and investigated promptly, while evidence is still available and memories are fresh.

As the Defense Legal Policy Board has explained:<sup>154</sup>

Failures can occur at any level [of the reporting process]. A Service member observing a civilian casualty may believe it does not amount to a “reportable incident” and fail to report it to superiors. Individuals may not want to report misconduct involving their comrades. Individuals involved in reportable incidents themselves may fear personal consequences connected to reporting. Commanders may question events, but conclude that nothing problematic occurred, and then fail to report an incident. Leaders engaged in war-fighting may not want to be distracted with allegations they believe will inevitably prove to be unproblematic or unsubstantiated. Individuals may feel they are bypassing “unnecessary” work by not reporting. Service members may lack confidence in “the system” to fairly investigate and exonerate when the facts warrant.

In underscoring the weaknesses of the existing reporting process, the Defense Legal Policy Board drew attention to a survey of US military personnel in Iraq that found that only 55 percent of soldiers and 40 percent of Marines would report a unit member for injuring or killing an innocent non-combatant. Bound by feelings of loyalty to their fellow service members, and fearful of negative career repercussions, soldiers are reluctant to report misconduct up the chain of command.<sup>155</sup> “I think there is a natural tendency among soldiers to band together,” said retired Air Force Col. Morris Davis, former director of the Air Force legal system. “It’s inherent in the culture.”<sup>156</sup>

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<sup>154</sup> Defense Legal Policy Review Board, Report of the Subcommittee on Military Justice in Combat Zones, Final Report, 30 May 2013, p. 58.

<sup>155</sup> Defense Legal Policy Review Board, Report of the Subcommittee on Military Justice in Combat Zones, Final Report, 30 May 2013, p. 54.

<sup>156</sup> See, for example, “Challenging Unwritten Code of Silence Among Troops,” *Pittsburgh Tribune-Review*, 7 May 2014.

Commanders, too, have little incentive to report cases or push them forward, as misconduct among their troops can reveal command failures, or even their own misconduct. By protecting their subordinates, they protect themselves.

In several of the cases of civilian deaths that Amnesty International documented, ISAF immediately announced that an investigation had been initiated.<sup>157</sup> The same day that nine boys were killed by helicopter strikes in Darah-Ye Pech district, Kunar province, for example, ISAF issued a news release stating that it was investigating the operation.<sup>158</sup> The following day, US Army Lt. Gen. David Rodriguez, the deputy commander of US forces in Afghanistan, appeared in a video statement of apology. "Rest assured," he promised in the video, "a full investigation is taking place, and if appropriate, disciplinary action will be taken."<sup>159</sup>

In the Kunar case, however, as in several other cases in which an investigation was announced, the announcement was the last public statement that the military made about the matter. Nothing more was said in these cases, either publicly or to family members of the victims, regarding the investigation's findings as to the legality of the air strikes or the possibility of prosecution. To the enormous frustration of family members, the promised investigation never seemed to occur.

It is difficult to ascertain what happened in these cases when the investigative record, if it exists at all, has not been publicly released.<sup>160</sup> But having interviewed dozens of family members of victims and eyewitnesses of these incidents, Amnesty International can underscore one basic and serious problem. Despite US and ISAF promises to carry out thorough investigations, Amnesty International found that military investigators failed to interview victims, family members, and witnesses to attacks that resulted in civilian casualties. In the 10 cases that Amnesty International documented in detail, the organization found only a single Afghan witness who had been interviewed by US military investigators (and he was interviewed only after the case received enormous media attention). Journalists who have looked into these cases have reported similar findings.<sup>161</sup>

"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 his family compound in May 2010. "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."

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<sup>157</sup> See, for example, Office of the Secretary of Defense Public Affairs, "Commander Appoints Board to Investigate Air Strike," 8 September 2009; ISAF HQ Public Affairs, "Afghan-International Security Force Are Conducting a Joint Investigation into Incident in Pakiya," 12 February 2010.

<sup>158</sup> ISAF Joint Command, "ISAF investigates civilian casualty allegations in Kunar," 1 March 2011.

<sup>159</sup> ISAF Joint Command, Video: Lt. Gen. Rodriguez Apology (English), 2 March 2011.

<sup>160</sup> The Open Society Foundation filed a request on 5 July 2012 with the US Army under the Freedom of Information Act seeking information about the investigation into the March 2011 Kunar air strikes; the Army responded that no such documents could be found.

<sup>161</sup> See, for example, Matthieu Atkins, "Will Justice Be Served in the A-Team Killings?" *Rolling Stone*, 21 November 2013.

Without an effort to ascertain the facts by speaking to those who can describe them directly, an investigation cannot be considered serious. While soldiers involved in an incident can give one view of the story, to obtain a full and accurate picture of what occurred, the accounts of both sides are necessary.

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### *Anatomy of Impunity*

Without seeing the relevant internal military documents for the case studies detailed in this report, Amnesty International cannot say whether investigations into them were started and then stopped, or whether they were never started in the first place. But a failed investigation of the killing of two civilian teenagers in Iraq illustrates how easily these cases can go awry.

