



Tackling Tough Calls: Lessons from Recent Conflicts on Hostile Intent and Civilian Protection

Harvard Law School International Human Rights Clinic



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Cover illustration

US soldiers from the 2nd Squadron, 2nd Stryker Cavalry Regiment take up position during a patrol in a neighborhood in Baghdad, January 18, 2008.
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Design

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Table of Acronyms

ATTP	Army Techniques, Tactics, and Procedures 3-37.31 on Civilian Casualty Mitigation
CALL	Center for Army Lessons Learned
CCMT	Civilian Casualty Mitigation Team
CCTC	Civilian Casualty Tracking Cell
CIVIC	Center for Civilians in Conflict
DOD	Department of Defense
EOF	Escalation of force
HTT	Human Terrain Teams
IED	Improvised explosive device
IHRC	International Human Rights Clinic
ISAF	International Security Assistance Force
JCOA	Joint and Coalition Operational Analysis
JIAT	Joint Incident Assessment Team
RIP/TOA	Relief in Place/Transfer of Authority
ROE	Rules of engagement
SROE	Standing rules of engagement
SRUF	Standing rules on the use of force
TAP	Threat assessment process
UN	United Nations
UNAMA	UN Assistance Mission in Afghanistan
USAID	US Agency for International Development

1. Summary and Recommendations

During its operations in Afghanistan and Iraq from 2001 to 2014, the US military increasingly prioritized minimizing civilian harm as a legal, humanitarian, and strategic imperative. The armed conflicts in Afghanistan and Iraq taught the US military many hard lessons, and over time, it made improvements in civilian protection.¹ Yet there are important additional steps that the US military should take now to ensure those lessons are not lost and to improve protection of civilians in the future. While its combat missions in Afghanistan and Iraq have officially come to a close, the US military is likely to be involved in comparable engagements again. Indeed, renewed US operations in Iraq and Syria against the Islamic State and other armed groups, as well as growing US support to other states’ security forces, underscore the urgent need to institutionalize and apply these lessons going forward.²

This report addresses an issue that can affect civilian protection but has received limited attention in examinations of the Afghanistan and Iraq conflicts, i.e., the determination of “hostile intent,” which proved to be especially difficult for US forces and was a major driver of US-caused civilian casualties. Troops have the right to fire in self-defense when they encounter hostile intent, a term that has been defined for more than a decade as “the threat of imminent use of force.”³ In practice, however, accurately determining hostile intent can be a serious challenge. The problem is exacerbated in operational environments where troops are unfamiliar with the local society and culture, and combatants are not easily distinguishable from the civilian population.

The report documents how erroneous determinations of hostile intent resulted from flaws in the rule of hostile intent, combined with poor application and implementation in the field. The consequences in both Afghanistan and Iraq were tragic, and US troops likely caused some civilian casualties that were avoidable.

The US Department of Defense has made genuine efforts to reduce civilian casualties and, since 2010, has produced several studies on civilian casualty mitigation that touch on hostile intent. Given that only selections of these documents have been publicly released thus far, however, the full extent of their analysis and the support for their conclusions cannot be assessed.

¹ See, e.g., International Security Assistance Force (ISAF), *The ISAF Civilian Casualty Avoidance and Mitigation Framework: Sustaining Best Practice* (2014). This report, which highlights ISAF’s successes in reducing civilian casualties, noted that the protection of civilians was “continually reinforced as an amalgam of legal, strategic, and moral imperatives.” Ibid., 23.

² Maj. Eric D. Montalvo, “When Did Imminent Stop Meaning Immediate? *Jus in Bello* Hostile Intent, Imminence, and Self-Defense in Counterinsurgency,” *The Army Lawyer* (August 2013): 24; David Rohde, “Obama’s Counter-Terrorism Doctrine: Let Locals Lead the Fight,” *Reuters*, June 4, 2014, accessed January 10, 2016, <http://www.reuters.com/article/2014/06/04/us-usa-security-doctrine-analysis-idUSKBN0EF2EK20140604>. As part of the recent US engagement in Iraq and Syria, President Barack Obama pledged, “We will train and equip forces fighting against these terrorists on the ground.” “Full Text of President Obama’s 2014 Address to the United Nations General Assembly,” *Washington Post*, September 24, 2014, accessed January 10, 2016, http://www.washingtonpost.com/politics/full-text-of-president-obamas-2014-address-to-the-united-nations-general-assembly/2014/09/24/88889e46-43f4-11e4-b437-1a7368204804_story.html.

³ This definition comes from the most recent available standing rules of engagement (SROE), which date to June 13, 2005, and according to the US military’s *Operational Law Handbook 2015* are scheduled for revision. See Chairman of the Joint Chiefs of Staff, *Instruction 3121.01B: Standing Rules of Engagement/Standing Rules For the Use of Force for U.S. Forces* (June 13, 2005), accessed January 10, 2016, http://lgdata.s3-website-us-east-1.amazonaws.com/docs/905/461325/SROE_2007.pdf [hereinafter CJCSI 3121.01B]. Unclassified excerpts of the 2005 SROE are reproduced in: US Army Judge Advocate General’s Legal Center and School, International and Operational Law Department, *Operational Law Handbook* (2015), 90-104, accessed January 10, 2016, http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2015.pdf [hereinafter *Operational Law Handbook 2015*]. For the definition of hostile intent, see CJCSI 3121.01B, Enclosure A, para. 3(f), reproduced in the *Operational Law Handbook 2015*, 97. For the report of scheduled revisions to the 2005 SROE, see *Operational Law Handbook 2015*, 6, n. 14.

This report strives to raise public awareness and generate greater and more informed engagement between the US military and civil society on hostile intent and the improvement of civilian protection more broadly. It also seeks to encourage military reflection and reform. The authors of this report recognize the “complicated human and physical environment” in which troops operate and do not wish to undermine the troops’ right to defend themselves.⁴ The military can and should emphasize and augment civilian protection without unduly jeopardizing the lives of military personnel. While the Department of Defense has taken steps in this direction in specific combat missions, more can be done to institutionalize and build upon its efforts.

Based on dozens of interviews with current and former military personnel and other experts as well as extensive open-source desk research, this report explores the issue of hostile intent in detail and offers practical lessons from the US military’s experiences in Afghanistan and Iraq. As the US military looks ahead at sustained operations against the Islamic State and other armed groups, as well as increasing direct and indirect support to foreign security forces, it is a unique opportunity to take stock. By putting in place the right policies, ensuring their implementation, and institutionalizing the lessons learned from Afghanistan and Iraq, the United States can ensure that the same deadly mistakes are not destined to be repeated.

Civilian Harm

An examination of civilian casualties during the international military engagement in Afghanistan illuminates the threat to civilians from hostile intent determinations. At the peak of the combat mission, a large percentage of the civilian casualties attributable to the United States and its allies came from three types of operations: escalation of force (EOF) procedures (steps taken to identify and mitigate threats, especially to checkpoints and convoys); search and seizure operations, including night raids; and air strikes, notably unplanned “opportunity” ones. According to reports from the UN Assistance Mission in Afghanistan (UNAMA), such operations killed 2,050 civilians in Afghanistan alone from 2008 through 2013. This figure represented about 70 percent of the total civilian deaths from pro-government forces (including US forces and their international and Afghan allies), although the annual totals declined over that period.⁵ In 2014, the three types of operations accounted for 25 percent of total deaths and injuries caused by pro-government forces, but the drop largely reflected the changed nature of the conflict after the international drawdown.⁶ (It should

⁴ ISAF, *The ISAF Civilian Casualty Avoidance and Mitigation Framework*, 34.
⁵ The casualty figures cited here begin in 2008 because that was the year of the first UNAMA civilian casualty report to analyze casualties by operation type. See UN Assistance Mission in Afghanistan, *Afghanistan: Annual Report on Protection of Civilians in Armed Conflict 2008* (Kabul: UNAMA, January 2009), 16-18 [hereinafter UNAMA, *Annual Report 2008*] (Air Strikes: 552 deaths; Force Protection: 41 deaths. In 2008 UNAMA did not track civilian deaths as a result of search and seizure operations); UN Assistance Mission in Afghanistan, *Afghanistan: Annual Report on Protection of Civilians in Armed Conflict 2009* (Kabul: UNAMA, January 2010), 16-22 [hereinafter UNAMA, *Annual Report 2009*] (Air Strikes: 359 deaths; Force Protection: 36 deaths; Search and Seizure Operations: 98 deaths); UN Assistance Mission in Afghanistan, *Afghanistan Annual Report 2010: Protection of Civilians in Armed Conflict* (Kabul: UNAMA, March 2011), 21-28 [hereinafter UNAMA, *Annual Report 2010*] (Air Strikes: 171 deaths; Force Protection: 45 deaths; Search and Seizure Operations: 80 deaths); UN Assistance Mission in Afghanistan, *Afghanistan Annual Report 2011: Protection of Civilians in Armed Conflict* (Kabul: UNAMA, February 2012), 22-26 [hereinafter UNAMA, *Annual Report 2011*] (Air Strikes: 187 deaths; Force Protection: 38 deaths; Search and Seizure Operations: 63 deaths); UN Assistance Mission in Afghanistan, *Afghanistan Annual Report 2012: Protection of Civilians in Armed Conflict* (Kabul: UNAMA, February 2013), 31-36 [hereinafter UNAMA, *Annual Report 2012*] (Air Strikes: 126 deaths; Force Protection: 14 deaths; Search and Seizure Operations: 54 deaths); UN Assistance Mission in Afghanistan, *Afghanistan Annual Report 2013: Protection of Civilians in Armed Conflict* (Kabul: UNAMA, February 2014), 46-50 [hereinafter UNAMA, *Annual Report 2013*] (Air Strikes: 118 deaths; Force Protection: 31 deaths; Search and Seizure Operations: 37 deaths).
⁶ UN Assistance Mission in Afghanistan, *Afghanistan Annual Report 2014: Protection of Civilians in Armed Conflict* (Kabul: UNAMA, February 2015), 78 [hereinafter UNAMA, *Annual Report 2014*] (Air Strikes: 11 percent of deaths and injuries by pro-government forces; Escalation of Force/Force Protection: 4 percent; Search Operations: 10 percent).

be noted that, overall, anti-government forces, primarily the Taliban, caused the majority of civilian casualties.)

While its specific numbers differ, a 2014 study by the International Security Assistance Force (ISAF) identifies relevant trends similar to those in the UNAMA reports. The study focuses on ISAF’s improvements in civilian casualty mitigation, but it finds that EOF incidents and air strikes were responsible for many of the civilian deaths and injuries caused by international forces.⁷

EOF incidents, search and seizure operations, and air strikes all frequently involve hostile intent determinations. While the exact number of casualties due to erroneous determinations is not available in public reports, the link with these operations suggests that flaws in the rule of hostile intent and its implementation have had a significant humanitarian cost and that there is a need to revisit the rule of hostile intent and its application.

Shortcomings of the Rule of Hostile Intent

The civilian casualties caused by inaccurate hostile intent determinations stem, in part, from weaknesses in the rule of hostile intent itself, especially as articulated in the US standing rules of engagement (SROE). The *Operational Law Handbook 2015* reports that the SROE are being updated, but the revisions remained unavailable when the handbook went to print in June 2015, even though they were “due for publication in 2014.”⁸ The 2005 SROE will continue to govern US military conduct until replaced, and their language on hostile intent has two major shortcomings.

First, the 2005 rule is too vague and thus allows for excessive subjectivity. The key phrase of the definition of hostile intent is “imminent use of force,” but the SROE provide little guidance on how to interpret it. Indeed, they only define “imminent” as what it is not, that is, “not necessarily . . . immediate or instantaneous.”⁹ The lack of direction makes it difficult for troops to make accurate determinations under the pressure of combat and increases the risk to civilians in operations that frequently rely on such determinations.

Second, the 2005 SROE leave the definition of imminent dangerously broad. They alter the common understanding of the term when they say it does “not necessarily mean immediate or instantaneous,” and at the same time they provide no outside temporal limit for imminent. The current US approach is more expansive than earlier US rules of engagement (ROE) as well as NATO’s ROE, and by allowing use of force in more situations, it increases the danger to civilians. The US military’s broader approach also creates differences in applicable ROE between the US and NATO allies, raising potential challenges in joint operations.

The US military should ensure its new SROE provide greater guidance to troops and establish a narrower definition of imminent. Doing so would enhance civilian protection and bring the definition more in line with that of US allies.

Tactical directives, a senior commander’s guidance for interpreting ROE, have demonstrated the potential to improve civilian protection in situations that often turn on hostile intent

⁷ ISAF, *The ISAF Civilian Casualty Avoidance and Mitigation Framework*, 35-40 (analyzing civilian casualty data by incident type).
⁸ *Operational Law Handbook 2015*, 6, n. 14.
⁹ CJCSI 3121.01B, Enclosure A, para. 3(g), reproduced in the *Operational Law Handbook 2015*, 97.

determinations. Concerns about excessive civilian harm in Afghanistan triggered the introduction of new tactical directives on EOF, night raids, and air strikes that helped achieve real reductions in civilian casualties. Tactical directives alone, however, do not adequately address the excessive subjectivity and breadth of the SROE on hostile intent. At least the unclassified portions of the tactical directives in Afghanistan did not explicitly discuss hostile intent. Tactical directives are also a short-term remedy and apply only to a specific conflict.

Building on the effective tactical directives issued in Afghanistan, the military should supplement amended SROE with more enduring and detailed guidelines that either focus on hostile intent specifically or elaborate on the definition and interpretation of self-defense more broadly. Such guidelines would help troops better interpret and implement the rule of hostile intent. Declassifying them, as much as possible, could demonstrate a commitment to allies and the public to tackling the challenge of hostile intent determinations and facilitate monitoring by internal and external experts.

Inadequate Use of Tools for Implementation

The US military’s experiences in Afghanistan and Iraq also demonstrate that improving implementation of the rule of hostile intent is possible and can yield gains in civilian protection. Three tools—training, leadership, and engagement with locals—all have the potential to reduce erroneous determinations of hostile intent, and the lessons learned can be used to improve the use of these tools in future operations.

Pre-deployment training is critical, and focused reforms can improve troops’ ability to accurately determine hostile intent during combat. Classroom sessions and practical simulations form the bedrock of troops’ knowledge and basis for decision making. Training on civilian protection has in general significantly improved over the past decade. Several veterans of Afghanistan and Iraq, who deployed from 2003 to 2011 and were interviewed for this report, however, said that they had received little or no training specifically on hostile intent and that simulations of hostile intent situations should have been more realistic. Military interviewees and studies highlighted training as a key way to make hostile intent determinations more accurate.

In its future training, the military should address hostile intent explicitly, including by using case studies of erroneous determinations, strive for ever greater realism in simulations, and institutionalize the advances it has made. The military should also update its training as the nature of combat evolves in order to prepare troops for the most current hostile intent situations on the battlefield. The United States should extend such steps to its training of other states’ security forces.

Effective leadership and clear communication and guidance from commanders in the field are also key. As conduits and interpreters of the ROE, military leaders can exert significant influence over the implementation of the rule of hostile intent. While the quality of leadership can depend on the individual in charge, leaders are responsible for explaining the rule to their units and can encourage restraint in hostile intent determinations. They can also keep their troops apprised of any developments that could alter threat determinations. The military should require leaders to prioritize clearly communicating the rule of hostile intent to their troops and ensure they understand and absorb the lessons learned about effective leadership on this topic from Afghanistan and Iraq.

Engagement with the local population, which encompasses cultural training and relationship building, can greatly improve hostile intent determinations. Such engagement helps ensure troops do not mistake ordinary actions as indications of hostile intent because it gives them a better understanding of the context in which they are operating. Some troops who deployed before 2011 reported that their cultural training should have focused more on common behaviors than social norms, and that simulations should have more realistically portrayed foreign environments. Interviewees also urged the military to push commanders to take developing relationships more seriously. The US military has made advances in these areas, and it should continue to build on them. In particular, it has improved pre-deployment cultural training and partnered with local forces who have a better understanding of the cultural environment on the battlefield. Improved civil-military relations can also enhance the military’s awareness of its operating environment.

The Need for an Effective Learning Process

The US military has demonstrated a commitment to learning from past operations. It has completed several studies of the causes of civilian casualties in Afghanistan and Iraq, and in 2012, the Army promulgated Techniques, Tactics, and Procedures 3-37.31 on Civilian Casualty Mitigation (ATTP) to improve protection of civilians in the future. The ATTP outline an effective learning process, which includes conducting in-depth investigations of hostile intent incidents that do not simply defer to troops’ determinations in the field, fostering a cooperative rather than an “overly punitive environment” when collecting information, and recording findings in a database to identify and respond to trends.¹⁰ This report echoes many of the ATTP’s conclusions, particularly their stress on the importance of training, leadership, and engagement with local population.

While there is much to commend in the ATTP on paper, their long-term success depends on the institutionalization and implementation of their findings. The measures the United States could take are elaborated on in their recommendations below. The military should adopt permanent policies and systems to track and analyze civilian casualties, perhaps building on the Civilian Casualty Mitigation Team (CCMT) used by ISAF in Afghanistan. The US government should also create a senior position within the Department of Defense responsible for continued learning, development, and implementation of new policies and practices.

In addition, given the significant role of the US military in supporting and training other militaries, it should share these policies and practices with partner security forces. As the US military’s own experience has shown, hostile intent is not only a major driver of civilian harm, but also one of the most challenging issues for troops and commanders. By incorporating lessons learned into trainings and prioritizing issues like hostile intent, the United States could improve the professionalism, performance, and legitimacy of partner security forces.

Finally, the military should take all these steps in as transparent a fashion as possible. Transparency allows for better monitoring by internal and external experts, which can reveal additional lessons and facilitate accountability. It also helps build public trust, particularly with local populations, local political leaders, and partner military and security forces.

¹⁰ US Department of the Army, *Tactics, Techniques, and Procedures 3-37.31: Civilian Casualty Mitigation* (July 2012), 2-23 [hereinafter ATTP 3-37.31].

Methodology

Researchers from Harvard Law School’s International Human Rights Clinic (IHRC) conducted about 50 interviews with active duty military personnel, veterans of Afghanistan and Iraq who deployed from 2001 to 2011, embedded journalists, and other experts. The military interviewees included members of the US Army, Marines, Navy, and Air Force, with ranks from specialist to brigadier general, who served in infantry, artillery, aviation, intelligence, and special operations units. These interviewees were stationed from the front lines to head-quarters and included, *inter alia*, judge advocates (from the battalion level to legal counsel of the Chairman of the Joint Chiefs of Staff); company commanders; platoon, section, and fire team leaders; staff officers; and a machine gunner and mortarman. Throughout this report, military ranks given are those held by the interviewee at the time of his or her last contact with IHRC or, if the interviewee was no longer in the service, at the time he or she left the military.

IHRC team members also did extensive legal research and analyzed publicly available military rules, directives, handbooks, studies, and other related sources. Finally, they gathered data of civilian harm from UNAMA, ISAF, and the US Department of Defense.

Recommendations

In order to reduce civilian casualties attributable to hostile intent incidents, the US military should take the following steps.

To clarify the rule of hostile intent and its interpretation, the US military should:

- Decrease the excessive subjectivity of hostile intent determinations,
- Narrow the definition of imminent, and
- Adopt clear, detailed, and enduring guidance on the concept of hostile intent specifically or self-defense more broadly, building on effective tactical directives issued in past conflicts.

To maximize use of its tools for implementing the rule of hostile intent, the US military should:

- Ensure pre-deployment training specifically addresses the concept of hostile intent and practical challenges of making determinations, and improves determinations through more realistic and up-to-date trainings,
- Adopt protocols to ensure leaders and commanders in the field provide clear guidance to troops on interpreting hostile intent and encourage feedback and learning,
- Improve cultural awareness training with specific reference to norms and behaviors that inhibit accurate hostile intent determinations, and
- Promote and teach skills to improve relationship building with local populations.

To institutionalize lessons learned and ensure effective learning in the future, the US military should:

- Create civilian casualty tracking cells to gather, analyze, and act on information related to hostile intent incidents from past and future conflicts, and ensure casualties resulting from erroneous hostile intent determinations are disaggregated,

- Appoint a senior advisor on civilian harm mitigation within the Office of the Under Secretary of Defense for Policy to serve as a permanent, expert focal point for analyzing policies and practices, developing and managing civilian casualty tracking cells, and translating lessons learned into recommendations and reforms for US military leaders and commanders,
- Ensure lessons learned with respect to hostile intent and civilian protection are incorporated and prioritized in US military support and training to foreign forces, and
- Promote transparency in the identification of lessons learned about the rule of hostile intent and in the actions taken in response.

2. Civilian Casualties and the Rule of Hostile Intent

The US military’s 2005 Standing Rules of Engagement grant US troops the right to act in self-defense when they encounter hostile intent. The SROE, which establish “fundamental policies and procedures” that govern the country’s military operations, define hostile intent as “the threat of imminent use of force.”¹¹ Hostile intent consists of three elements. First, there must be a threat, which can be described as “an expression of intention to inflict evil, injury, or damage.”¹² Second, the threat must be of an attack or other use of force against the United States, US forces, or other designated persons or property.¹³ Finally, the threat of force must be imminent.

The armed conflicts in Afghanistan and Iraq have illuminated the danger that the rule of hostile intent and its application pose to civilians. Those wars caused thousands of civilian deaths and injuries,¹⁴ and while the specific number attributable to misidentification of hostile intent is unclear, there is reason for concern. According to a Center for Army Lessons Learned (CALL) handbook on Afghanistan, “the vast majority of [civilian casualties] occur during engagements based on self-defense,” which often require hostile intent determinations.¹⁵

Three types of operations—escalation of force procedures, especially involving checkpoints and convoys; search and seizure operations, including night raids; and air strikes, notably unplanned “opportunity” ones—generated especially large numbers of civilian casualties. In Afghanistan alone, these operations killed 2,050 civilians from 2008 through 2013, according to the UN Assistance Mission in Afghanistan. Annual figures gradually decreased over that time period and anti-government forces were responsible for more civilian casualties, but the cumulative figure represents about 70 percent of all civilian deaths reported by UNAMA from pro-government forces (i.e., US forces and their international and Afghan allies).¹⁶ In 2014, civilian casualties from the three types of operations dropped to 25 percent of the

total caused by pro-government forces, and ground engagements led to the majority of deaths and injuries; however, the change largely reflected the new nature of the conflict after the drawdown of international forces.¹⁷

In a May 2014 study on Afghanistan, the International Security Assistance Force provided an alternative set of statistics, but it identified some of the same problematic incident types, notably EOF situations and air strikes.¹⁸ The study tracks civilian casualties attributable to ISAF rather than all pro-government forces and emphasizes that an effective mitigation framework led to an 83 percent decline in the civilian casualties caused by international forces from 2008 to 2014.¹⁹ Distinct methodologies led ISAF and UNAMA to produce varied results, but the ISAF report found that “despite inevitable numerical differences there is often similarity in trends reported on by the two organizations.”²⁰ This report primarily uses UNAMA data because that organization provides more specific figures.

Whatever the casualty numbers one prefers, EOF procedures, search and seizure operations, and air strikes emerged as common causes of civilian deaths and injuries in Afghanistan. The fact that these operations frequently involve determinations of hostile intent suggests that troops’ perception and implementation of the rule were likely significant factors in causing civilian harm.

The Risks and Challenges of Hostile Intent Determinations

Testimonial and documentary evidence points to a link between determinations of hostile intent and civilian casualties. A former UNAMA official said that the rule of hostile intent was “one of the main drivers” of civilian casualties caused by US forces in Afghanistan. He said, “[It is] one of the biggest issues that needs to be confronted by the US military.”²¹ A 2013 report by Joint and Coalition Operational Analysis (JCOA), the US Defense Department’s joint lessons learned organization, found that “misidentification, where civilians are mistakenly believed to be the enemy and are engaged because of that belief. . . . was the primary cause of [civilian casualties] in Afghanistan.”²² Misidentification, it explained, often stemmed from incorrect perceptions of hostile intent.²³

The belief that civilians displayed hostile intent was reportedly used as a “common justification” for civilian casualties.²⁴ For example, the 2010 *Joint Civilian Casualty Study*, which Gen. David Petraeus described as “the first comprehensive assessment of the problem of civilian protection,” documented such a pattern in Afghanistan.²⁵ Discussing hostile intent in the context of self-defense, it found that “US legal investigations illustrated that US forces [in Afghanistan] justified their use of force as self-defense in situations that were of disputed necessity.”²⁶

¹¹ For the definition of SROE, see CJCSI 3121.01B, Enclosure A, para. 1, reproduced in the *Operational Law Handbook 2015*, 95. For the definition of hostile intent, see *ibid.*, Enclosure A, para. 3(f), reproduced in the *Operational Law Handbook 2015*, 97. As will be discussed more below, troops can also act if they face a “hostile act.” For the definition of hostile act, see *ibid.*, Enclosure A, para. 3(e), reproduced in the *Operational Law Handbook 2015*, 97. For similar definitions of hostile intent and hostile act, see also Joint Chiefs of Staff, *Joint Publication 1–02: Department of Defense Dictionary of Military and Associated Terms* (November 8, 2010, as amended through November 15, 2015), 107 [hereinafter *Department of Defense Dictionary*].

¹² “Threat” Definition, *Merriam-Webster Collegiate Dictionary* (11th ed.), accessed January 10, 2016, <http://www.merriam-webster.com/dictionary/threat>.

¹³ See CJCSI 3121.01B, Enclosure A, para. 3(f), reproduced in the *Operational Law Handbook 2015*, 97. See also *Department of Defense Dictionary*, 107.

¹⁴ See “Iraqi Deaths from Violence 2003–2011,” *Iraq Body Count*, accessed January 10, 2016, <http://www.iraqbodycount.org/analysis/numbers/2011/>. UNAMA documented 2,931 civilian deaths from pro-government forces between January 2008 and December 2013, according to the figures reported in each UNAMA annual report covering those years. These totals include only deaths, and thousands more civilians have been injured in these conflicts.

¹⁵ Center for Army Lessons Learned, *Afghanistan Civilian Casualty Prevention Handbook* (June 2012), 6 [hereinafter CALL, *Civilian Casualty Handbook*].

¹⁶ The casualty figures cited here begin in 2008 because that was the year of the first UNAMA civilian casualty report to analyze casualties by operation type. Since UNAMA did not disaggregate data by country until recently, the statistics cited here are attributable to all pro-government forces, which include US, other international, and Afghan forces. For casualty statistics, see UNAMA, *Annual Report 2008*, 16–18 (Air Strikes: 552 deaths; Force Protection: 41 deaths; Other: 235 deaths. Note that in 2008 UNAMA did not track civilian deaths as a result of search and seizure operations); UNAMA, *Annual Report 2009*, 16–22 (Air Strikes: 359 deaths; Force Protection: 36 deaths; Search and Seizure Operations: 98 deaths); UNAMA, *Annual Report 2010*, 21–28 (Air Strikes: 171 deaths; Force Protection: 45 deaths; Search and Seizure Operations: 80 deaths); UNAMA, *Annual Report 2011*, 22–26 (Air Strikes: 187 deaths; Force Protection: 38 deaths; Search and Seizure Operations: 63 deaths); UNAMA, *Annual Report 2012*, 31–36 (Air Strikes: 126 deaths; Force Protection: 14 deaths; Search and Seizure Operations: 54 deaths); UNAMA, *Annual Report 2013*, 46–50 (Air Strikes: 118 deaths; Force Protection: 31 deaths; Search and Seizure Operations: 37 deaths).

¹⁷ UNAMA, *Annual Report 2014*, 78 (Air Strikes: 11 percent of deaths and injuries by pro-government forces; Escalation of Force/Force Protection: 4 percent; Search Operations: 10 percent).

¹⁸ ISAF, *The ISAF Civilian Casualty Avoidance and Mitigation Framework*, 36–40.

¹⁹ *Ibid.*, 30, 32–33.

²⁰ *Ibid.*, 40.

²¹ The official recognized that civilian casualties had decreased over the past several years, but he described hostile intent as “still a problem.” Telephone interview with former UNAMA official (name withheld), February 17, 2012.

²² Joint and Coalition Operational Analysis (JCOA), *Reducing and Mitigating Civilian Casualties: Enduring Lessons* (April 2013), 10, accessed January 10, 2016, <https://publicintelligence.net/jcoa-reducing-civcas/>.

²³ *Ibid.*

²⁴ See Telephone interview with expert on civilian casualty research in Afghanistan (name withheld), February 17, 2012 (explaining that the related right to self-defense was “certainly a common justification for casualties”).

²⁵ Sarah Sewall and Larry Lewis, *Joint Civilian Casualty Study: Executive Summary* (August 2010), iii, accessed July 30, 2014, <http://www.cna.org/research/2010/joint-civilian-casualty-study-jccs-executive> (quoting forward by Gen. David Petraeus).

²⁶ *Ibid.*, 8.

Making accurate determinations of hostile intent can be difficult for troops. Some of the military personnel the International Human Rights Clinic interviewed noted the heightened challenge of correctly identifying hostile intent in conflict environments, especially those in populated areas, where enemy soldiers wear civilian clothes and civilians carry guns.²⁷ In such situations, distinguishing combatants from civilians requires greater care.

EOF procedures, night raids, and air strikes pose particular risks to civilians. In interviews with IHRC, US veterans and observers of the Afghanistan and Iraq conflicts highlighted these operations as presenting especially “tricky situations” for determining hostile intent.²⁸ UNAMA and US government reports of casualties from such operations in Afghanistan reveal the civilian impact of erroneous determinations, even though deaths and injuries gradually decreased and not all of the casualties discussed below were necessarily from hostile intent situations.

The prevalence of civilian harm from these operations indicates a need to revisit the rule of hostile intent and its application. Casualties caused by erroneous hostile intent determinations come at a humanitarian cost. In addition, they have negative strategic effects for international forces because they alienate local civilians.²⁹ Understanding the harm resulting from mistakes in past conflicts is the first step to improving the accuracy of troops’ determinations in the future.

Escalation of Force Procedures

EOF procedures are steps that troops take to determine when hostile intent is present and they may resort to lethal force in self-defense. EOF situations frequently arise at checkpoints and with convoys, where unknown individuals, who could be civilians or combatants, approach military positions.³⁰ The US military’s *Operational Law Handbook 2015* describes these procedures as a “threat assessment process” to evaluate whether approaching individuals are demonstrating hostile intent.³¹ Troops are instructed to follow “5 Ss” if they encounter a possible threat:

²⁷ A US Army officer who served in both Afghanistan and Iraq, described the difficulty of differentiating between hostile individuals and civilians in an environment in which combatants do not wear uniforms. Interview with US Army officer #4 (name withheld), Cambridge, MA, March 7, 2012. A senior defense official who spent 15 months in Afghanistan, agreed, explaining that hostile intent determinations are “much more complicated in a counterinsurgency.” When civilians and combatants both wear civilian clothes and carry arms, he said, “decision making becomes much more difficult.” Telephone interview with senior US defense official (name withheld), April 4, 2012. See also CALL, *Civilian Casualty Handbook*, 22 (“Discriminating civilians from the enemy in an environment like Afghanistan, where the enemy and the civilian population dress alike and often act alike, is extremely difficult.”).

²⁸ See, e.g., Interview with Sgt. Graham Phillips, US Army, Cambridge, MA, February 24, 2012; Interview with Capt. Bob Hodges, judge advocate, US Army, Washington, DC, April 13, 2012; Interview with Capt. Michael Harrison, US Army, Cambridge, MA, April 4, 2012; Telephone interview with Erlingur Erlingsson, former political officer, UNAMA, February 17, 2012. See also CALL, *Civilian Casualty Handbook*, 26; JCOA, *Reducing and Mitigating Civilian Casualties*, 10.

²⁹ Montalvo, “When Did Imminent Stop Meaning Immediate?” 32. See also CALL, *Civilian Casualty Handbook*, 1 (noting that “the impact of [civilian casualties] has increased to the point that single tactical actions can have strategic consequences and limit overall freedom of action”); ISAF, *The ISAF Civilian Casualty Avoidance and Mitigation Framework*, 19.

³⁰ Interview with Sgt. Graham Phillips, US Army, Cambridge, MA, February 24, 2012. Sergeant Phillips elaborated on the EOF process, explaining that if a vehicle approaching a checkpoint did not stop right away, “we would normally shoot the laser pointers on our weapons at the ground in front of the car. That would usually stop [the vehicle]. If it didn’t, then we would shoot [the laser] at the windshield, and that would usually do it. From there the next steps would be a warning shot off to the side, and from there shoot the engine block, and from there shoot the windshield.” Ibid. *Operational Law Handbook 2015*, 89. See also Lt. Col. Randall Bagwell, “The Threat Assessment Process (TAP):

³¹ The Evolution of Escalation of Force,” *The Army Lawyer* (April 2008): 7 (quoting the Multi-National Corps–Iraq ROE card instructing soldiers to “use EOF to determine whether hostile act/intent exists”); Center for Army Lessons Learned, *Escalation of Force Handbook: Tactics, Techniques, and Procedures* (July 2007), 41 [hereinafter CALL, *Escalation of Force Handbook*]; Lt. Col. John N. Ohlweiler, “Building the Airplane While in Flight: International and Military Law Challenges in Operation Unified Response,” *The Army Lawyer* (January 2011): 16. ISAF statistics indicate that the problem with EOF procedures in Afghanistan lay with the threat assessment process rather than the type of weapon used in response. ISAF, *The ISAF Civilian Casualty Avoidance and Mitigation Framework*, 37.