The two victims, unarmed deaf mutes, were Ahmad Khalid al-Timmimi, age 15, and his brother Abbas, age 14.<sup>162</sup> On 6 March 2007, the day they were killed, they were tending to their cattle in a farming village northeast of Baghdad. Shortly after noon, then-Staff Sgt. Michael Barbera, a US Army Small Kill Team leader, shot them, hitting one boy in the head and another in the chest. Minutes later, he ordered his men to shoot a third unarmed teenager, Muhamed Khaleel Kareem al-Galyani, age 14, a cousin of the two brothers. According to other soldiers who witnessed the killings, none of the boys posed a threat.

Immediately after the shootings, according to witnesses, Barbera ordered his squad to leave the area, and denied requests to conduct a Battle Damage Assessment on the killings. Instead, Barbera radioed his platoon leader to tell him that “two military-age males were maneuvering on them and that his team engaged them and then returned to base.”<sup>163</sup> There was no after-action briefing when Barbera and his squad came back. None of the squad members reported the killings up the chain of command; they later said that they feared retaliation, and they assumed that commanders would cover up the incident.

It was not until April 2009, two years after the killings, that one of the squad members, reportedly plagued with guilt, wrote an official statement to the Army’s Criminal Investigation Command (CID) describing the incident. He claims that his decision to report the alleged crime led to heavy reprisals from other soldiers. They made his life “a living hell,” he later told a reporter. But the CID investigation went forward, finally concluding that Barbera was responsible for murder. Barbera, the CID report said, “intentionally shot and killed two unarmed Iraqi non-combatants,”

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<sup>162</sup> The story of the Barbera case was the fruit of a long investigation by reporter Carl Prine of the *Pittsburgh Tribune-Review*. The description below is drawn from his articles about the case. See Carl Prine, “Five-year legacy of Iraq mission gone awry,” *Pittsburgh Tribune-Review*, 1 December 2012; Carl Prine, “Department of Justice urged to refile charges in 2007 deaths of Iraqi boys,” *Pittsburgh Tribune-Review*, 3 December 2012. While Prine was carrying out his investigation of the case, his wife received a threatening phone call that was allegedly made by Barbera.

<sup>163</sup> Carl Prine, “Five-year legacy of Iraq mission gone awry,” *Pittsburgh Tribune-Review*, 1 December 2012.

then told his superiors the slayings were “a justified shooting resulting from enemy compromise of his position.”<sup>164</sup> The report recommended that Barbera be charged with two counts of murder and other crimes. Family members of the victims said that they were told they would be called to testify at a court-martial in Baghdad, but the call never came.

Instead, Barbera’s commanders dropped the case. According to a military investigative report reviewed by reporter Carl Prine of the *Pittsburgh Tribune-Review*, commander Maj. Gen. James L. Huggins Jr. gave Barbera an official reprimand on 16 September 2010 for breaking the squadron’s rules of engagement. The reprimand was the Army’s second mildest sanction and carried with it no loss of rank. Indeed, Barbera was later promoted.

Failed initial self-reporting, a reluctance of squad members to report possible misconduct, and a command decision to deal lightly with an alleged crime—the case highlights many of the basic structural problems of the military justice system. It was only due to a reporter’s persistence, investigating the case two years after the military dropped it, that any of these problems came to light.<sup>165</sup> At present, because of media and political attention, Sgt. Barbera now faces a renewed possibility of trial, an outcome that seemed unlikely at the time he committed the alleged crime.<sup>166</sup>

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### *Prosecutions*

Few cases involving Afghan civilian victims have reached the prosecution stage. Without access to information that the military has not released publicly, it is impossible to know why most cases of alleged unlawful killings did not go forward. But the structural problems of the US court-martial system are clear. They involve, most obviously, the inherent conflict of interest that arises when commanders who themselves might be implicated in their subordinates’ misconduct—either because they ordered abuses, allowed them to occur, or failed to maintain unit discipline—are given broad decision-making authority over the possible prosecution of such misconduct. Commanders make crucial decisions over whether cases go to trial, decisions that should not be tainted by potentially improper motives.

Another structural problem is the lack of independence of military judges and juries. With insufficient protection from possible retaliation, both judges and juries are members of the military, part of a chain of command that leads up to the president. Because judges and jurors are picked by the commanding officer who oversees the trial, rather than chosen randomly, they may be selected based on their perceived

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<sup>164</sup> Ibid.

<sup>165</sup> Karen Peterson, “Soldier on trial because reporter kept digging,” *News Tribune* (Tacoma, Washington), 27 April 2014; Al Tompkins, “How an award-winning investigative reporter tracked killings in Iraq,” *Poynter*, 11 April 2013.

<sup>166</sup> Jim Wilhelm, “Pentagon tries to challenge unwritten code of silence among troops,” *Pittsburgh Tribune-Review*, 6 May 2014.



views and biases, potentially tainting the verdict. As military justice expert Victor Hansen has pointed out, “[i]t is not hard to imagine a convening authority that has a mind to manipulate or unduly influence the outcome of a court-martial using [his jury selection] authority to hand pick those members who will be inclined to see the case as he does rather than deciding the case on its merits.”<sup>167</sup>

Still another serious flaw is the lack of transparency of military trials. Although court-martial proceedings are open to the public, the overall process is much less open than in civilian courts. Access to court filings, transcripts, and other documents is more restricted in the military setting than in its civilian counterpart. Even after a trial has concluded, it can be a very slow process to gain access to trial documents.

A final problem is not necessarily inherent to the military justice system, but exists in practice: courts-martial and Article 32 proceedings in cases of civilian casualties frequently leave out the Afghan side of the story. In only one case, the prosecution of Robert Bales for the murder of 16 Afghan villagers, have Afghans been brought to the United States to testify at a military trial.<sup>168</sup> In other cases, the prosecution bases its argument on forensic evidence and the testimony of other soldiers. The 2011 prosecution of Sgt Calvin Gibbs for the deliberate killing of three Afghan civilians, for example, was based in large part on the testimony of another member of his platoon, Spc. Jeremy Morlock.<sup>169</sup> But by leaving out the testimony of Afghan witnesses, such prosecutions omit what may be crucial and compelling evidence. In addition, both in the courtroom and in the media, the lack of an Afghan presence leaves the victims faceless, less sympathetic, and less likely to be fully valued.

“I wanted the Afghans to be part of the process,” a prosecutor in the Bales case told Amnesty International, explaining the decision to bring family members of the victims to testify at the defendant’s sentencing hearing. “It was important that they had a say in the proceedings. It was also important for the jury to see that these were real people—women and kids—who were victims.”

### **Reform Efforts**

The failings of the US military justice system have been much in the public eye over the past few years, due to high-profile scandals involving the military’s failure to effectively investigate and punish sexual harassment and sexual assault within the ranks.<sup>170</sup> A number of bills have been introduced in the US Congress to reform the military justice system to ensure that prosecutions of serious crimes—such as crimes of sexual violence—do not face unwarranted obstacles. One of the most ambitious

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<sup>167</sup> Victor Hansen, “The Impact of Military Justice Reforms on the Law of Armed Conflict: How to Avoid Unintended Consequences,” *Michigan State International Law Review*, vol. 21, no. 2 (2013), p. 267.

<sup>168</sup> Afghan witnesses testified by video link at the Article 32 pre-trial proceeding, and in person at the sentencing hearing.

<sup>169</sup> See, for example, Hal Bernton, “Panel deliberates in war-crimes court-martial,” *Seattle Times*, 10 November 2011.

<sup>170</sup> See, for example, Mark Thompson, “The Military’s Latest Rape-Case Mess,” *Time*, 16 September 2013. According to a study cited in *Time* magazine, only 3,374 of approximately 26,000 service members who experienced unwanted sexual contact in 2012 filed complaints.

proposals would remove the chain of command from the entire decision-making process in cases involving sexual assault and other serious crimes. Unfortunately that bill, the Military Justice Improvement Act, was blocked via a procedural manoeuvre in March 2014.<sup>171</sup> Efforts are ongoing, however, to bring a package of reform legislation to a vote.<sup>172</sup>

While obstacles to accountability for civilian casualties have not received comparable press attention, there have still been reform initiatives. Notably, in July 2012, then-Secretary of Defense Leon Panetta asked the Defense Legal Policy Board (DLPB), a federal advisory committee, to assess the military justice system's effectiveness in cases in which US troops were accused of crimes against civilians. The review was prompted by cases such as the Stryker Brigade case in Afghanistan, and the Haditha case in Iraq, involving US soldiers who committed war crimes against civilians living in countries in which the US military was operating.<sup>173</sup>

The DLPB carried out a broad consultation, hearing testimony from numerous sources and receiving a variety of written submissions. Unfortunately, the process had significant flaws. One problem lay in the board's sources of information: not a single Afghan or Iraqi testified or provided evidence to it, not even representatives of organizations like the AIHRC, which has documented hundreds of killings of civilians in Afghanistan. It is unfortunate that their perspective, which could have helped the board understand the challenges faced by Afghans seeking justice for their losses, was not included. Instead, the bulk of the testimony was from serving members of the military, people like the Judge Advocate General of the Army and the Commander of the Air Force Office of Special Investigations.<sup>174</sup> Another basic problem with the review was that the board examined three cases in detail to

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<sup>171</sup> The bill, S. 1752, was filibustered in the Senate; a cloture motion to end the filibuster failed. See Amanda Marcotte, "What Happened to the Military Sexual Assault Bill in the Senate on Thursday?" *Slate*, 7 March 2014. However, the bill has broad bipartisan support.

<sup>172</sup> There has, unfortunately, been some talk of limiting the reforms to cover only sexual offenses, which would be a serious mistake. See Eugene R. Fidell, "Don't create separate military justice system for sex offenses," *The Hill*, 5 June 2014.

<sup>173</sup> The memorandum that Panetta sent to the DLPB, to request the review, put it this way: "We know that, over the last 10 years in Iraq and Afghanistan, bad things have happened involving combat excesses and innocent civilians in deployed areas." Jim Garamone, "Panetta Asks Board to Review Military Justice in Deployed Areas," *Armed Forces Press Service*, 3 August 2012. Nearly all of the members of the DLRB subcommittee that carried out the review were former service members, primarily generals.