1. Shout, or use hand signals or air horns, to get the attention of the threat;
2. Shock, via non-lethal means, such as a dazzling laser or spotlight;
3. Show weapon and intention to use it;
4. Split-second observation and reevaluation of threat;
5. Shoot to disable or eliminate threat.³²

Military personnel interviewed by IHRC highlighted checkpoints and convoys as involving particularly challenging hostile intent determinations. For example, Iraq veteran Army Sgt. Graham Phillips said figuring out how to respond to approaching vehicles demanded “tougher calls.”³³ Army Capt. Michael Harrison, who deployed twice to Afghanistan, said it was “very difficult to assess” the intent of a car speeding toward you.³⁴ “Maybe it can’t read your warning signs. You can’t tell. It’s very hard to differentiate,” he said.³⁵ CALL came to a similar conclusion about EOF engagements in Afghanistan, saying that “discerning intent is extremely difficult and requires forces to make split-second decisions often with little time to react.”³⁶

The challenges of EOF situations increase the chances of mistaken identifications and thus endanger civilians. Erlingur Erlingsson, a UNAMA political officer from 2009 to 2010, said incidents involving an unknown vehicle approaching a military vehicle presented “the biggest risk” of an erroneous determination of hostile intent.³⁷ Several veterans interviewed by IHRC said that in most of these situations the behavior demonstrated was found to be harmless, not hostile. One interviewee stated, “Nine times out of ten if someone got too close to us and we started EOF procedures it was because they just weren’t paying attention.”³⁸ Nonetheless, the fact that EOF procedures were triggered shows how often innocent actions can be initially perceived as hostile, or potentially hostile, by the military.³⁹ While not all such incidents cause civilian casualties, the potential consequences are grave. An Army lawyer told IHRC that “[i]f a car continues to speed, the interpretation is that they’ve seen my shot, they know my rules, they are purposefully violating them, and they consequently can be presumed to have nefarious purposes.”⁴⁰ Although the ROE might authorize military personnel to shoot in such a case, the incident can lead to the death or injury of a civilian.⁴¹

³² Bagwell, “The Threat Assessment Process,” 7-9. There are different variations of the 5 Ss. The list in the text refers to a version used for threat assessment. An earlier version, which was used to determine proportional force in response to a hostile intent determination, states that a soldier must: 1) Shout, 2) Show his or her weapon, 3) Shove the threat, 4) Shoot a warning shot, and 5) Shoot to kill. Ibid., 6. See also Ohlweiler, “Building the Airplane While in Flight,” 16.

³³ Interview with Sgt. Graham Phillips, US Army, Cambridge, MA, February 24, 2012. See also Interview with US Army officer #4 (name withheld), Cambridge, MA, March 7, 2012; Interview with Capt. Bob Hodges, judge advocate, US Army, Washington, DC, April 13, 2012 (saying, “EOF incidents are tough calls”).

³⁴ Interview with Capt. Michael Harrison, US Army, Cambridge, MA, April 4, 2012.

³⁵ Ibid.

³⁶ CALL, *Civilian Casualty Handbook*, 26.

³⁷ Telephone interview with Erlingur Erlingsson, former political officer, UNAMA, February 17, 2012.

³⁸ Telephone interview with US Army officer #2 (name withheld), April 12, 2012. See also Interview with Sgt. Graham Phillips, US Army, Cambridge, MA, February 24, 2012.

³⁹ Military interviewees told IHRC of numerous such incidents at checkpoints, including those involving civilians who were unfamiliar with the checkpoint process, not slowing because they were rushing a pregnant woman to the hospital, unable to stop or slow because their car had faulty brakes, unable to hear warning shots because they were driving with the window down or the radio on, distracted while using a cell phone, or unable to read signs or heed visual warnings because they were driving without glasses, disabled, or intoxicated. For further information on these incidents, in the order listed, see Interview with Capt. Regan Turner, US Marine Corps, Cambridge, MA, March 28, 2012 (checkpoint unfamiliarity); Telephone interview with senior US defense official (name withheld), April 4, 2012 (pregnant woman); Interview with US Army officer #4 (name withheld), Cambridge, MA, March 7, 2012 (faulty brakes); Telephone interview with US Army judge advocate #1 (name withheld), April 2, 2012 (unable to hear); Interview with US Army officer #3 (name withheld), Arlington, VA, April 13, 2012 (distracted by cell phone); Telephone interview with Lt. Col. Matt Hover, judge advocate, US Army, April 5, 2012 (no glasses); Telephone interview with Spc. Jacob Sells, US Army, March 20, 2012 (disabled); Interview with US Army officer #4 (name withheld), Cambridge, MA, March 7, 2012 (intoxicated).

⁴⁰ Telephone interview with US Army judge advocate #1 (name withheld), April 2, 2012.

⁴¹ See CALL, *Civilian Casualty Handbook*, 3 (quoting a US legal investigation saying, “‘Just because we can shoot does not mean that we should shoot.’”).

US Department of Defense press releases provide evidence that EOF incidents pose dangers to civilians. For example, one department press release stated that in August 2010, the year that EOF incidents peaked, two Afghan civilians did not respond to EOF measures when approaching a medical evacuation helicopter.⁴² The release continued, “An Afghan-coalition force determined that the individuals displayed hostile intent, and in accordance with established procedures, the force fired on the individuals. One Afghan civilian was killed and the other wounded.”⁴³ While classified investigation reports may offer additional information, such press releases shed little light on what specific actions led to the inference of hostile intent or why civilians might have failed to heed the EOF warnings.

UNAMA reported that at least 205 civilians died and many more were injured in EOF, also called “force protection,” incidents in Afghanistan from January 2008 to December 2013.⁴⁴ These deaths represented 7 percent of the total 2,931 caused by pro-government forces, including the US military, during that time period.⁴⁵ For several years, the annual number of EOF deaths generally hovered around 40, but it dropped to 14 in 2012. UNAMA wrote in its 2012 report, “The reduction suggests increased efforts by Pro-Government Forces to distinguish civilians from genuine threats at security force checkpoints and convoys, as well as to ensure the use of non-lethal alternatives.”⁴⁶ Among the efforts UNAMA may have been referring to were new standard operating procedures on EOF issued in 2012, which are discussed in more depth in the next chapter.⁴⁷ The decline in casualties illustrates how reforms to both practices and policies related to hostile intent can produce real gains for civilian protection. During 2013 alone, however, the number of EOF deaths jumped again to 31, the majority of which were caused by Afghan rather than international forces.⁴⁸ Alluding to the rule of hostile intent, UNAMA expressed its concern “with the continued use by some military forces of subjective criteria to assess a situation as an imminent threat and justify the use of lethal force.”⁴⁹ Suggesting that the reforms were not passed on to Afghan forces, in 2014, EOF incidents represented 4 percent of civilian deaths and injuries caused by pro-government forces, which would have totaled around 59 casualties, although the numbers are not disaggregated in the UNAMA report.⁵⁰

⁴² “Afghan, Coalition Troops Kill, Capture Hundreds of Insurgents,” *DoD News*, September 1, 2010, accessed January 10, 2016, <http://archive.defense.gov/news/newsarticle.aspx?id=60689>.
⁴³ Ibid.
⁴⁴ See UNAMA, *Annual Report 2008*, 16-18 (Force Protection: 41 deaths); UNAMA, *Annual Report 2009*, 16-22 (Force Protection: 36 deaths); UNAMA, *Annual Report 2010*, 21-28 (Force Protection: 45 deaths); UNAMA, *Annual Report 2011*, 22-26 (Force Protection: 38 deaths); UNAMA, *Annual Report 2012*, 36 (Force Protection: 14 deaths); UNAMA, *Annual Report 2013*, 48 (Force Protection: 31 deaths). UNAMA defines force protection incidents as “situations where civilians do not pay attention to warnings from military personnel when in the proximity of, approaching or overtaking military convoys or do not follow instructions at check points.” UNAMA, *Annual Report 2013*, v. For ISAF’s assessment of civilian casualties from EOF incidents, see ISAF, *The ISAF Civilian Casualty Avoidance and Mitigation Framework*, 37-38.
⁴⁵ See UNAMA, *Annual Report 2008*, 16 (Total civilian deaths caused by pro-government forces: 828); UNAMA, *Annual Report 2009*, 16 (Total civilian deaths caused by pro-government forces: 596); UNAMA, *Annual Report 2010*, 21 (Total civilian deaths caused by pro-government forces: 440); UNAMA, *Annual Report 2011*, 22 (Total civilian deaths caused by pro-government forces: 410); UNAMA, *Annual Report 2012*, 30 (Total civilian deaths caused by pro-government forces: 316); UNAMA, *Annual Report 2013*, 7 (Total civilian deaths caused by pro-government forces: 341).
⁴⁶ UNAMA, *Annual Report 2012*, 36.
⁴⁷ Ibid., 38.
⁴⁸ UNAMA, *Annual Report 2013*, 48.
⁴⁹ UN Assistance Mission in Afghanistan, *Afghanistan Mid-Year Report 2013: Protection of Civilians in Armed Conflict* (Kabul: UNAMA, July 2013), 42 [hereinafter UNAMA, *Mid-Year Report 2013*].
⁵⁰ UNAMA, *Annual Report 2014*, 78.

Civilian Deaths from Pro-Government Forces: UNAMA Data*

Year	Escalation of Force Incidents	Searches/ Night Raids	Air Strikes	Total Civilian Deaths
2008	41	Statistics unavailable	552	828
2009	36	98	359	596
2010	45	80	171	440
2011	38	63	187	410
2012	14	54	126	316
2013	31	37	118	341
Total	205	332	1,513	2,931
Percentage of Total Deaths	7%	11.3%	51.6%	100%

* This data is compiled from UNAMA’s annual protection of civilians reports from 2008 to 2013. Note that UNAMA gives absolute numbers of deaths; it does not do a statistical analysis that takes into account contextual factors such as operational tempo or the number of troops in theater. UNAMA’s 2014 report does not break down percentages by numbers of individual deaths and thus that year is not included in this chart.

Search and Seizure Operations/Night Raids

Search and seizure operations, and in particular the subset of night raids, can also lead to dangerous hostile intent situations.⁵¹ The public version of a 2010 tactical directive issued by Gen. Stanley McChrystal, commander of ISAF, defined a night raid as “any offensive operation involving entry into a compound, residence, building or structure that occurs in the period between nautical twilight and nautical dawn.”⁵² The military has highly valued nighttime operations, and McChrystal’s directive described them as “an essential component of our campaign delivering often decisive effects in disrupting and defeating some of the most dangerous insurgent groups.”⁵³ According to an Open Society Foundations report, however, “Night raids might create [a] hostile intent situ-ation where one would not exist otherwise.”⁵⁴ Indeed, according to a former combat platoon leader in Iraq, it is “much harder” to determine hostile intent during night raids than at checkpoints.⁵⁵ While night raids are initially offensive in nature, troops might act in self-defense if they believe they are encountering a hostile individual during the operation. At their peak, the US military was conducting up to 40 raids across Afghanistan in a single night, posing significant risk to civilians.⁵⁶

⁵¹ Open Society Foundations, *The Cost of Kill/Capture: Impact of the Night Raid Surge on Afghan Civilians* (2011), 2.
⁵² ISAF, “ISAF Issues Guidance on Night Raids in Afghanistan,” March 5, 2010, 1-2, accessed January 10, 2016, <http://www.isaf.nato.int/article/isaf-releases/isaf-issues-guidance-on-night-raids-in-afghanistan.html> [hereinafter *McChrystal Night Raids Tactical Directive*].
⁵³ Ibid., 2.
⁵⁴ Open Society Foundations, *The Cost of Kill/Capture*, 18.
⁵⁵ Interview with US Army officer #4 (name withheld), Cambridge, MA, March 7, 2012. See also Telephone interview with Spc. Jacob Sells, US Army, March 20, 2012.
⁵⁶ Erica Gaston, “Night Raids: For Afghan Civilians, the Costs May Outweigh the Benefits,” *Open Society Foundations*, September 20, 2011, accessed January 10, 2016, <http://www.opensocietyfoundations.org/voices/night-raids-afghan-civilians-costs-may-outweigh-benefits>.

When troops enter a home without warning, the response they receive from residents may appear threatening. Civilians may shout, grow confrontational, or flee out of fear. As one Army veteran asked rhetorically, “[I]f your door gets kicked in unexpectedly, how would you react?”⁵⁷ While such behavior is a natural reaction to a surprise home invasion, troops can mistake it as hostility and shoot an innocent person. A US Army officer described the possibility of breaking down a door with intelligence that a terrorist is inside and finding someone who “jumps up because you woke them up and scared them.” He said, “We didn’t have any situations in which we made a mistake, but we sure could have.”⁵⁸ A former UNAMA official said that “night raids are without a doubt a huge problem” for protecting civilians.⁵⁹

Two US Department of Defense press releases from 2010 illustrate the link between civilian casualties during search and seizure operations and determinations of hostile intent. While it is unclear whether the raids took place during the day or at night, they raise similar hostile intent issues; staging comparable raids at night only exacerbates the problem by increasing residents’ surprise and outrage.⁶⁰ The first press release described a search in March 2010 for a Taliban commander in the Chak-e Wardak district of Wardak Province in Afghanistan.⁶¹ The report reads, “After repeated requests in Dari, Pashtu, and Urdu for everyone to come out of their homes, a man was found inside one of the buildings. Officials said the assault force reacted to what they thought was hostile intent and shot [and killed] the man. It was subsequently determined the individual was an elderly man.”⁶²

In July 2010, according to the second press release, a combined force in Kandahar, Afghanistan, accidentally killed two civilians, including a woman, and wounded another during an operation in search of a Taliban sub-commander. The release explains that the casualties were due to fire from troops who were responding to a man who “came out of a building during the operation and demonstrated hostile intent.”⁶³ This incident shows the danger to bystanders once troops start firing in a hostile intent situation. As in its EOF press releases, the Department of Defense here describes the risks hostile intent incidents present to civilians but fails to elaborate publicly on what type of civilian behavior was considered hostile or what steps the troops took to assess the threat prior to shooting.

According to UNAMA, search and seizure operations, especially night raids, caused more than 11 percent of civilian deaths attributable to pro-government forces from January 2009

to December 2013. UNAMA documented 332 civilian deaths, although it noted that the deaths were likely underreported due to the difficulty of obtaining information about night raid casualties.⁶⁴ (It expressed “concern” about night raids in 2008, but did not provide specific data.⁶⁵) On December 1, 2010, a joint operation that killed 15 people highlighted the humanitarian risks of hostile intent determinations in such operations. An ISAF investigation cited by UNAMA found that of these 15 people, 7 were civilians “killed due to ‘hostile intent.’”⁶⁶

The annual deaths from search and seizure operations gradually decreased from 98 in 2009 to 54 in 2012 and 37 in 2013, due in part to tactical directives discussed in the next chapter. Nevertheless, negative feelings about these culturally insensitive intrusions, especially at night, remained. UNAMA wrote in 2011, “Despite fewer civilian casualties, night raids continue to generate controversy and anger among Afghans countrywide.”⁶⁷ In 2013, responding to Afghan President Hamid Karzai’s complaints about such raids, US President Barack Obama agreed as part of a Bilateral Security Agreement that “U.S. forces shall not enter Afghan homes for the purposes of military operations, except under extraordinary circumstances involving urgent risk to life and limb of U.S. nationals.”⁶⁸ In 2014, Afghan security forces, sometimes still partnered with international forces, continued to endanger civilians in search and seizure operations, implying that lessons that were learned were not adequately relayed to the Afghan forces. More than 140 civilians were killed or injured in such operations that year, representing 10 percent of civilian casualties caused by pro-government forces.⁶⁹

Air Strikes

While air strikes can be either pre-planned attacks or “unplanned ‘opportunity’ strikes,” the more problematic ones from a humanitarian perspective are unplanned.⁷⁰ They can be called in as close air support by ground forces or initiated by pilots. According to a senior US general cited in a Human Rights Watch report on Afghanistan, “NATO and the US both require ‘hostile intent’ for aerial munitions to be employed to defend their forces.”⁷¹ This requirement suggests that the large number of civilian casualties due to air strikes corresponds, at least in part, to inaccurate determinations of hostile intent or disproportionate responses to a hostile intent situation.