<sup>174</sup> The report's executive summary described the sources of the information the board received:

The Board and Subcommittee received testimony from a number of commanders who served in Iraq and Afghanistan at the battalion, brigade, and division levels. Additionally, the Board and Subcommittee heard from the Judge Advocates General of each Service, the heads of the Military Criminal Investigative Organizations ("MCIOs"), a number of attorneys with a variety of subject matter expertise, concerned members of non-governmental organizations and academia. The Board and Subcommittee also received testimony and submissions from the families of Service members convicted of offenses involving the death, injury or abuse of civilian non-combatants in Iraq and Afghanistan.

Defense Legal Policy Review Board, Report of the Subcommittee on Military Justice in Combat Zones, Final Report, 30 May 2013, pp. 2-3. Among those who testified before the board were two representatives of US-based human rights organisations.

understand possible systematic problems with the military justice system, but the three cases it examined were cases in which prosecutions had actually been brought. Given that basic problems with the system mean that only a tiny minority of cases ever reach the prosecution stage, a review of some egregious cases in which prosecutions were *not* brought might have been more instructive.

The DLPB's report, issued in May 2013, included some useful recommendations. It did not, however, mount a broad challenge to the existing, "commander-driven" military justice system, possibly because of the flaws mentioned above, and possibly because most of the board's members had spent their careers working within that system.<sup>175</sup> Its most substantial recommendation was that the joint force commander should be responsible for investigations and prosecutions in combat zones, rather than the branch of the armed services in which the implicated service member serves. It also found that barriers to justice existed "in the reporting process, the investigative process, and in case resolution," and made some recommendations to address those deficiencies.<sup>176</sup>

It is not clear whether any of the DLPB's recommendations have been implemented to date, but discussion of justice reform within the military continues. On 18 October 2013, Defense Secretary Chuck Hagel ordered a "comprehensive review of the Uniform Code of Military Justice (UCMJ) and the military justice system."<sup>177</sup> Secretary Hagel directed that a report setting out recommendations for amendments to the UCMJ be submitted within 12 months, with a related follow-on report due later. The Military Justice Review Committee, charged with carrying out the review, has expressed an openness to input from a broad variety of actors. Along with the pending legislative proposals, these discussions offer an important opportunity to create momentum for reform.

The experience of other countries suggests that such reforms are eminently possible. Over the past two decades, countries such as the UK, Canada, Belgium and New Zealand have carried out extensive reforms of their military justice systems, "civilianizing" their systems to various degrees by limiting the role of the commander, strengthening the independence of judges, and/or establishing external accountability mechanisms.<sup>178</sup> In some countries, including Denmark and Sweden, civilian courts have jurisdiction over military matters; in others, including the UK, the

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<sup>175</sup> In a separate statement, however, one member of the board, military justice expert Eugene Fidell, did urge Congress to consider broader reforms. As he pointed out, giving the power to refer cases to prosecutors, as opposed to commanders, would "allay concerns that commanders may decline to refer cases for inappropriate reasons." Defense Legal Policy Review Board, Report of the Subcommittee on Military Justice in Combat Zones, Final Report, 30 May 2013, p. 188.

<sup>176</sup> *Ibid.*, p. 4.

<sup>177</sup> Memorandum from the Secretary of Defense regarding Comprehensive Review of the Uniform Code of Military Justice, 18 October 2013; US Department of Defense, "DoD Announces Comprehensive Review of Military Justice System," 15 April 2014.

<sup>178</sup> See, for example, Mindia Vashakmadze, *Understanding Military Justice*, Geneva Centre for the Democratic Control of Armed Forces (2010) (describing reforms in the Czech Republic, Finland, the Netherlands and Tunisia, among others); Victor Hansen, *The Impact of Military Justice Reforms on the Law of Armed Conflict: How to Avoid Unintended Consequences*, Boston Legal Studies Research Paper Series, Paper No. 14-03 (August 2013).

judges that preside over military trials are civilians, appointed in the same way as other civilian judges and benefiting from the same protections on tenure. While these changes do much to ensure fairness and due process, they have not proven to harm military discipline or to undermine the effectiveness of military operations.

### **Lack of Transparency about Investigations and Prosecutions**

The US government is extremely secretive regarding its record of investigating and prosecuting cases of unlawful killings of civilians in Afghanistan. It is difficult—and often functionally impossible—to obtain basic information about such cases.

Notably, the US does not make public any overall data regarding investigations and prosecutions of unlawful killings of civilians. None of the military's publications address how many such cases have been investigated, how many have gone to trial, how many have been resolved administratively, or related questions. The military's failure to make public such information stands in marked contrast to its openness on another controversial topic, sexual abuse in the ranks, for which it publishes an annual report, mandated by Congress, that sets out a range of qualitative and quantitative information.<sup>179</sup> Nor is such overall data provided on demand. The Department of Defense gave no information whatsoever in response to a 2013 request from Amnesty International about the numbers of investigations the US military has launched in response to reports of civilian casualties in Afghanistan since 2009, the results of those investigation, and the details of four specific cases.<sup>180</sup> Instead, Amnesty International was advised to file a formal request for information under the federal Freedom of Information Act (FOIA).

Yet FOIA, meant to enforce transparency when government bodies fail to provide information, does not function well when civilian casualties are at issue. Numerous journalists and human rights researchers who have filed requests for such information under FOIA have waited years to receive little or nothing of substance.

Amnesty International interviewed a number of journalists who have filed FOIA requests with the US military seeking investigative materials in cases involving different kinds of crimes. Two of them said that with cases involving common crimes such as drug use, they could expect to receive investigative reports and other information within six to nine months of filing a request. But several journalists who have looked into civilian casualties—either into civilian casualty incidents or into the subsequent investigations—have dismissed the process as onerous and unproductive.

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, requesting expedited processing in accordance with FOIA

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<sup>179</sup> See, for example, Department of Defense Annual Report on Sexual Assault in the Military, May 2013.

<sup>180</sup> Letter from Catherine Baber, Amnesty International, to Chuck Hagel, Secretary of Defense, U.S. Department of Defense, 30 October 2013.

rules.<sup>181</sup> As of July 2014, more than two-and-a-half years later, he had not received a single document in response. Similarly, journalist Carl Prine of the *Pittsburgh Tribune-Review*, who carried out an important investigation of the 2007 killing of three Iraqi civilians, said that the FOIA system was frustratingly slow and unresponsive. He received a copy of a 2009 investigative report, which he requested in 2011, only after informing the military that he had already obtained a leaked copy of it. Other documents were never granted; some of his requests were simply ignored.

Human rights organizations have fared no better. The Regional Policy Initiative of the Open Society Foundations (OSF), for example, filed 35 requests under FOIA with US military agencies, primarily CentCom and SOCOM, in 2012. The requests sought information about a series of incidents in Afghanistan that had reportedly resulted in civilian casualties, including 30 air strikes, three night raids, one offensive and an escalation of force incident, all of which took place between March 2007 and July 2011. Of the 35 requests that OSF made under FOIA in those two years, only three led to the release of information. The military responded to several requests by stating that no relevant documents could be found, but the majority of the requests remain open and unfulfilled, some two years after they were filed.

The Afghanistan, Pakistan, and Taliban Project of the National Security Archive has had a similar experience, receiving documents in response to only about a quarter of its civilian-casualty related requests. None of the released materials were particularly useful or newsworthy, said Barbara Elias, the director of the project: “Much more interesting material came out via Wikileaks.”

A more sure way to obtain meaningful access to military documents is via litigation, an option that is not available to many journalists and researchers. In 2010, the American Civil Liberties Union (ACLU) obtained voluminous materials from the US military on civilian casualties, based on a lawsuit that it brought in 2007 in US district court.<sup>182</sup> The ACLU’s original FOIA request, made in 2006, led the Army to provide the ACLU with information, but not other branches of the US military. As ACLU attorney Ben Wizner stated at the time that the suit was filed, “The government’s refusal to comply with the ACLU’s FOIA request unlawfully obstructs the public’s right to know the true costs of our nation’s wars.”<sup>183</sup>

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<sup>181</sup> Letter from Robert Dreyfuss, Contributing Editor, *The Nation*, to Steven Johnson, U.S. Central Command C2J6-RDF, 27 September 2011. The letter asked for expedited processing because the request was “made by a person primarily engaged in disseminating information” and there is an “urgency to inform the public concerning actual or alleged Federal Government activity.” 5 U.S.C. § 552(a)(6)(E)(v)(II).

<sup>182</sup> “ACLU Releases 13,000 Pages Of Government Files That Underscore Flaws In Compensating Victims' Families,” 1 April 2010. As a result of the 2007 suit, the ACLU received 13,000 pages of documents relating to reports of civilians killed or injured by US and allied forces in Afghanistan and Iraq.

<sup>183</sup> “ACLU Files Lawsuit to Require Department of Defense to Comply With FOIA Request on Human Costs of War,” 4 September 2007.

## **INTERNATIONAL LEGAL STANDARDS ON ACCOUNTABILITY FOR UNLAWFUL CIVILIAN DEATHS**

International military forces operating in Afghanistan are bound by two overlapping bodies of law: international humanitarian law, also known as the laws of war, and international human rights law.<sup>184</sup>

Under both bodies of law, international forces are obligated to provide an effective remedy for unlawful civilian deaths by investigating the deaths, punishing those responsible for them, providing fair and adequate compensation to the families of the victims, and establishing the truth about what occurred.<sup>185</sup> In addition to requirements under customary international law, the responsibility to investigate and bring perpetrators to justice is set out in a range of treaties, including the Geneva Conventions and the International Covenant on Civil and Political Rights.<sup>186</sup>

### **The Obligation to Investigate**

The obligation to investigate is fundamental to ensuring all the other aspects of the right to a remedy. Without a meaningful investigation, the perpetrators may not be identified, and are very unlikely to be brought to trial. A meaningful investigation is also a necessity for establishing the full truth about an incident.

In concrete terms, the obligation to investigate requires that a prompt, thorough, and impartial investigation be carried out if there is *prima-facie* evidence or credible allegations of unlawful killings. It is also good practice to undertake a robust fact-finding inquiry whenever civilians are killed or seriously injured in international military operations, even without evidence of illegality. An investigation should determine the cause and circumstances of the death or injury, identify the person or persons responsible for the harm, and make a preliminary legal determination as to whether criminal conduct took place and a prosecution should go forward.