Judging hostile intent is particularly challenging for pilots because they are so far removed from the individuals in question. A former UNAMA official told IHRC, “When you only have a unit in the air, it is tough to figure out there’s hostile intent from a thousand feet.”⁷² A US Army lawyer echoed that concern. He said that while troops on the ground might be able to recognize that a civilian digging in the middle of the night is working on an irrigation ditch, “a fellow in a helicopter who is not close to the ground” might immediately think this individual is

⁵⁷ Interview with US Army officer #3 (name withheld), Arlington, VA, April 13, 2012.
⁵⁸ Interview with US Army officer #4 (name withheld), Cambridge, MA, March 7, 2012.
⁵⁹ Telephone interview with former UNAMA official (name withheld), February 17, 2012.
⁶⁰ General McChrystal’s tactical directive on night raids notes, “[I]n the Afghan culture, a man’s home is more than just his residence. It represents his family and protecting it is closely intertwined with his honor. He has been conditioned to respond aggressively in defense of his home and his guests whenever he perceives his home or honor is threatened. In a similar situation, most of us would do the same. This reaction is compounded when our forces invade his home at night, particularly when women are present. Instinctive responses to defend his home and family are sometimes interpreted as insurgent acts, with tragic results. Even when there is no damage or injuries, Afghans can feel deeply violated and dishonored, making winning their support that much more difficult.” *McChrystal Night Raids Tactical Directive*, 2.
⁶¹ See “Officials Give Update on Afghanistan Operations,” *DoD News*, March 22, 2010, accessed January 10, 2016, <http://archive.defense.gov/news/newsarticle.aspx?id=58429>.
⁶² *Ibid.*
⁶³ “Forces Conduct Operations in Three Afghan Provinces,” *DoD News*, July 6, 2010, accessed January 10, 2016, <http://archive.defense.gov/news/newsarticle.aspx?id=59912>. Less than two weeks later, in an effort to detain a number of suspected insurgents in Helmand, Afghanistan, another individual was killed during a hostile intent incident, although it is unclear if he was a civilian or insurgent. The Pentagon’s press release reads, “Several individuals attempted to escape as the security force approached a series of compounds in Nad-e Ali district. As the combined security forced attempted to apprehend those fleeing, one man was killed when he displayed hostile intent.” See “Officials Report on Operations, Insurgent Attacks,” *DoD News*, July 14, 2010, accessed January 10, 2016, <http://archive.defense.gov/news/newsarticle.aspx?id=60009>.

⁶⁴ UNAMA, *Annual Report 2009*, 16 (Raids: 98 deaths); UNAMA, *Annual Report 2010*, 21 (Raids: 80 deaths); UNAMA, *Annual Report 2011*, 25 (Raids: 63 deaths); UNAMA, *Annual Report 2012*, 35 (Raids: 54 deaths); UNAMA, *Annual Report 2013*, 49 (Raids: 37 deaths). UNAMA notes that “accurate data on numbers of search operations and civilian casualties from search operations is difficult to obtain due to the multiple security bodies conducting joint and independent operations, as well as military classification of such information.” UNAMA, *Annual Report 2012*, 36.
⁶⁵ UNAMA, *Annual Report 2008*, iii.
⁶⁶ UNAMA, *Annual Report 2010*, 32.
⁶⁷ UNAMA, *Annual Report 2011*, 25.
⁶⁸ Letter from Barack Obama, President of the United States, to Hamid Karzai, President of Afghanistan, November 20, 2013, accessed January 10, 2016, <http://president.gov.af/Content/files/President%20Obama%27s%20Letter%20to%20President%20Karzai.pdf>.
⁶⁹ UNAMA, *Annual Report 2014*, 78.
⁷⁰ Human Rights Watch, “*Troops in Contact*”: *Airstrikes and Civilian Deaths in Afghanistan* (September 2008), 3-4, accessed January 10, 2016, <http://www.hrw.org/reports/2008/09/08/troops-contact-0>.
⁷¹ *Ibid.* (citing a briefing from a US Army general who asked for anonymity, Bagram Air Force Base, July 30, 2007).
⁷² Telephone interview with former UNAMA official (name withheld), February 17, 2012.

planting an improvised explosive device (IED).⁷³ Distance increases the chance of erroneous hostile intent determinations and the likelihood opportunity strikes could kill or injure civilians.⁷⁴

Air strikes were for many years the biggest cause of civilian casualties caused by pro-government forces in Afghanistan, constituting 52 percent of the total 2,931 civilian deaths UNAMA reported from January 2008 to December 2013. UNAMA documented 1,513 civilian deaths from air strikes in that time period.⁷⁵ Since 2008, the numbers have decreased, with the exception of a jump in 2011. In 2013, air strikes killed 118 civilians, down from a high of 552 for 2008. The decline in civilian casualties from air strikes has largely been attributed to continued efforts by ISAF to prevent civilian casualties, including through the tactical directives discussed below, combined with a reduction in military operations by international forces and a decrease in attacks requiring international forces to respond with close air support.⁷⁶

In 2014 the reduction in civilian casualties from air strikes continued. UNAMA reported that “the decrease in civilian casualties may be attributed to the reduced frequency of aerial operations conducted by ISAF and an on-going commitment from international forces to mitigate civilian harm during their operations.”⁷⁷ Aerial operations still caused 104 deaths and 58 injuries, however.⁷⁸ A growing number of these incidents involved Afghan ground forces, who should bear primary responsibility for making determinations of hostile intent, and thus for the strike itself. In addition, the Afghan Air Force is slowly building capacity, with training and advice from the United States and NATO, who are in a powerful position to impart lessons learned on civilian protection in aerial operations.

Regardless of the decrease in casualties, the scale of the long-standing problem of air strikes, combined with the link of many such strikes to hostile intent determinations, raises significant humanitarian concerns about the rule of hostile intent and its implementation. UNAMA in its 2012 report called for a review of the criteria used to identify targets and urged troops to “exercise tactical patience, consider tactical alternatives and take additional time to confirm positive identification and situational awareness.”⁷⁹ It continued: “This is of particular relevance when positive identification is based on perceived ‘hostile intent’ rather than the identification of a specific individual.”⁸⁰

⁷³ Telephone interview with US Army judge advocate #1 (name withheld), April 2, 2012. See also JCOA, *Reducing and Mitigating Civilian Casualties*, 10 (explaining that “misidentification of civilians contributed to [civilian casualties] in different scenarios: . . . [including] an airstrike that engaged individuals who were participating in suspicious behavior (such as digging next to a road used by military forces) that was later found to not be nefarious”).

⁷⁴ Troops-in-contact situations also present challenges because they involve a lack of situational awareness. Troops are requesting air support in order to suppress enemy fire that they encountered because of inadequate intelligence. Human Rights Watch explained, “Civilian casualties increase when forces on the ground do not have a clear picture of the location and number of combatants and civilians in an area. Such gaps in knowledge, when combined with fear and the ‘fog of war’ at times mean that forces resort to airstrikes when options less likely to cause civilian loss are available.” Human Rights Watch, *Troops in Contact*,” 33. For example, on April 29, 2007, a US airstrike killed at least 25 civilians, according to Human Rights Watch. *Ibid.*, 17. A US official argued that ground forces had been engaged by “intense enemy fire,” and that “[a]ll targets were positively identified as hostile, [and] were under observation at the time of the engagement.” *Ibid.*, 18. The civilian casualties were likely due to a mistaken determination of hostility, a disproportionate attack, or limited information about civilians in the area.

⁷⁵ UNAMA, *Annual Report 2008*, 15 (Air Strikes: 552 deaths); UNAMA, *Annual Report 2009*, 16 (Air Strikes: 359 deaths); UNAMA, *Annual Report 2010*, 21 (Air Strikes: 171 deaths); UNAMA, *Annual Report 2011*, 22 (Air Strikes: 187 deaths); UNAMA, *Annual Report 2012*, 31 (Air Strikes: 126 deaths); UNAMA, *Annual Report 2013*, 46 (Air Strikes: 118 deaths).

⁷⁶ See, e.g., UNAMA, *Annual Report 2009*, 17. See also ISAF, *The ISAF Civilian Casualty Avoidance and Mitigation Framework*, 38-40 (finding that improvements in policies and practices reduced civilian casualties from airstrikes by 97 percent from 2008 to 2013.)

⁷⁷ UNAMA, *Annual Report 2014*, 93.

⁷⁸ *Ibid.*

⁷⁹ UNAMA, *Annual Report 2012*, 32.

⁸⁰ *Ibid.*

3. Shortcomings of the Rule of Hostile Intent

The US rule of hostile intent has shortcomings that can endanger civilians who encounter US forces. Vagueness in the SROE has made hostile intent determinations excessively subjective, and the SROE’s broad definition of imminent expands the scope of what troops can consider hostile intent. In Afghanistan, tactical directives, commanders’ guidance for interpreting ROE, effectively restricted EOF procedures, night raids, and air strikes and, in the process, demonstrated the potential for such guidance to save civilian lives. Tactical directives, however, have not directly addressed the interpretation of hostile intent, at least publicly, and apply only to a specific conflict, not to the US military’s future operations. Learning from such experiences by reforming the SROE and supplementing tactical directives with enduring and detailed guidance on hostile intent could yield significant improvements in civilian protection.

The Rule of Hostile Intent

US military personnel are permitted to act in self-defense when they face “a hostile act or demonstrated hostile intent.”⁸¹ The 2005 SROE define hostile intent as “the threat of imminent use of force against the United States, U.S. forces or other designated persons or property.”⁸² (While the military is reportedly revising the SROE, the 2005 rules will govern conduct until they are replaced.⁸³) By contrast, a hostile act involves an actual “attack or other use of force.”⁸⁴ While it is relatively easy to identify a hostile act, it can be difficult to prove a threat. Hostile intent is therefore a more troublesome prerequisite for the use of force. The rule of hostile intent is also challenging because rather than set standards for how troops may behave proactively, it requires troops to interpret another person’s conduct and then react accordingly.

Individual members of the military as well as commanders on behalf of their units may make determinations of hostile intent when exercising the right to self-defense.⁸⁵ (This report will not address the issue of “national” self-defense, or self-defense as a matter of *jus ad bellum* under international law.) The right to self-defense does not authorize military personnel to use unlimited force when responding to hostile intent. Rather, any armed response to the presence of hostile intent must be necessary and proportional.⁸⁶ Paraphrasing the SROE, the US military’s *Operational Law Handbook 2015* explains that:

Upon commission of a hostile act or demonstration of hostile intent, U.S. forces may use all necessary means available and all appropriate actions in self-defense. If time and circumstances permit, forces should attempt to deescalate the situation, but de-escalation is not required. When U.S. personnel respond to a hostile

⁸¹ CJCSI 3121.01B, Enclosure A, para. 3(a), reproduced in the *Operational Law Handbook 2015*, 96. According to CALL, recognizing a hostile act or hostile intent is one of only two ways to achieve positive identification, a prerequisite for the use of force. The other way, which applies in offensive and defensive operations, involves declaring an individual hostile based on “affiliation with known enemy groups.” CALL, *Civilian Casualty Handbook*, 6.

⁸² CJCSI 3121.01B, Enclosure A, para. 3(f), reproduced in the *Operational Law Handbook 2015*, 97. The definition continues, “It also includes the threat of force to preclude or impede the mission and/or duties of U.S. forces, including the recovery of U.S. personnel or vital USG property.” *Ibid.*

⁸³ The *Operational Law Handbook 2015* reports the SROE are being updated, but the revisions remained unavailable when the handbook went to print in June 2015, even though they were “due for publication in 2014.” *Operational Law Handbook 2015*, 6, n. 14.

⁸⁴ CJCSI 3121.01B, Enclosure A, art. 3(e), reproduced in the *Operational Law Handbook 2015*, 97.

⁸⁵ “Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Unless otherwise directed by a unit commander . . . military members may exercise individual self-defense in response to a hostile act or demonstrated hostile intent.” *Ibid.*, Enclosure A, para. 3(a), reproduced in the *Operational Law Handbook 2015*, 96.

⁸⁶ *Ibid.*, Enclosure A, art. 4(a), reproduced in the *Operational Law Handbook 2015*, 97.

act or demonstration of hostile intent, the force used in self-defense must be proportional. Force used may exceed that of the hostile act or hostile intent, but the nature, duration, and scope of force should not exceed what is required to respond decisively.⁸⁷

While the SROE impose limits on the level of force that can be used in hostile intent situations, the excessive subjectivity and breadth of the rules combined with inadequate guidance on how to operationalize them weaken the effectiveness of these restrictions.

Standing Rules of Engagement

Excessive Subjectivity

The 2005 SROE’s vagueness about how to recognize hostile intent has the potential to cause unnecessary civilian casualties because it forces troops to rely too heavily on subjective decision making. The key phrase in the definition is “imminent use of force,” but the SROE offer little explanation of what that means or guidance on how troops should interpret the standard in practice. The SROE define the term imminent only by what it is not: “Imminent does not necessarily mean immediate or instantaneous.”⁸⁸ The rest of the definition merely states: “The determination of whether the use of force against U.S. forces is imminent will be based on an assessment of all facts and circumstances known to U.S. forces at the time and may be made at any level.”⁸⁹ This sentence provides no direction to help troops interpret either imminent or hostile intent. It does not indicate what criteria they should consider or how they should weigh them.

The subjectivity of hostile intent determinations in practice emerged as a theme in IHRC interviews with military personnel. Army Sgt. Devon McGinnis, who deployed to Afghanistan in 2010-2011 and Iraq in 2005, told IHRC, “The rule [for determining hostile intent] comes down to if you feel that you, your men, or your equipment are in danger of harm.”⁹⁰ A Marine judge advocate said, “You know it when you see it.”⁹¹ Another military lawyer explained that “for most soldiers on the ground, you feel a sense that you have to protect yourself. It’s intuitive.”⁹² As a result, hostile intent is “going to look different to everybody,” said Brig. Gen. Richard Gross, senior military lawyer for the Joint Chiefs of Staff.⁹³ This excessive subjectivity is due in part to the SROE’s failure to elaborate on the meaning of hostile intent. In a 2013 article, Maj. Eric Montalvo, a Marine judge advocate, criticized the SROE for providing “no further explanation to help Marines and Soldiers apply [the definition of hostile intent] in a fast-paced combat environment. . . . The SROE’s definition creates more problems than it attempts to solve.”⁹⁴

A comparison of the 2005 SROE with other US rules governing use of force highlights the vagueness of the rule of hostile intent as currently written. In May 2000, the Joint Chiefs of Staff published new standing rules on the use of force (2000 SRUF), which are “preapproved directives to guide United States forces on the use of force during various operations.”⁹⁵

⁸⁷ Operational Law Handbook 2015, 84. See also CJCSI 3121.01B, Enclosure A, art. 4(a), reproduced in the Operational Law Handbook 2015, 97.
⁸⁸ CJCSI 3121.01B, Enclosure A, art. 3(g), reproduced in the Operational Law Handbook 2015, 97.
⁸⁹ Ibid.
⁹⁰ Telephone interview with Sgt. Devon McGinnis, US Army, April 3, 2012.
⁹¹ Interview with US Marine judge advocate (name withheld), Washington, DC, April 12, 2012.
⁹² Interview with military lawyer (name withheld), Arlington, VA, April 13, 2012.
⁹³ Interview with Brig. Gen. Richard Gross, Legal Counsel to Chairman of Joint Chiefs of Staff, US Army, Arlington, VA, April 13, 2012.
⁹⁴ Montalvo, “When Did Imminent Stop Meaning Immediate?” 26.
⁹⁵ For the definition of standing rules on the use of force, see Department of Defense Dictionary, 229.

The 2000 SRUF, specifically designed for counter-drug operations within the United States, resemble the 2005 SROE in focusing on imminent use of force,⁹⁶ but they include two examples of imminent threats.⁹⁷ The first case arises when:

An individual possesses a weapon or is attempting to gain access to a weapon under circumstances indicating an intention to use it against DOD [Department of Defense] personnel or other persons within the immediate vicinity of the DOD personnel.⁹⁸

The second example involves “[a]n individual without a deadly weapon, but who has the capability of inflicting death or serious physical injury and is demonstrating an intention to do so.”⁹⁹ These scenarios help clarify the notion of what constitutes an imminent threat. The former conditions hostile intent on the presence of a weapon, a fact that is generally easy to determine. The latter establishes two cumulative criteria for situations without a weapon: capability and demonstrated intention.