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<sup>184</sup> All NATO states, as well as other non-NATO states carrying out military activities in Afghanistan, are parties to the four Geneva Conventions.

<sup>185</sup> This report does not cover compensation, as other reports have recently been published on the topic. In general, our research indicated that compensation practices have improved significantly over the years. According to the Center for Civilians in Conflict (CIVIC), a nongovernmental organization that has done extensive research on military compensation policies, there are several mechanisms in Afghanistan for making amends to civilians who have suffered combat-related losses. While they are typically framed as solatia or condolence payments—in other words, they do not imply any acknowledgment of fault or wrongful behavior—they are often made in situations in which fault may be at issue. The militaries that have established such programs include the US, Canada and Australia. In addition, NATO adopted non-binding guidelines in 2010 that recommended that troop-contributing countries provide financial assistance to civilians who have suffered combat-related harm. See CIVIC, United States Military Compensation to Civilians in Armed Conflict, May 2010; Sahr Muhammedally, “Civilian War Victims Receive Recognition in US Law,” Just Security blog, 3 April 2014.

<sup>186</sup> First Geneva Convention, Article 49; Second Geneva Convention, Article 50; Third Geneva Convention, Article 129; Fourth Geneva Convention, Article 146; International Covenant on Civil and Political Rights, Article 2.

A key requirement of a good investigation is that those responsible for carrying out the investigation are independent of those implicated in the alleged crimes.<sup>187</sup> It is this requirement that military justice systems so often fail. Other indicators of good investigations include taking witness statements in a timely fashion, protecting witnesses from violence or intimidation, and drafting detailed written reports of findings that are made public within a reasonable time.<sup>188</sup>

### **Military or Civilian Courts?**

As for prosecutions, there is an emerging consensus that because military courts typically lack basic indicia of independence, they should not be used for trials of members of the armed forces who are accused of serious crimes against civilians.<sup>189</sup> Instead, as the UN Special Rapporteur on the Independence of Judges and Lawyers has affirmed, courts-martial should be reserved for crimes that are strictly military in nature, such as desertion or insubordination.<sup>190</sup>

As a matter of principle, across all countries, Amnesty International believes that justice is best served by prosecuting war crimes, crimes against humanity, and other grave violations of international law in independent and impartial civilian courts. Although the military justice system may be well-suited for trying service members for purely military offences, it is not appropriate for cases involving war crimes or serious human rights violations. With these considerations in mind, several countries have reformed their justice systems in recent years to limit the jurisdiction of military courts.<sup>191</sup>

### **International Criminal Court**

Afghanistan is a party to the Rome Statute of the International Criminal Court (ICC), meaning that the ICC has potential jurisdiction over grave crimes under international law—genocide, crimes against humanity and war crimes—committed on the

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<sup>187</sup> See, for example, European Court of Human Rights, *Hugh Jordan v. United Kingdom*, 4 May 2001, Application no. 24746/94, para. 107.

<sup>188</sup> See UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, 1989.

<sup>189</sup> See UN Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, "Administration of Justice: Issue of administration of justice through military tribunals," UN Doc. E/CN.4/Sub.2/2003/4, 27 June 2003, paras. 21-22.

<sup>190</sup> UN Doc. A/68/285, 7 August 2013, para. 98.

<sup>191</sup> Mexico, for example, just passed legislation mandating that human rights violations committed by members of the military against civilians will be tried in the civilian courts. See Center for Justice and International Law, "CEJIL Celebrates Historic Reform of Mexico's Military Justice Code," 2 May 2014. Mexico's Supreme Court—following earlier rulings from the Inter-American Court of Human Rights—had previously ruled that such cases should be tried in the civilian courts. See Human Rights Watch, "Mexico: Ruling Affirms Obligation for Military Justice Reform," 6 July 2011. In the state of Iowa, similarly, legislation was recently passed that gives the civilian courts exclusive jurisdiction over serious crimes like murder and sexual abuse committed by members of the state military. See Senate File 2321, An Act Relating to Jurisdiction over Certain Offenses Committed by Members of the State Military Forces, and Establishing Certain Notification and Reporting Requirements (signed into law on 3 April 2014).

country's territory since 2003.<sup>192</sup> In 2007, the ICC prosecutor opened a preliminary inquiry into the situation in Afghanistan; that inquiry is still pending. Indeed, it is the longest-standing inquiry to remain at this early stage.