In 2005 the Joint Chiefs of Staff published a document that includes both new SRUF and SROE.¹⁰⁰ While the 2005 SRUF do not list the specific examples articulated in the 2000 SRUF, they reaffirm the test of capability and demonstrated intention.¹⁰¹ They state: “Individuals with the capability to inflict death or serious bodily harm and who demonstrate intent to do so may be considered an imminent threat.”¹⁰² By contrast, the SROE in the same document do not include that element of the definition. The document does not explain why it defines imminent threat in two different ways.

Sources from the international military community provide further evidence of the shortcomings in the US rule of hostile intent. In 2009, the International Institute on Humanitarian Law published a Rules of Engagement Handbook (Sanremo Handbook). This handbook was designed to serve as a “common rules of engagement reference that could be used by any nation for training and/or operations.”¹⁰³ Adopting a similar approach to the 2000 and 2005 SRUF, the Sanremo Handbook states: “a determination of hostile intent is based on the existence of an identifiable threat recognizable on the basis of both of the following conditions: capability [and] intention.”¹⁰⁴

While some subjectivity is inherent in hostile intent determinations, too much can be problematic for civilian protection. The vague 2005 SROE, and the excessive subjectivity in

⁹⁶ Although the 2000 SRUF did not use the term hostile intent, they authorized deadly force in the case of “an imminent danger of death or serious physical injury.” Chairman of the Joint Chiefs of Staff, Instruction 3121.02: Rules on the Use of Force by DoD Personnel Providing Support to Law Enforcement Agencies Conducting Counterdrug Operations in the United States (May 31, 2000), Enclosure A, para. (3)(a)(6)(b)(1) [hereinafter CJCSI 3121.02]. Like the 2005 SROE, the 2000 SRUF state that “[i]mminent’ does not necessarily mean ‘immediate’ or ‘instantaneous.’” Ibid., Enclosure A, para. (3)(a)(6)(c).
⁹⁷ Ibid., Enclosure A, para. (3)(a)(6)(c). It prefaces its examples noting that “an individual could pose an imminent danger even if he or she is not at that very moment pointing a weapon at DOD personnel or someone within the immediate vicinity of the DOD personnel.” Ibid.
⁹⁸ Ibid., Enclosure A, para. (3)(a)(6)(c)(1).
⁹⁹ Ibid., Enclosure A, para. (3)(a)(6)(c)(2).
¹⁰⁰ CJCSI 3121.01B. The 2005 SRUF cover more operations than the 2000 SRUF. They apply, *inter alia*, to: “actions taken by DOD forces performing civil support missions . . . and routine Service functions . . . within US territory”; “homeland defense missions within US territory”; and “law enforcement duties and security duties at all DOD installations” within or outside the United States. Ibid., Enclosure L, para. 1(a).
¹⁰¹ Ibid., Enclosure L, para. 4(b). Unlike the 2000 SRUF, the 2005 SRUF use the term hostile intent, which they, like the SROE, define as an “imminent threat of the use of force.” Ibid., Enclosure L, para. 4(d).
¹⁰² Ibid., Enclosure L, para. 4(b).
¹⁰³ International Institute of Humanitarian Law, Rules of Engagement Handbook (Sanremo Handbook) (November 2009), ii [hereinafter Sanremo Handbook].
¹⁰⁴ Ibid., 22-23. The Sanremo Handbook does not include the language about “immediate or instantaneous.”

judgment they appear to allow, do not necessarily take civilian protection adequately into account. In addition, the SROE’s lack of guidance puts considerable pressure on troops, who have to make life-and-death decisions in the span of mere seconds. According to Major Montalvo, “A primary contributor to the civilian casualty problem is the difficulty in assessing hostile intent within a fast-paced combat environment using the SROE’s limited explanation of imminence.”¹⁰⁵ The SRUF and Sanremo Handbook offer a possible alternative approach to the SROE’s version of the rule of hostile intent. Their additions could decrease subjectivity and provide a clearer basis for hostile intent determinations.

Overbroad Definition of Imminent

The breadth of the definition of imminent exacerbates the problems excessive subjectivity raises. The *Oxford English Dictionary* defines imminent as “ready to take place; especially: hanging threateningly over one’s head.”¹⁰⁶ Rather than adopt the common meaning of the term, however, the 2005 SROE specify that it can go beyond “immediate or instantaneous.”¹⁰⁷ A judge advocate who served in Afghanistan and Iraq, noted that “[t]he US definition isn’t clear on imminence” and, read literally, “it almost goes to infinity.”¹⁰⁸ The SROE impose no outside limits on interpretation because they only define imminent in the negative.

CALL’s 2012 *Afghanistan Civilian Casualty Prevention Handbook* similarly distinguishes between immediate and imminent. According to the handbook, troops should shoot if they face an immediate threat and there are no alternatives to using force. If a threat is imminent, “which is not necessarily immediate,” troops are allowed to shoot although they should pause to consider whether they should shoot.¹⁰⁹ Urging troops to exercise tactical patience in cases of an imminent threat is commendable, but the handbook presents an overbroad concept of imminence by defining it in contrast to “immediate,” without further limitation.

Contrasting the 2005 SROE’s definition with earlier ones illuminates the needless breadth of the 2005 language. The four versions of the SROE issued before 2005 did not include the phrase “[i]mmminent does not necessarily mean immediate or instantaneous.”¹¹⁰ This absence “left military leaders and individual servicemembers to apply the plain and traditional meaning of the term imminent.”¹¹¹ The change to the rule of individual self-defense came after President George W. Bush extended the policy of anticipatory self-defense for the nation, which dictated when the United States could launch an attack against another nation. Regardless of their view of the Bush Doctrine, some military commanders and lawyers have argued that broadening the definition of imminent for individual self-defense was unnecessary and “muddled the waters for no clear gain.”¹¹²

As a result of the broader definition, targeting has shifted from being conduct based to status based. In situations of self-defense, troops are supposed to identify a legitimate target by his or her conduct, in other words, demonstration of a hostile act or hostile intent.¹¹³ Instead, with the more expansive understanding of imminent, troops have at times begun to focus on

¹⁰⁵ Montalvo, “When Did Imminent Stop Meaning Immediate?” 26.
¹⁰⁶ The Merriam-Webster Dictionary defines imminent as “ready to take place.” “Imminent” Definition, *Merriam-Webster Collegiate Dictionary* (11th ed.), accessed January 10, 2016, <http://www.merriam-webster.com/dictionary/imminent>.
¹⁰⁷ CJCSI 3121.01B, Enclosure A, para. 3(g), reproduced in the *Operational Law Handbook 2015*, 97. See also *Operational Law Handbook 2015*, 84.
¹⁰⁸ Telephone interview with US Army judge advocate #1 (name withheld), April 2, 2012.
¹⁰⁹ CALL, *Civilian Casualty Handbook*, 6.
¹¹⁰ Montalvo, “When Did Imminent Stop Meaning Immediate?” 28, 35.
¹¹¹ *Ibid.*, 32.
¹¹² *Ibid.* (citing Marine commander Col. Eric M. Smith and Army judge advocate Maj. John J. Merriam).
¹¹³ *Ibid.*, 30-31.

an individual’s status—that is, whether he or she appears to be an enemy based on physical characteristics—instead of conduct, which the 2005 SROE suggest can be in the future.¹¹⁴ According to Major Montalvo, “The result is an increase in alleged self-defense engagements and unnecessary risk to surrounding civilians.”¹¹⁵

The US SROE’s broad definition of imminent also contrasts with that of many of its allies.¹¹⁶ While it generally follows NATO’s ROE in joint operations, the US military creates an exception for the right of self-defense, which can be triggered by hostile intent.¹¹⁷ In this context, NATO’s ROE define imminent as “manifest, instant and overwhelming.”¹¹⁸ The NATO definition more closely approximates the common understanding of the term imminent, and as the US *Operational Law Handbook 2015* acknowledges, it is more restrictive than the one used by the US military.¹¹⁹ The difference between the US and NATO definitions has attracted criticism. For example, Marine lawyer Montalvo found that it made “it more difficult to justify some U.S. actions.”¹²⁰ Human Rights Watch wrote in a 2008 report on air strikes in Afghanistan that, compared to the NATO ROE, the US version “significantly lowers the bar for US forces to call in airstrikes . . . [and] is likely to lead to mistaken attacks against civilians.”¹²¹

The breadth of the SROE’s definition of imminent increases the threat to civilians who have contact with US forces.¹²² It places more situations within the scope of an imminent threat, and thus more individuals are vulnerable to being treated as lawful targets.¹²³ Major Montalvo suggests that the United States return to the pre-2005 understanding of imminent in order to encourage restraint and protect civilians.¹²⁴ Multiple experts interviewed by IHRC recommended that the US military adopt NATO’s definition.¹²⁵ Either approach would narrow the definition and standardize rules in joint operations between US and allied forces such as those conducted in Afghanistan.

Tactical Directives

Tactical directives, a senior commander’s guidance for interpreting ROE,¹²⁶ have a proven ability to advance civilian protection, and although they should not be seen as a substitute

¹¹⁴ *Ibid.*, 33. Montalvo explains that conduct-based targeting is particularly important in counterinsurgency operations, such as those in Afghanistan and Iraq, because enemy combatants rarely wear uniforms and thus their status is difficult to determine based on physical characteristics. He writes that in these conflicts, US troops have made “faulty status-based determination[s]” due to a “false sense of familiarity with the local population’s culture and enemy techniques, tactics, and procedures.” *Ibid.*
¹¹⁵ *Ibid.*
¹¹⁶ In Afghanistan, “[t]he ISAF ROE do not include self-defense criteria but defer instead to national ROE self-defense guidance for each partner nation. Therefore, the collective ROE for [U.S.] soldiers under the ISAF mission consist of the U.S. standing ROE (SROE for self-defense) and theater ISAF ROE.” CALL, *Civilian Casualty Handbook*, 4.
¹¹⁷ *Operational Law Handbook 2015*, 451-452.
¹¹⁸ *Ibid.*, 452. See also Maj. John J. Merriam, “Natural Law and Self-Defense,” *Military Law Review* 206 (2010): 84.
¹¹⁹ *Operational Law Handbook 2015*, 452.
¹²⁰ Montalvo, “When Did Imminent Stop Meaning Immediate?” 26.
¹²¹ Human Rights Watch, “*Troops in Contact*,” 31-32. A former UNAMA official referred to the difference between US and NATO definitions as “a recipe for confusion.” Telephone interview with former UNAMA official (name withheld), February 17, 2012.
¹²² Merriam, “Natural Law and Self-Defense,” 82.
¹²³ Montalvo writes, “[A] broad application of hostile intent and imminence gives a servicemember greater authority to engage perceived threats, which increases the risk of civilian casualties.” Montalvo, “When Did Imminent Stop Meaning Immediate?” 26. In addition, an expanded definition of imminence makes it harder for civilians to predict what actions could cause soldiers to believe they are a threat and to respond with lethal force. Merriam, “Natural Law and Self-Defense,” 82.
¹²⁴ Montalvo, “When Did Imminent Stop Meaning Immediate?” 32.
¹²⁵ See, e.g., Telephone interview with former UNAMA official (name withheld), February 17, 2012; Telephone interview with expert on civilian casualty research in Afghanistan (name withheld), February 17, 2012.
¹²⁶ Tactical directives are designed to provide “guidance and intent for the employment of force in support of ISAF operations. International Security Assistance Force, *Tactical Directive* (November 30, 2011), 1, accessed January 10, 2016, http://lgdata.s3-website-us-east-1.amazonaws.com/docs/905/474743/ISAF_General_Allen_Tactical_Directive_of_Nov_2011.pdf [hereinafter *Allen Tactical Directive*]. See also International Security Assistance Force, *Tactical Directive* (July 6, 2009), 1, accessed January 10, 2016, http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf [hereinafter *McChrystal Tactical Directive*].

for improving the SROE’s articulation of hostile intent, they are an important tool. A series of tactical directives issued by the US commanders of ISAF from 2008 to 2012 illustrate the potential and shortcomings of such documents. The Afghanistan directives guided troops on what they should do, not simply what they were legally required to do, and significantly reduced civilian casualties, including from operations associated with hostile intent determinations.¹²⁷ According to ISAF, the tactical directives were “crucial in achieving the difficult and delicate balance between achieving the mandated mission, ISAF’s legal and moral obligations . . . , and force protection imperatives including the right to self-defense.”¹²⁸ The directives, however, do not apply beyond the conflict in Afghanistan, and at least the unclassified versions did not explicitly take on the specific issue of hostile intent.

While the full tactical directives from the Afghanistan conflict are classified, the sections of the tactical directives that were publicly distributed noted the importance of reducing civilian casualties. In 2008, Gen. David D. McKiernan wrote that “minimizing civilian casualties is of paramount importance.”¹²⁹ The next year, Gen. Stanley McChrystal declared that ISAF troops must “respect and protect the population” and “avoid the trap of winning tactical victories—but suffering strategic defeats—by causing civilian casualties.”¹³⁰ In urging “disciplined use of force,” Gen. David Petraeus called on ISAF in 2010 to “continue—indeed, redouble—our efforts to reduce the loss of innocent civilian life to an absolute minimum.”¹³¹ In 2011, Gen. John R. Allen wrote that his intent was to “eliminate ISAF-caused civilian casualties across Afghanistan, and minimize civilian casualties throughout the area of operations by reducing their exposure to insurgent operations.”¹³² Allen called for “great discipline and tactical patience” and “even more judicious application of force.”¹³³ Such statements are laudable from a humanitarian perspective.

Although they did not mention hostile intent specifically, the unclassified portions of the tactical directives addressed the three types of operations that frequently require determinations of hostile intent, and in the process they made notable contributions to advancing civilian protection. As discussed in the previous chapter, civilian casualty numbers from these operations generally declined between 2009 and 2013, and the tactical directives played a significant role. For example, McKiernan mandated in 2008 that troops should seek to “minimize death or injury of innocent civilians in escalation of force engagements.”¹³⁴ To do so, commanders should look to “techniques and procedures and, most importantly, the training of

¹²⁷ CALL, *Civilian Casualty Handbook*, 4. Although not in the form of a tactical directive, guidance from a senior commander also reduced civilian casualties from EOF incidents in Iraq. In 2006, General Peter Chiarelli, the new commander of the Multi-National Corps–Iraq, “reinforced tactical fixes” for the EOF problem, including standardizing procedures, urging troops to consider the number of people in a vehicle since suicide bombers usually drive alone, and emphasizing that warning shots should be used only as a last resort. These reforms helped reduce civilian casualties in the first half of 2006 to 200 deaths and injuries, down from 480 in the previous six months. Marla B. Keenan, “Operationalizing Civilian Protection in Mali: The Case for a Civilian Casualty Tracking, Analysis, and Response Cell,” *International Journal of Security and Development* 2 (2013): 3.

¹²⁸ ISAF, *The ISAF Civilian Casualty Avoidance and Mitigation Framework*, 23.

¹²⁹ International Security Assistance Force, *Tactical Directive* (December 30, 2008), 1, accessed January 10, 2016, http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090114.pdf [hereinafter *McKiernan Tactical Directive*].

¹³⁰ *McChrystal Tactical Directive*, 1. For comment on new standards, see David Zucchino and Laura King, “U.S. to Limit Airstrikes in Afghanistan to Help Reduce Civilian Deaths,” *Los Angeles Times*, June 23, 2009, accessed January 10, 2016, <http://articles.latimes.com/2009/jun/23/world/fg-afghan-air23>.

¹³¹ International Security Assistance Force, “General Petraeus Issues Updated Tactical Directive,” August 4, 2010, 2, accessed January 10, 2016, http://lgdata.s3-website-us-east-1.amazonaws.com/docs/905/474745/tactical_directive_2010_Petraeus_.pdf [hereinafter *Petraeus Tactical Directive*].

¹³² *Allen Tactical Directive*, 2. The introduction to the unclassified version of Allen’s tactical directive states that Allen “is absolutely committed to eliminating the tragic waste of human life amongst the law-abiding citizens of Afghanistan, and spares no effort in preventing civilian casualties whether caused by ISAF or US forces, or by the insurgents.” Ibid., 2.

¹³³ Ibid.

¹³⁴ *McKiernan Tactical Directive*, 2.

forces to minimize the need to resort to deadly force.”¹³⁵ UNAMA’s report covering casualties in 2008 explicitly credited McKiernan’s guidance on EOF procedures with helping to decrease the number of civilian casualties due to EOF incidents during the year.¹³⁶

Commanders also took on the issue of air strikes, which had been notorious for causing civilian casualties. In 2009, McChrystal, McKiernan’s successor, required leaders to “scrutinize and limit the use of force” in air strikes against residential areas. He said his directive would require a “cultural shift within our forces—and complete understanding at every level—down to the most junior soldiers.”¹³⁷ According to UNAMA’s 2009 report, the number of civilians killed by aerial operations went down significantly—from 552 to 359—between 2008 and 2009.¹³⁸ UNAMA wrote that McChrystal’s tactical directive appeared to have contributed to this decline.¹³⁹ Responding to a June 2012 airstrike that killed 18 civilians, Allen amended a 2011 tactical directive with a fragmentary order that further limited air strikes on residential compounds to situations of self-defense when no other options are available.¹⁴⁰ In 2012, civilian deaths and injuries from air strikes dropped 42 percent.¹⁴¹

McChrystal and Allen both issued directives specifically on night raids, in March 2010 and December 2011, respectively.¹⁴² They sought to address the criticism that these actions were harming civilians by laying out requirements for implementation, such as partnership with Afghan forces, coordination with the Afghan government and local elders, and the use of females to search women and children.¹⁴³ Night raid deaths and injuries fell by 18 percent over the course of 2010, and UNAMA praised tactical directives as well as other new policies.¹⁴⁴ The casualty numbers dropped again, by 33 percent, in 2012 after the issuance of Allen’s tactical directive, although UNAMA wrote that it was unclear if the decrease was due to changed practices or fewer raids.¹⁴⁵

The Afghanistan tactical directives provide a model for how to decrease civilian casualties from hostile intent incidents. But the use of tactical directives to guide hostile intent determinations has shortcomings from a humanitarian perspective. First, tactical directives have limited scope because they depend on a particular commander in a particular theater. The

¹³⁵ Ibid.

¹³⁶ UNAMA, *Annual Report 2008*, 9. The US military also made tactical changes in Iraq that reduced the civilian casualties caused in EOF incidents. Keenan, “Operationalizing Civilian Protection in Mali,” 3.

¹³⁷ *McChrystal Tactical Directive*, 1–2.

¹³⁸ UNAMA, *Annual Report 2009*, 17.

¹³⁹ Ibid.

¹⁴⁰ UNAMA, *Annual Report 2012*, 38 (referring to ISAF Tactical Directive, Rev. 5.1). A fragmentary order is used to amend existing operation orders. See *Department of Defense Dictionary*, 97. After the incident, Allen said, “I eventually said to President Karzai that civilian structures, tents, potential areas where civilians might be either taking refuge or hiding or living, I’m not going to deliver any more fires on those structures unless my troops are pinned down, can’t move, and the only option they have is to deliver fires on these structures, or I decide, the senior leader out here, I decide to deliver fires on these structures.” See Kate Clark, “General Allen Leaves with an Improved Report Card on Civilian Casualties and Torture,” *Afghanistan Analysts Network*, February 10, 2013, accessed January 10, 2016, <http://www.afghanistan-analysts.org/general-allen-leaves-with-an-improved-report-card-on-civilian-casualties-and-torture>.

¹⁴¹ UNAMA, *Annual Report 2012*, 31. See also Clark, “General Allen Leaves with an Improved Report Card” (reporting that Allen said the effect of his order was that civilian casualties attributable to air strike “plummeted immediately”).

¹⁴² *McChrystal Night Raids Tactical Directive*; International Security Assistance Force, *Night Operations Tactical Directive* (December 1, 2011), 1, accessed January 10, 2016, <http://www.isaf.nato.int/images/docs/20111105%20nuc%20night%20operations%20tactical%20directive%20%28releaseable%20version%29%20r.pdf> [hereinafter *Allen Night Operations Tactical Directive*]. In his more general tactical directive from 2008, General McKiernan had established a requirement that all home raids be led by Afghan forces “unless there is a clear and identified danger meaning from a building and to do otherwise would threaten our [Afghan National Security Forces] partners and ourselves.” *McKiernan Tactical Directive*, 1.

¹⁴³ *McChrystal Night Raids Tactical Directive*, 2; *Allen Night Operations Tactical Directive*, 1. As mentioned above, night raids were later prohibited in a 2013 Bilateral Security Agreement. Letter from Barack Obama, President of the United States, to Hamid Karzai, President of Afghanistan, November 20, 2013.

¹⁴⁴ UNAMA, *Annual Report 2010*, iv.

¹⁴⁵ UNAMA, *Annual Report 2012*, 35.

ones discussed above applied only to the conflict in Afghanistan. Despite their success in decreasing civilian casualties, they will have no bearing on EOF procedures, air strikes, or night raids in future conflicts. Although each conflict is different in some ways, the United States is likely to participate in operations comparable to those in Afghanistan again. In order to maximize civilian protection, the US military should therefore ensure the principles laid out in effective tactical directives endure.

While conflict-specific tactical directives may at times still be appropriate, the military should institute formal and more lasting guidance on the rule of hostile intent. The military should adopt in-depth guidelines dedicated to hostile intent specifically, or to self-defense more broadly, and use them to clarify how troops should interpret and implement the rule in the future. The guidelines should supplement and expand on an amended rule of hostile intent articulated in legally binding SROE.¹⁴⁶ Portions of the guidelines should be made available to the public, as has been the case with the 2005 SROE and the Afghanistan tactical directives. While national security interests should be respected, there would be several advantages to declassifying parts of the guidelines. Doing so would show the public, especially past and future victims, that the military recognizes that interpretation and implementation of the rule of hostile intent has been problematic and could be improved. It would open the policy to scrutiny about its adequacy. It would also strengthen enforcement by creating a standard against which the military could be held accountable

A second humanitarian shortcoming is that the unclassified versions of the tactical directives issued by ISAF commanders failed explicitly to address the rule of hostile intent. The directives repeatedly noted that they did not intend to restrict troops’ ability to defend themselves. For example, directives issued by McChrystal and Petraeus specified that they did “not prevent commanders from protecting the lives of their men and women as a matter of self-defense where it is determined no other options are available to effectively counter the threat.”¹⁴⁷ Respecting the right to self-defense while protecting civilians was appropriate, but the public versions of the tactical directives offered limited guidance for troops on how to strike that delicate balance or determine that force was the only option.¹⁴⁸ In particular, they did not elaborate on how hostile intent should be understood or even mention the term, although the rule has serious implications for civilians and troops. According to UNAMA, in 2012 the military added some clarity to the definition of hostile intent in its new classified Standard Operating Procedure 373, which deals with EOF.¹⁴⁹ Such attention to the rule of hostile intent is important, but its secrecy makes it impossible to judge its depth or adequacy.

¹⁴⁶ CALL, *Civilian Casualty Handbook*, 5 (noting that “[u]nlike ROE, tactical directives are not legally binding but rather communicate commander’s intent”).

¹⁴⁷ *Petraeus Tactical Directive*, 2. See also *McChrystal Tactical Directive*, 2; *McKiernan Tactical Directive*, 2; *Allen Tactical Directive*, 2.

¹⁴⁸ Tactical directives issued by Generals McKiernan and Allen noted that force must only be used when it is necessary and proportionate, but they did not explain what that means under the rule of hostile intent. *McKiernan Tactical Directive*, 2; *Allen Tactical Directive*, 2.

¹⁴⁹ In its 2012 report UNAMA wrote, “The new revision of [Standard Operating Procedure 373] incorporates clearer definitions of what constitutes self-defence, extended self-defence, hostile act, hostile intent, minimum of force, non-lethal force and lethal force. It also provides additional clarification to both the individual soldier and commanders in respect of their responsibilities and seeks to ‘reinforce the theatre wide understanding of Escalation of Force (EoF) procedures to protect our forces and eliminate civilian casualties.’” UNAMA, *Annual Report 2012*, 38.

4. Inadequate Use of Tools for Implementation

Rules provide a basis for civilian protection, but well-informed implementation is also essential. Determinations of hostile intent are affected by a range of factors, such as combat environment, theater of war, and personal experience. Training, leadership, and engagement with the local population, however, can help troops make more accurate judgments whatever the context.¹⁵⁰ The individuals IHRC interviewed attested to the value of each of these tools.¹⁵¹ Taking into account the lessons of the Afghanistan and Iraq conflicts, the US military should ensure it tailors its tools to address the rule of hostile intent specifically and realistically.

Context-Driven Determinations

In practice, determinations of hostile intent depend heavily on context.¹⁵² An artillery officer who served in Iraq between 2005 and 2008 told IHRC, “[H]ostile intent is hostile intent, but your awareness of the potential for a hostile act occurring varies based on where you’re at and what you’re doing.”¹⁵³ As discussed above, hostile intent determinations are generally more difficult during operations in which enemy combatants seek to blend in with the civilian population. Other external and internal factors also affect how troops view a possible threat.

The theater of war can influence hostile intent determinations. Several interviewees told IHRC that troops might analyze the same conduct differently depending on whether they were in Afghanistan or Iraq.¹⁵⁴ For example, Army Sgt. Devon McGinnis, who served in both countries, explained that the application of the rule of hostile intent was “looser” in Iraq in 2005 and “much more limited” in Afghanistan in 2010-2011. He said, “In Iraq, we had a little more leeway. In Afghanistan, you couldn’t really do anything until [there was] a hostile act.”¹⁵⁵ In his case, the time between his tours likely also made a difference.

Even within a theater, the specific combat environment can play a major role in troops’ understanding of what constitutes hostile intent.¹⁵⁶ Sgt. Graham Phillips, who served in Iraq from August 2007 until October 2008, said, “What exact facts would constitute hostile intent varied depending on what was normal where you were.”¹⁵⁷ For example, Phillips told IHRC that in many parts of Iraq it was commonplace to see local people patrolling with guns, but US troops did not consider them hostile because the people were merely policing an area. A March 2008 “mini-uprising” of Shiites changed that perception in Sadr City, a neighborhood of Baghdad. Phillips said, “The threshold for what people considered hostile intent went way down.”¹⁵⁸

¹⁵⁰ The tactical directives discussed in the previous chapter repeatedly highlighted these three tools as means for implementing their guidance. See, e.g., *Petraeus Tactical Directive*, 2; *McChrystal Tactical Directive*, 2; *McKiernan Tactical Directive*, 2; *Allen Tactical Directive*, 2.

¹⁵¹ See also Montalvo, “When Did Imminent Stop Meaning Immediate?” 34 (calling for “a ROE philosophy as well as a training program that sets left and right lateral limits on what constitutes an imminent threat of force under the SROE”).

¹⁵² See Telephone interview with US Army judge advocate #2 (name withheld), March 26, 2012; Telephone interview with Lt. Col. Matt Hover, judge advocate, US Army, April 5, 2012; Telephone interview with US Army judge advocate #1 (name withheld), April 2, 2012.

¹⁵³ Interview with US Army officer #1 (name withheld), Cambridge, MA, March 28, 2012. See also Interview with Lt. Col. Matt Lewis, US Army, Cambridge, MA, April 10, 2012 (“It mattered within Iraq depending on where you were. Your calculus had to be different.”).

¹⁵⁴ See Interview with US Army officer #3 (name withheld), Arlington, VA, April 13, 2012. A senior defense official explained that something that might be considered hostile intent in Afghanistan would often be analyzed differently in Iraq: “In other theaters, things may be very different. . . . [K]nowledge of the local situation . . . is key to making decisions in highly ambiguous situations.” Telephone interview with senior US defense official (name withheld), April 4, 2012. See also Interview with Lt. Col. Matt Lewis, US Army, Cambridge, MA, April 10, 2012.

¹⁵⁵ Telephone interview with Sgt. Devon McGinnis, US Army, April 3, 2012.

¹⁵⁶ Telephone interview with US Army judge advocate #1 (name withheld), April 2, 2012.

¹⁵⁷ Interview with Sgt. Graham Phillips, US Army, Cambridge, MA, February 24, 2012.

¹⁵⁸ Interview with Sgt. Graham Phillips, US Army, Cambridge, MA, February 24, 2012.

Internal factors, in particular personal experiences, further influence what behavior troops consider indicative of hostile intent. An Army lawyer and veteran of Afghanistan and Iraq explained, “Your interpretation of hostile intent definitely changes as you learn about . . . how the enemy conduct themselves.”¹⁵⁹ In some ways, experience makes hostile intent determinations more reliable because as units “become more aware of terrain and the environment . . . [t]heir decision-making becomes more refined . . . [and] they get better at recognizing what is hostile intent,” a Marine lawyer who had served in Afghanistan told IHRC.¹⁶⁰ Rather than encouraging restraint, however, lessons learned in combat can also have the opposite effect, making troops more willing to fire. Capt. Bob Hodges, another Army lawyer who did tours in both Afghanistan and Iraq, said, “[I]f you take fire every day . . . what you consider suspicious is broader. That weighs into your context and what is hostile intent.”¹⁶¹

While the contextual nature of determinations of hostile intent cannot be eliminated entirely, good training, leadership, and engagement with locals can help soldiers deal with different contexts. These tools offer guidance for troops on implementing the rule of hostile intent and making more accurate determinations.

Training

Pre-deployment training is critical to ensuring protection of civilians because it provides troops a basis on which to make better decisions in the field. “We don’t want them to have doubt when they run into a certain instance,” said a judge advocate who trained Marines in Afghanistan. “We help them know how they should act when in a tough situation.”¹⁶² Training achieves this goal in part by giving troops an opportunity to wrestle with complex scenarios before they encounter one in actual combat. An Army judge advocate who served in Afghanistan and Iraq told IHRC, “The goal was to minimize the situations where they had to make a gut call because they’ve never experienced it before.”¹⁶³ Echoing his sentiments, Army Capt. Michael Harrison, who served in Afghanistan, said that troops remember and learn from the mistakes they make in training.¹⁶⁴

The complexity of the rule of hostile intent makes training on it especially valuable. The *Operational Law Handbook 2015* recommends that military lawyers regularly brief commanders on the rules of self-defense. It notes these rules “bear repeating at an ROE briefing,” and adds, “The concepts of hostile act and hostile intent may require additional explanation.”¹⁶⁵ The 2010 *Joint Civilian Casualty Study* similarly called for training on “what constitutes hostile intent.”¹⁶⁶ Interviewees told IHRC that EOF procedures, which are used to assess whether an individual is displaying hostile intent, can require extra training. A Marine judge advocate who served in Afghanistan in 2010 explained that EOF situations “are the areas where you’re potentially going to have doubt that might lead to something.”¹⁶⁷ In such situations, according to Brig. Gen. Richard Gross, training can help “bring the irrational [fear] down without bringing

¹⁵⁹ Telephone interview with US Army judge advocate #1 (name withheld), April 2, 2012.
¹⁶⁰ Interview with US Marine battalion judge advocate (name withheld), Arlington, VA, April 13, 2012.
¹⁶¹ Interview with Capt. Bob Hodges, judge advocate, US Army, Washington, DC, April 13, 2012.
¹⁶² Interview with US Marine regiment judge advocate (name withheld), Arlington, VA, April 13, 2012.
¹⁶³ Telephone interview with US Army judge advocate #1 (name withheld), April 2, 2012 (explaining further, “The goal is when they run into [a possible self-defense situation], it’s not the first time they’ve thought about it.”).
¹⁶⁴ Interview with Capt. Michael Harrison, US Army, Cambridge, MA, April 4, 2012 (“A great way to learn is by making mistakes. When you’re actually deployed, you will probably think more if you had made a mistake in training.”).
¹⁶⁵ *Operational Law Handbook 2015*, 85. Apparently referring to self-defense training more broadly, General Petraeus wrote, “We must train our forces to know and understand the rules of engagement and the intent of the tactical directives. We must give our troopers the confidence to take all necessary actions when it matters most, while understanding the strategic consequences of civilian casualties.” *Petraeus Tactical Directive*, 2.
¹⁶⁶ Sewall and Lewis, *Joint Civilian Casualty Study*, 15.
¹⁶⁷ Interview with US Marine regiment judge advocate (name withheld), Arlington, VA, April 13, 2012.

awareness down. You want [troops] wide awake and watching, but you don’t want them so hyper and geared up.”¹⁶⁸

Pre-deployment training teaches troops rules and gives them practice applying them.¹⁶⁹ In classroom sessions, trainers, who are often military lawyers, explain the ROE through Power-Point presentations and lay out hypothetical scenarios for troops to discuss.¹⁷⁰ CALL’s 2011 *ROE Vignettes Handbook* and 2007 *Escalation of Force Handbook* provide potentially very good training vignettes, most of which raise the issue of hostile intent and are based on actual operations.¹⁷¹ The former explains, “Vignettes put the rules of engagement (ROE) into context. Rules can be memorized, but without context, those rules have little meaning or value.”¹⁷² It emphasizes that soldiers must understand and be able to apply key concepts, including hostile intent, in “a dynamic, confusing, and dangerous environment.”¹⁷³ Although it is unclear how much of a role these handbooks have played in training because they were not mentioned by IHRC interviewees, these materials could be valuable tools for training on hostile intent.