In a November 2013 report on situations under preliminary examination, the ICC prosecutor gave a review of the inquiry's progress.<sup>193</sup> The report indicated that the Taliban had committed war crimes and crimes against humanity in Afghanistan and that Afghan government forces may have committed war crimes, including the torture of detainees. The report was somewhat more circumspect as to whether international forces were also responsible for torture, saying that the prosecutor's office was continuing to seek information relevant to that determination.<sup>194</sup>

The report also specifically addressed the question of civilian casualties caused by "pro-government forces," including via air strikes, night raids, and escalation of force incidents. It first acknowledged that UNAMA had found that a large number of air strikes carried out by pro-government forces "have caused incidental loss of civilian life and harm to civilians which appears to be excessive by comparison with the anticipated concrete and direct military advantage." Noting, however, that the Rome Statute does not have a provision that addresses disproportionate attacks carried out within a non-international armed conflict, the report said that the available information did not indicate that acts within the purview of the treaty had been committed.<sup>195</sup> Specifically, the report said, there was not a reasonable basis to conclude that pro-government forces had intentionally directed attacks against the civilian population as such, "or against individual civilians not taking direct part in hostilities."<sup>196</sup>

Most of the cases documented in this report, UNAMA reports, and other similar reports raise concerns about disproportionate or indiscriminate attacks by international forces. There are, however, a small number of cases in which soldiers are alleged to have deliberately targeted individual civilians; some of these cases have even led to convictions (for example, the case of Robert Bales). Under the ICC's complementarity principle—which says that the court only handles cases when national jurisdictions are unable or unwilling to do so—the fact of meaningful national prosecutions is enough to defeat the court's jurisdiction. In addition, even if the prosecutor did conclude that crimes within the court's jurisdiction had been committed, she would need to assess the gravity of the situation before deciding whether to take the decision to prosecute.<sup>197</sup>

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<sup>192</sup> Under the Rome Statute, the ICC has jurisdiction over war crimes, crimes against humanity and genocide committed on the territory of a state party or by its nationals. Afghanistan acceded to the Rome Statute on 10 February 2003, giving the court jurisdiction over crimes committed beginning on 1 May 2003.

<sup>193</sup> Office of the Prosecutor of the International Criminal Court, Report on Preliminary Examination Activities 2013 (November 2013).

<sup>194</sup> *Ibid.*, pp. 7, 10-13.

<sup>195</sup> *Ibid.*, pp. 12-13.

<sup>196</sup> See Rome Statute, article 8(2)(e)(i).

<sup>197</sup> Under article 17(1)(d) of the Rome Statute, a case is inadmissible if it is "not of sufficient gravity to justify further action by the Court." This so-called gravity threshold requires an assessment of such



There is also a practical barrier to ICC action, at least with regard to US personnel. According to provisions in the US-Afghan bilateral security agreement dating from September 2002, the Afghan government is barred from surrendering US personnel to the ICC without US consent.<sup>198</sup> The agreement does not, however, contain any requirement that the US authorities investigate and, where appropriate, prosecute US personnel accused of crimes by the ICC prosecutor.<sup>199</sup> It also violates Afghanistan's obligation under the Rome Statute to arrest and surrender to the ICC any person against whom the ICC has issued a warrant of arrest.<sup>200</sup> To date, the US government has made it clear that it would not cooperate with the ICC in any investigation of crimes allegedly committed by US citizens.

## CONCLUSION

Thousands of Afghan civilians have been killed since 2001 by international forces, and thousands more have been injured. While the US military has taken important steps to limit civilian deaths in military operations, it has not taken comparable steps to improve its system of bringing those suspected of unlawful killings to justice. Afghans who have lost family members in potentially unlawful attacks have little hope of seeing the perpetrators of the attack face prosecution. Because of the military justice system's structural flaws, particularly its lack of independence from the chain of command, its record of investigating and prosecuting crimes against civilians is poor.

The reforms currently under discussion in the US Congress to address the problem of sexual assault and harassment in the ranks could bring much-needed improvements in military justice. While more could be done to ensure that those responsible for making key investigative and prosecutorial choices are independent of those potentially implicated in crimes, the proposed reforms are an important first step. They would go some way toward bringing the US military justice system into line with best practices elsewhere, practices that have not proven to harm military discipline or to bring military operations unfairly into question.

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factors as the scale and severity of the crimes, and whether they were committed in a systematic fashion. See Susana Sacouto and Katherine Cleary, "The Gravity Threshold of the International Criminal Court," *American University International Law Review*, vol. 23, no. 5 (2007), p. 809-10. After the prosecutor conducts a preliminary inquiry and concludes that there is a reasonable basis to carry out an investigation, she must request authorization for the investigation from the ICC's Pre-Trial Chamber.

<sup>198</sup> The agreement provides that: "[T]he Government of Afghanistan authorizes the United States of America to exercise its criminal jurisdiction over the personnel of the United States," and confirms that "without the explicit consent of the Government of the United States, such personnel may not be surrendered to, or otherwise transferred to the custody of an international tribunal or any other entity or State." Exchange of notes between the Afghan ministry of foreign affairs and the US embassy in Afghanistan, 26 September and 12 December 2002, and 28 May 2003.

<sup>199</sup> See generally Amnesty International, *International Criminal Court: US efforts to obtain impunity for genocide, crimes against humanity and war crimes*, OR 40/025/2002, August 2002, pp. 28-29.

<sup>200</sup> See Rome Statute, article 86.