Military trainers sometimes supplement vignettes with video games that require troops to respond to potentially hostile situations¹⁷⁴ or footage of actual events. Brigadier General Gross contended that latter was particularly helpful as it allowed troops to think through real-life nuances more so than inherently simplified written vignettes.¹⁷⁵ In addition, simulations provide an opportunity for troops to apply what they have learned in the classroom. The military has several training centers that seek to recreate contemporary combat environments with mock villages and actors playing civilians and enemy combatants.¹⁷⁶ The simulations force troops to react to challenging situations, including ones involving hostile intent determinations.¹⁷⁷

Despite the potential benefits of such training, there have been problems with regard to training on civilian protection broadly and hostile intent in particular. In its 2012 *Afghanistan Civilian Casualty Prevention Handbook*, CALL found that “[o]ne of the most common themes when talking to troops on the ground in Afghanistan is that their home station training did not

¹⁶⁸ Interview with Brig. Gen. Richard Gross, Legal Counsel to Chairman of Joint Chiefs of Staff, US Army, Arlington, VA, April 13, 2012.
¹⁶⁹ One military lawyer told IHRC that training is key for teaching troops how to implement legal principles of the use of force. Interview with military lawyer (name withheld), Arlington, VA, April 13, 2012.
¹⁷⁰ Telephone interview with Lt. Col. Matt Hover, judge advocate, US Army, April 5, 2012. See also Interview with Capt. Regan Turner, US Marine Corps, Cambridge, MA, March 28, 2012 (explaining that the classroom sessions are designed to elicit discussion about the scenarios). Lt. Col. Matt Lewis explained that the Army encourages “honest, frank discussion about the rules of force and definitions of hostile intent. . . . The challenge [with vignette training] is how do you teach a guy to walk away, to measure the response and de-escalate the conflict.” He noted that teaching about de-escalation can enhance civilian protection from erroneous determinations of hostile intent. Interview with Lt. Col. Matt Lewis, US Army, Cambridge, MA, April 10, 2012.
¹⁷¹ See generally Center for Army Lessons Learned, *ROE Vignettes: Observations, Insights, and Lessons Handbook* (May 2011) [hereinafter CALL, *ROE Vignettes Handbook*]; CALL, *Escalation of Force Handbook*.
¹⁷² CALL, *ROE Vignettes Handbook*, 1.
¹⁷³ *Ibid.*
¹⁷⁴ Maj. Matt Mason, described a situation during training where a trainer used a video game scenario depicting a man with an AK-47, and asked troops to decide whether or not to fire back, and what to fire back with. Interview with Maj. Matt Mason, US Army, Cambridge, MA, March 28, 2012.
¹⁷⁵ Interview with Brig. Gen. Richard Gross, Legal Counsel to Chairman of Joint Chiefs of Staff, US Army, Arlington, VA, April 13, 2012.
¹⁷⁶ See Bonnie Docherty, “*More Sweat . . . Less Blood*”: *US Military Training and Minimizing Civilian Casualties*. (Cambridge, MA: Carr Center for Human Rights Policy, November 2007), 18.
¹⁷⁷ Interview with Capt. Regan Turner, US Marine Corps, Cambridge, MA, March 28, 2012 (“They’re constantly being tested on when they will/will not use force.”). Lt. Col. Matt Hover, a US Army lawyer who served in both Afghanistan and Iraq, told IHRC, “We put [troops] in [simulation] situations and they have to react to something that may be a threat. . . . They are difficult situations.” In after action reviews, trainers question troops on their thought processes and whether additional EOF measures could have been taken before choosing to use deadly force. Telephone interview with Lt. Col. Matt Hover, judge advocate, US Army, April 5, 2012.

adequately prepare them for the complexities of dealing with the challenge of avoiding and mitigating civilian casualties . . . in Afghanistan.”¹⁷⁸

Reflecting CALL’s finding, several IHRC interviewees who had deployed to Afghanistan and Iraq described shortcomings in the nature and extent of the training they received about the rule of hostile intent. Sgt. Graham Phillips, for example, remembered a classroom session in which military lawyers had introduced the concept of hostile intent, but he told IHRC that he learned “nothing very specific” about indicators for hostile intent before his 2007-2008 deployment to Iraq.¹⁷⁹ While hostile intent did come up in his simulation training at the US Army’s combat training center in Hohenfels, Germany, he said there was not “a very specific discussion or evaluation or after-action review delving into the concept specifically.”¹⁸⁰ As a result, Phillips was surprised on arriving in Iraq by the number of unofficial checkpoints manned by armed men without uniforms, the kind of individuals who could raise questions of hostile intent.¹⁸¹ That type of information should have been readily available to him. Phillips was not the only IHRC interviewee to find training on the rule of hostile intent limited. Maj. Matthew Mason, a member of the Special Forces, whose tours to Iraq and Afghanistan spanned 2003-2010, said, “Aside from the battle drills, I can’t think of any hostile intent training we received.”¹⁸²

US military training has evolved over the past decade in a positive direction. A US Army officer told IHRC that the training he received before deploying to Iraq in 2003 as a combat platoon leader “didn’t really prepare” him because it was designed for Cold War-era force-on-force battles.¹⁸³ “Hostile intent didn’t really come up in the trainings,” he said. “It was not explicitly mentioned as a concept to think about, but self-defense came up and mission completion—how to determine if you’re safe or not.”¹⁸⁴ This officer who was stationed at a training center after leaving Iraq, noted, however, that training changed quickly after his deployment. The military “re-engineered what training looked like in a short period of time,” he said. Simulation training, in particular, moved from staging tank-on-tank battles to requiring troops to deal with civilians on the battlefield.¹⁸⁵ CALL’s *Afghanistan Civilian Casualty Prevention Handbook* reflects the evolution toward more appropriate training, emphasizing the importance of incorporating “realistic, real-world scenarios that will challenge troops to make difficult shoot/no-shoot decisions like they will face in theater.”¹⁸⁶ JCOA’s 2013 study concluded that the United States had “made great strides in dealing with the topic of [civilian casualties] in pre-deployment training for forces deploying to Afghanistan.”¹⁸⁷

While acknowledging this evolution, when IHRC asked military personnel what they would recommend to help improve hostile intent determinations, a large number focused on training.¹⁸⁸ The need for ever greater realism was a particularly common theme among

interviewees, regardless of rank or branch of service. Army Spc. Jacob Sells, who served in the infantry in Iraq from 2007 to 2008, said in the training he experienced, unlike in the field, anyone with a gun was usually hostile. “They try to make it a little more complicated but don’t do as great a job as they could,” he told IHRC.¹⁸⁹ Brigadier General Gross said the military should strive to “create realistic training to replicate the stress and help folks develop and heighten their senses. You’ve got to train it, train it, train it, train it, train it.”¹⁹⁰ A US Marine Corps officer who served in Afghanistan and Iraq between 2005 and 2007 and later taught at Quantico told IHRC, “I genuinely did feel like training was very good, . . . [but] there are always more ways to improve it, to make it more realistic.”¹⁹¹

Observers have also called on the military to capture the advances it has made in training so that it can better prepare troops to avoid civilian casualties in future operations. Army Maj. Rob Shaw, who served in Afghanistan and Iraq and remained in the service after his deployments, told IHRC:

The Army sometimes misses opportunities to build ambiguity into training scenarios to challenge leaders and soldiers. Maintaining an emphasis on understanding the rules of engagement and training to respond accordingly is critical as we shift away from the wars in Iraq and Afghanistan. Institutionalizing lessons learned in training and from experiences in combat is imperative as the Army transitions and seasoned veterans leave the force.”¹⁹²

JCOA similarly recommended the military “[c]odify [civilian casualty] training best practices for operations beyond Afghanistan.”¹⁹³

As it prepares troops for future conflicts, the US military should build on its progress in training while not resting on its laurels. It should be sure to address the rule of hostile intent more specifically and to use scenarios drawn from the Afghanistan and Iraq conflicts in particular to teach troops to deal with the challenge of making determinations when enemy combatants blend in with the civilian population. The military should also codify for later use the best practices it has developed on civilian casualty training. Finally, it should incorporate such improvements into the training it provides to security forces from other countries.

Field Leadership

Military leaders, especially those closest to combat operations, significantly influence the implementation of rules. Junior commissioned officers and non-commissioned officers typically receive ROE training from military lawyers and then distill it for their units.¹⁹⁴ A military

¹⁷⁸ CALL, *Civilian Casualty Handbook*, 11.
¹⁷⁹ Interview with Sgt. Graham Phillips, US Army, Cambridge, MA, February 24, 2012.
¹⁸⁰ Ibid.
¹⁸¹ Ibid.
¹⁸² Interview with Maj. Matt Mason, US Army, Cambridge, MA, March 28, 2012.
¹⁸³ Interview with US Army officer #4 (name withheld), Cambridge, MA, March 7, 2012.
¹⁸⁴ Ibid.
¹⁸⁵ Ibid. Other interviewees echoed his praise for updated training. See, e.g., Interview with Capt. Matt Noyes, US Army, Cambridge, MA, March 30, 2012.
¹⁸⁶ CALL, *Civilian Casualty Handbook*, 12.
¹⁸⁷ JCOA, *Reducing and Mitigating Civilian Casualties*, 6.
¹⁸⁸ See, e.g., Interview with Maj. Rob Shaw, US Army, Cambridge, MA, March 28, 2012, Telephone interview with US Army judge advocate #1 (name withheld), April 2, 2012; Interview with Capt. Michael Harrison, US Army, Cambridge, MA, April 4, 2012; Interview with Capt. Bob Hodges, judge advocate, US Army, Washington, DC, April 13, 2012; Interview with Lt. Col. Matt Lewis, US Army, Cambridge, MA, April 10, 2012.

¹⁸⁹ Telephone interview with Spc. Jacob Sells, US Army, March 20, 2012.
¹⁹⁰ Interview with Brig. Gen. Richard Gross, Legal Counsel to Chairman of Joint Chiefs of Staff, US Army, Arlington, VA, April 13, 2012.
¹⁹¹ Interview with Capt. Regan Turner, US Marine Corps, Cambridge, MA, March 28, 2012.
¹⁹² Email from Maj. Rob Shaw, US Army, to Bonnie Docherty, IHRC, July 23, 2014.
¹⁹³ JCOA, *Reducing and Mitigating Civilian Casualties*, 7.
¹⁹⁴ Army judge advocate Capt. Bob Hodges, who served in both conflicts, told IHRC he walked through ROE scenarios pre-deployment and bi-weekly during deployment, but the leaders had to “disseminate the material.” Interview with Capt. Bob Hodges, judge advocate, US Army, Washington, DC, April 13, 2012. Other soldiers interviewed by IHRC echoed that view. See, e.g. Interview with US Army officer #1 (name withheld), Cambridge, MA, March 28, 2012; Interview with US Marine judge advocate (name withheld), Washington, DC, April 12, 2012; Interview with US Army officer #4 (name withheld), Cambridge, MA, March 7, 2012. In his article, Major Montalvo notes that judge advocates also play a critical role in the educational process and can serve as commanders’ “surrogates to convey intent.” He writes that “judge advocates must have a conversation with the commander regarding the commander’s self-defense philosophy in a COIN [counterinsurgency] environment, specifically with regard to hostile intent and imminence.” Montalvo, “When Did Imminent Stop Meaning Immediate?” 33.

lawyer who served in Afghanistan, said troops generally respond better to their unit’s leader discussing issues in small groups than to judge advocates doing lectures in a gym.¹⁹⁵ Leaders not only relay information but also interpret it for their subordinates.¹⁹⁶ A tactical directive, for example, “cannot prescribe the appropriate use of force for every condition that a complex battlefield will produce” so leaders in the field have to decide how to apply it.¹⁹⁷ According to an Army artillery officer and Iraq veteran, “It’s up to the commander to figure out how to operationalize and meet their [superior’s] intent.”¹⁹⁸

Because of their roles as conduits and interpreters of ROE, leaders are key to the understanding and application of the rule of hostile intent.¹⁹⁹ When asked who has the duty to boil down the ROE for the troops, US Army lawyer Capt. Bob Hodges said, “It’s on leaders—squad leaders, platoon leaders, company commanders, battalion commanders, [and] brigade commanders.”²⁰⁰ Leaders also set a tone for their subordinates to follow. A senior defense official who worked in Afghanistan, said, “The command climate within a given organization becomes critical. If you’re going in thinking civilians are hostile insurgent supporters, chances are you have a lot more EOF incidents, judgments of hostile intent, and probably a lot more civilian casualties.”²⁰¹ Lt. Col. Matt Lewis, who was an aviation officer in Iraq between 2010 and 2011, explained, “It’s the officer’s job to maintain the morality of the mission. . . . Once you let war loose, it’s hard to keep it in the bag.”²⁰²

Leaders can also influence the implementation of the rule of hostile intent by urging restraint in hostile intent determinations.²⁰³ Michael Harrison, who served as a platoon leader and then company commander on two deployments to Afghanistan between 2006 and 2010, said, “When you’re a leader or commander, you stress it’s very important to err on the side of caution.”²⁰⁴ An infantry officer who did two tours in Iraq told IHRC, “I tried to tell my

¹⁹⁵ Telephone interview with US Army judge advocate #2 (name withheld), March 26, 2012. See also Montalvo, “When Did Imminent Stop Meaning Immediate?” 33 (“[I]t is also important to realize that ‘ROE philosophy is not derived from ROE classes, but from constant interaction between the commander and his subordinates. Commanders must try and weave ROE into all of the communications.’” (quoting Marine Corps Col. Eric M. Smith)).

¹⁹⁶ Telephone interview with Lt. Col. Matt Hover, judge advocate, US Army, April 5, 2012.

¹⁹⁷ *McChrystal Tactical Directive*, 2. For example, in his directive on airstrikes, General McChrystal addressed the role of leaders, stating, “I expect leaders at all levels to scrutinize and limit the use of force like close air support against . . . locations likely to produce civilian casualties. . . . I expect leaders to ensure this is clearly communicated and continually reinforced.” *Ibid.*

¹⁹⁸ Interview with US Army officer #1 (name withheld), Cambridge, MA, March 28, 2012 (“It comes down to command and leadership and how you understand the threat environment.”). In his 2010 tactical directive, General Petraeus wrote that while his directive should guide leaders’ actions, “[w]e have no desire to undermine the judgment of tactical commanders.” *Petraeus Tactical Directive*, 3.

¹⁹⁹ In a 2011 tactical directive, General Allen specified that commanders bear responsibility for decreasing civilian casualties in general, although he did not discuss casualties from hostile intent determinations in particular. He wrote, “Eliminating civilian casualties is a difficult task, requiring constant command attention. I expect commanders at all levels to place as high a priority on it as I do.” *Allen Tactical Directive*, 2. See also CALL, *Civilian Casualty Handbook*, iii (quoting General Allen saying, “Commanders and leaders at all levels must ensure their units instinctively grasp the importance of protecting the civilian population and .”).

²⁰⁰ Interview with Capt. Bob Hodges, judge advocate, US Army, Washington, DC, April 13, 2012. Capt. Ian Gore, a US Army intelligence officer who was stationed in Baghdad from 2006 to 2007, told IHRC, “As a practical matter on deployment, [interpretation of the rule of hostile intent] falls to the highest ranking person on the particular patrol—platoon leaders, etc.” Interview with Capt. Ian Gore, US Army, Cambridge, MA, February 24, 2012.

²⁰¹ Telephone interview with senior US defense official (name withheld), April 4, 2012. See also Interview with US Army officer #1 (name withheld), Cambridge, MA, March 28, 2012 (“More likely than not you get your attitude from the leader above.”).

²⁰² Interview with Lt. Col. Matt Lewis, US Army, Cambridge, MA, April 10, 2012.

²⁰³ Leaders are not allowed to make ROE more expansive but generally they can narrow them. Interview with US Marine regiment judge advocate (name withheld), Arlington, VA, April 13, 2012. General Petraeus, however, declared that “[s]ubordinate commanders are not authorized to further restrict this [tactical directive] guidance without my approval.” *Petraeus Tactical Directive*, 1. Reportedly General Petraeus issued this tactical directive in response to restrictions on use of force in self-defense “to make clear that no one subordinate to him could take away the right of self-defense.” Telephone interview with Dennis Mandsager, professor, US Naval War College, April 26, 2012.