Besides forward-looking changes, efforts to ensure justice for Afghan families who have lost relatives in past attacks are also needed. Amnesty International recommends that the US government review the case studies detailed in this report, interview family members, witnesses, survivors of the attacks, and others, and, where appropriate, open investigations into the deaths. The fact that several years have passed since some of the attacks took place may hinder investigations, but should not in itself preclude them. In an encouraging precedent, the US military recently opened an inquiry into the killing of two unarmed teenagers in Iraq in 2007, even though several years had gone by since the alleged crime took place.<sup>201</sup> The same could happen with cases in Afghanistan. Murder charges have no statute of limitations under the UCMJ, while charges of manslaughter and negligent homicide must be brought within five years of an incident.

Leaving Afghan families in the dark about the full circumstances and legality of their relatives' deaths should not be an option. If the cases are not brought forward, the military should inform the families, and provide them with an explanation as to why. The conflict's human cost should not be compounded by injustice.

## **RECOMMENDATIONS**

### **To the government of the United States of America**

#### *To the Obama administration, including the Department of Defense*

- After any incident in which civilians have been killed in US military operations, ensure that a prompt, thorough and impartial investigation is conducted, including interviews with Afghan witnesses, survivors and family members, and, whenever there is sufficient admissible evidence, ensure that suspects are prosecuted in fair trials in line with international standards and without resort to the death penalty. Such investigations should be carried out regardless of whether the operations involves US service members, private security contractors, or members of the intelligence services.
- 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.
- Release overall data relating to civilian casualties in Afghanistan without imposing unnecessary and time-consuming requirements to file requests under the Freedom of Information Act.
- Establish an Office of Civilian Protection charged with monitoring the military's efforts to protect the civilian population from the harsh impact of war, and with recommending guidelines and best practices to protect

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<sup>201</sup> See Carl Prine and Jim Wilhelm, "American soldier charged in Iraq killings of deaf, unarmed teens," *Pittsburgh Tribune-Review*, 15 November 2013; "U.S. soldier accused of gunning down unarmed teens in Iraq," AP, 23 April 2014.

civilians in armed conflict and ensure accountability for unlawful attacks on civilians.

- Publish an annual report on civilian casualties, similar to the annual report that is published on sexual assaults in the military. The report should include numerical data and statistics on civilian casualties, as well as information regarding prevention and mitigation measures, compensation and solatia payments, and accountability.

#### *To the US Congress*

- Pass the Military Justice Improvement Act or similar legislation, and consider more far-reaching reforms that would ensure that civilian authorities are responsible for investigating and prosecuting war crimes and other serious human rights violations allegedly committed by members of the military. As a first step, change military justice rules so that the decision to prosecute a member of the armed forces is made by an independent prosecutor outside the military chain of command.
- Commission a study of other countries' experiences in reforming their military justice systems, and hold hearings on the topic before the House and Senate Armed Services Committees, inviting officials from countries such as the United Kingdom and the Czech Republic to testify.
- Amend the Uniform Code of Military Justice to codify the doctrine of command responsibility, requiring persons in positions of command authority to take reasonable steps to investigate, prevent and punish violations of the laws of war, including crimes against civilians.
- Amend the Uniform Code of Military Justice to codify war crimes.
- Amend the Uniform Code of Military Justice to prescribe a fixed term of office for military trial and appellate judges.
- Hold hearings to assess the military's record in preventing civilian casualties in Afghanistan, investigating reports of civilian casualties, and prosecuting unlawful killings of civilians. Family members of civilians killed in US military operations should be invited to speak at these hearings, preferably in person.

#### **To NATO/ISAF**

- Carry out prompt, thorough, independent, and impartial inquiries whenever there are plausible reports of civilian casualties caused by ISAF military operations; such inquiries should include interviews with Afghan witnesses, survivors and family members.
- Publicly release the findings of Joint Incident Assessment Teams (JIATs) that are deployed to assess reports of civilian casualties, including findings made regarding the lawfulness or unlawfulness of any given attack.
- Press NATO member states, and other countries participating in ISAF operations in Afghanistan, to ensure investigations of incidents of civilian casualties by the civilian authorities and, where warranted, appropriate action in the civilian courts.
- Provide full reparation to victims of NATO/ISAF military operations, including compensation, rehabilitation, satisfaction and guarantees of non-repetition.

- Assist the Afghan government in establishing a credible, independent mechanism to monitor, investigate and report publicly on civilian deaths and injuries caused by the Afghan National Security Forces (ANSF), and to ensure timely and effective remedies. This mechanism should include detailed procedures for recording casualties, receiving claims, conducting investigations, carrying out disciplinary measures including prosecutions where warranted, and ensuring reparation, including restitution, compensation, and rehabilitation.

**To the government of Afghanistan**

- Create a credible, independent mechanism to monitor, investigate and report publicly on civilian deaths and injuries caused by the ANSF, and to ensure timely and effective remedies. This mechanism should include detailed procedures for recording casualties, receiving claims, conducting investigations, carrying out disciplinary measures including prosecutions where warranted, and ensuring reparation, including restitution, compensation, and rehabilitation.
- Ensure that accountability for civilian casualties is guaranteed in any future bilateral security agreements signed with NATO and the United States, including by requiring that international forces provide a regular accounting of any incidents of civilian casualties, the results of investigations into such incidents, and the progress of any related prosecutions. Such agreements should exclude any provision that might infringe upon Afghanistan's obligations under the Rome Statute of the International Criminal Court.
- 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.