²⁰⁴ Interview with Capt. Michael Harrison, US Army, Cambridge, MA, April 4, 2012. He explained that in addition to being humanitarian, protecting civilians is important to avoid alienating them.

soldiers you have to be willing to accept a little bit of risk and trust your judgment.”²⁰⁵ Major Montalvo writes that commanders should “ensur[e] that members of their units not only understand when they can shoot, but also when they should not shoot even though legally permitted.”²⁰⁶

Field leaders are in a unique position to have this kind of influence over hostile intent determinations. First, they bring good situational awareness. For example, leaders can warn troops of recent suicide attacks or tell them to think twice before firing on a vehicle because there have been no bombings for six months.²⁰⁷ A senior defense official told IHRC, “[Com-manders’] knowledge of the local situation, their experience, is key to making decisions in highly ambiguous situations.”²⁰⁸ Second, field leaders generally have the respect of their troops.²⁰⁹ A Marine judge advocate and Afghanistan veteran said, “We want squad leaders to get [ROE] like the back of their hand. . . . They get dirty with [the troops] and shot at with them so they trust them more [than military lawyers]. They really see their squad leader as their big brother and go to him first.”²¹⁰

Leaders can use their position to influence the implementation of the rule of hostile intent in a positive way and thus promote civilian protection. In Afghanistan and Iraq, many leaders held daily briefings to go over the ROE before going out on patrol.²¹¹ According to Sergeant McGinnis, troops in his unit routinely reviewed hostile intent and EOF procedures during such briefings.²¹² An infantry officer told IHRC, “We didn’t leave [for an operation] without me briefing my soldiers,” and “if there was a reason to modify their own perception of hostile intent, that was always included.”²¹³ Outside of formal briefings, leaders have often served as a resource for troops with questions about the ambiguities of the ROEs.²¹⁴ Troops typically start with their squad leaders, who, if they need support, will move the questions up the chain of command.²¹⁵ Leaders are also responsible for “know[ing] their team,” which includes

²⁰⁵ Telephone interview with US Army officer #2 (name withheld), April 12, 2012.

²⁰⁶ Montalvo, “When Did Imminent Stop Meaning Immediate?” 33. CALL’s *ROE Vignette Handbook* noted that restraint is especially critical in counterinsurgency operations in which the military needs to avoid civilian casualties in order to maintain local support for US operations. CALL, *ROE Vignettes Handbook*, i. See also CALL, *Civilian Casualty Handbook*, 8 (adding that it is “imperative to assume greater risk during [counterinsur-gency] than conventional operations”).

²⁰⁷ Interview with US Army officer #1 (name withheld), Cambridge, MA, March 28, 2012.

²⁰⁸ Telephone interview with senior US defense official (name withheld), April 4, 2012.

²⁰⁹ For example, a US Army officer who served two tours in Iraq recalled “the trust that my soldiers had that if they took a shot within the ROE, then I would go to bat for them.” Interview with US Army officer #1 (name withheld), Cambridge, MA, March 28, 2012. The officer added later, “We would then seek to find ways to improve the system to ensure soldier *and* civilian safety, even if the action was determined justified.” Email from US Army officer #1, to Bonnie Docherty, IHRC, July 23, 2014.

²¹⁰ Interview with US Marine battalion judge advocate (name withheld), Arlington, VA, April 13, 2012.

²¹¹ See, e.g., Interview with US Army officer #4 (name withheld), Cambridge, MA, March 7, 2012 (“If there were changes to the ROE, they would be communicated because they were read aloud every day before we went out. I’m not sure if every unit or platoon did that, but it certainly was helpful.”); Telephone interview with US Army officer #2 (name withheld), April 12, 2012 (“We didn’t leave [for an operation] without me briefing my soldiers. Sometimes it was more abbreviated than others depending on what we were doing, but they always got the highlights of what was going on. Part of that was going over ROE but if there was a reason to modify their own perception of hostile intent that was always included.”).

²¹² Telephone interview with Sgt. Devon McGinnis, US Army, April 3, 2012. A former artillery officer said that he asked his soldiers to repeat the steps of EOF before every mission and “they’d spit it off like rote memory.” Interview with US Army officer #1 (name withheld), Cambridge, MA, March 28, 2012.

²¹³ Telephone interview with US Army officer #2 (name withheld), April 12, 2012.

²¹⁴ Telephone interview with Sgt. Devon McGinnis, US Army, April 3, 2012. See also Telephone interview with Spc. Jacob Sells, US Army, March 20, 2012 (Sells also said he would call a platoon sergeant about any questions.); Interview with Capt. Michael Harrison, US Army, Cambridge, MA, April 4, 2012 (“There are definitely a lot of resources out there, several people from the company who are experts at that who could talk quickly. The question is whether you have the time.”).

²¹⁵ Telephone interview with Sgt. Devon McGinnis, US Army, April 3, 2012. A good leader will take advantage of available support. For example, an Army lawyer who was stationed at divisional headquarters said he received questions from junior officers such as: “Would this scenario be considered hostile intent? Can I shoot this guy?” Telephone interview with US Army judge advocate #1 (name withheld), April 2, 2012.

monitoring their troops’ state of mind.²¹⁶ By resting or rotating the assignments of individuals who need a break and could thus be prone to making erroneous hostile intent determinations, leaders can help save military and civilian lives.²¹⁷

Leadership can be “personality based,” however, and leaders vary in their approach to implementing the rule of hostile intent.²¹⁸ Erlingur Erlingsson, a UNAMA political officer from 2009 to 2010, recalled a company commander telling his troops not to go through EOF procedures and explaining that “[h]e would rather chance being hit with an IED than chance hitting innocent people.”²¹⁹ Erlingsson encountered another commander in Kandahar who, by contrast, made it clear to his troops that “they weren’t going to do counterinsurgency but [would] search and destroy, [i.e., do] ‘proper warfare.’” Erlingsson said, “Based on what I’ve seen, that sets the tone, and you invite disaster when you do it that way.”²²⁰

Good leaders reinforce training and demand that soldiers properly interpret and implement the ROE in the field. To promote such leadership, the military should ensure that leaders adequately understand and abide by the rule of hostile intent. It should also require them to prioritize clearly communicating the rule and discuss it routinely in field briefings.²²¹

Engagement with the Local Population

Engaging with the local population can further advance the goal of minimizing civilian casualties, particularly in situations in which troops often operate among or near civilians. In his 2010 tactical directive, General Petraeus acknowledged that “[s]ome civilian casualties result from a misunderstanding or ignorance of local customs and behaviors.”²²² Engagement with the local population requires developing an understanding of the culture of the people in combat zones. It also involves building relationships with the people themselves. Such engagement can help ensure that ordinary actions are not mistaken as hostile.²²³

Many military personnel interviewed by IHRC recognized the value of having engaged with the local population for troops who faced hostile intent situations. An Army lawyer who served in Afghanistan and Iraq told IHRC, “The guys on the ground, over the course of a year there, learn something about the locals. They learn about patterns of life, how they go about their day, and use that [knowledge] to tailor what they think of as a threat or not a threat.”²²⁴ He added that “your interpretation of hostile intent definitely changes as you learn about the

civilian population and how the enemy conducts themselves. You have a better idea of what you’re looking at and whether it’s perfectly innocent activity.”²²⁵ Troops look for clues such as whether children are playing soccer where and when they usually do or if their parents are pulling them inside.²²⁶ An Army veteran of three tours in Afghanistan and Iraq between 2005 and 2009 said that for troops living in the area, “it becomes easier to discern those nuances and you just notice stuff.”²²⁷ Troops who regularly interact with the local population are thus better equipped to differentiate between behavior that is threatening and behavior that is routine for a specific area.²²⁸

In IHRC interviews, veterans described several types of encounters that exemplified the impact of engagement with the local population on hostile intent determinations. US troops often felt threatened by people digging at night because they could be placing an IED.²²⁹ An infantry officer said that digging at night was “suicidal” in Iraq in 2006. “For us that was enough to engage them,” he said.²³⁰ As that officer predicted, however, growing cultural awareness revealed that these actions were not inherently dangerous.²³¹ Iraqi farmers often worked at night because it was too hot during the day.²³² In Afghanistan, an Army judge advocate who was stationed near a village with only one source of water said that troops saw people “hacking away at dykes and replacing them at 2 a.m.”²³³ “Without the same anthropological knowledge of locals,” these civilians could easily have been mistaken for insurgents planting IEDs.²³⁴

Another factor that complicated hostile intent determinations was the prevalence of guns in Afghanistan and Iraq.²³⁵ Local people frequently carried guns to protect themselves or their livestock, but how they handled their weapons was illuminating. “Having an AK-47 wasn’t necessarily hostile intent,” explained a US Marine Corps officer who served in Afghanistan and Iraq from 2005 to 2007. “It’s not enough if he has it slung over his shoulder. But if he takes it off his shoulder, as soon as he elevates it, I’m authorized to use deadly force.”²³⁶

²¹⁶ Interview with Col. (Ret.) John Agoglia, former director of Counterinsurgency Training Center-Afghanistan, Arlington, VA, April 11, 2012.
²¹⁷ Ibid.
²¹⁸ See, e.g., Telephone interview with US Army judge advocate #1 (name withheld), April 2, 2012; Interview with Capt. Bob Hodges, judge advocate, US Army, Washington, DC, April 13, 2012; Interview with US Army officer #3 (name withheld), Arlington, VA, April 13, 2012; Telephone interview with senior US defense official (name withheld), April 4, 2012; Interview with US Army officer #1 (name withheld), Cambridge, MA, March 28, 2012.
²¹⁹ Telephone interview with Erlingur Erlingsson, former political officer, UNAMA, February 17, 2012.
²²⁰ Ibid.
²²¹ CALL’s *Afghanistan Civilian Casualty Prevention Handbook* also encouraged leaders to “reward actions by Soldiers when they place themselves at increased risk to avoid [civilian casualties].” CALL, *Civilian Casualty Handbook*, 52. See also Sewall and Lewis, *Joint Civilian Casualty Study*, 17.
²²² *Petraeus Tactical Directive*, 3.
²²³ A journalist embedded in Afghanistan and Iraq observed that “[s]tarting off everyone is suspicious of [the local people] and wouldn’t talk to them. As weeks went by more feedback or hits from the local population and by virtue of knowing people better, they’d have a better sense of who is there and who doesn’t belong.” Telephone interview with Matthew Green, journalist embedded in Afghanistan, April 6, 2012. Sloan Mann explained, based on his experiences in Iraq and Afghanistan as a US Agency for International Development (USAID) official, “When things are less kinetic and you have a better relationship with locals, you’re more likely to show restraint.” He added, “Those that made the best efforts with locals were the most restrained. They would do much better because they were closely intertwined.” Interview with Sloan Mann, managing director, Development Transformations, and former USAID official, Washington, DC, April 13, 2012.
²²⁴ Telephone interview with US Army judge advocate #1 (name withheld), April 2, 2012.

²²⁵ Ibid.
²²⁶ Interview with US Army officer #3 (name withheld), Arlington, VA, April 13, 2012. See also Telephone interview with Spc. Jacob Sells, US Army, March 20, 2012 (“In a small neighborhood on patrol, you get a feel for the neighborhood and look for things that are out of place. If people vacate than you probably know that something’s going down.”).
²²⁷ Interview with US Army officer #3 (name withheld), Arlington, VA, April 13, 2012.
²²⁸ CALL came to a similar conclusion, noting that “understanding the level and nature of civilian activity can help Soldiers to better discriminate between the enemy and civilians.” CALL, *Civilian Casualty Handbook*, 16. Cultural understanding can also affect troops’ tactics, such as how they set up checkpoints to reveal information about the intent of approaching individuals. Interview with Brig. Gen. Richard Gross, Legal Counsel to Chairman of Joint Chiefs of Staff, US Army, Arlington, VA, April 13, 2012.
²²⁹ A US Army judge advocate asked, “At what point are they digging in a road and at what point are they planting an IED? Or is it hostile intent as soon as you see a yellow plastic jug that they’re going to put in there? Everyone wants black and white rules, and it’s just not black and white.” His answer was once a yellow jug went in the road the man demonstrated hostile intent. Interview with Capt. Bob Hodges, judge advocate, US Army, Washington, DC, April 13, 2012.
²³⁰ Telephone interview with US Army officer #2 (name withheld), April 12, 2012.
²³¹ Ibid.
²³² Telephone interview with US Army judge advocate #1 (name withheld), April 2, 2012.
²³³ Ibid.
²³⁴ Ibid.
²³⁵ Although less related to cultural understanding, the use of cell phones was another oft-cited example of a potential threat because cell phones can be used by the enemy to communicate or set off IEDs. Reflecting on his 2005 tour in Iraq, Sgt. Devon McGinnis told IHRC, “In Iraq it used to be that if you saw someone with a cell phone, you had a green light to kill them. They might be giving instructions to enemy forces even if they had no weapon. . . . That sounds terrible, but a lot of soldiers got killed because someone was using a cell phone instead of a radio.” McGinnis said an investigation revealing that this policy led to civilian casualties helped change US conduct. Telephone interview with Sgt. Devon McGinnis, US Army, April 3, 2012. A Marine Corps officer who served in Afghanistan and Iraq between 2005 and 2007, said that in his experience you could confront a suspicious cell phone user, but “you can’t shoot at him because he hasn’t demonstrated an hostile intent.” Interview with US Marine Corps officer, Cambridge, MA, March 28, 2012. For a similar account, see Telephone interview with Spc. Jacob Sells, US Army, March 20, 2012.
²³⁶ Interview with Capt. Regan Turner, US Marine Corps, Cambridge, MA, March 28, 2012. See also Interview with US Marine judge advocate (name withheld), Washington, DC, April 12, 2012 (prevalence of guns for personal protection).

Awareness of a country’s gun culture can help prevent close calls from leading to civilian casualties. In Afghanistan in 2003, a small child pointed a black water gun at Army infantry officer Rob Shaw, then a company commander. Shaw instinctively raised his weapon in response before backing off. “I told the kid’s dad that if his son does that and surprises soldiers, the results could be tragic. The combination of inexperienced combat soldiers in a volatile, uncertain environment can lead to terrible outcomes.”²³⁷ During Shaw’s deployment to Iraq, one of his squad leaders encountered a 10-year-old boy who pointed a loaded AK-47 at him. The squad leader “had the presence of mind to not shoot and pushed the barrel out of the way and avoided tragedy.”²³⁸ Shaw said of such incidents, “It’s humbling how it could go either way.”²³⁹

To avoid tragic endings to close calls, the military needs to impart appropriate cultural awareness before troops deploy. “In terms of hostile intent, cultural training is so important,” said Capt. Matt Noyes, who did infantry tours to Iraq in 2007 and 2009.²⁴⁰ Special Forces Maj. Matt Mason told IHRC that he believed that cultural training should focus less on social norms, such as the fact that showing the soles of one’s feet is offensive, and more on behavior. “I think the better training would be how do people drive, what are the traffic patterns, how do people act, the fact that every little kid has an AK-47 toy,” he explained.²⁴¹ Simulation training must realistically present life in a foreign country to be effective. Before his 2007 deployment to Iraq, Sgt. Graham Phillips said, he was trained at the Hohenfels training center to identify IEDs by looking for “strange objects by the road.” He said, however, “That was totally unhelpful because Iraq is full of strange objects. It is full of trash everywhere. We come from training in pristine Germany where a box by the road is clearly the fake IED in a simulation.”²⁴² While on patrol in Iraq, he saw a child carry a box of trash to the middle of a road, “doing exactly what the oversanitized training would consider IED planting.”²⁴³ Phillips said he remembered the incident “because it struck me as so different from what you learn in training and not the kind of thing you thought you’d see.”²⁴⁴

The military should also encourage troops on the ground to interact and develop relationships with the local population.²⁴⁵ Spc. Jacob Sells, an infantryman who served in Iraq from 2007 to 2008, said patrolling an area would help troops better interpret a situation. “[Y]ou get a feel for the neighborhood and look for things that are out of place. If people vacate, then you probably know that something’s going down,” he said.²⁴⁶ While other military personnel echoed Sells’s observation,²⁴⁷ Sloan Mann, who worked as a US Agency for International Development (USAID) official in Afghanistan and Iraq said, “Something I saw in both theaters

²³⁷ Interview with Maj. Rob Shaw, US Army, Cambridge, MA, March 28, 2012.

²³⁸ Ibid. Due to his squad leader’s conduct, Shaw described this incident as “one of [his] proudest moments” as a company commander in Iraq. “This, to me, indicated soldiers ‘got it’ and did things because ‘they had to . . . not because they could.’” Email from Maj. Rob Shaw, US Army, to Bonnie Docherty, IHRC, July 23, 2014.

²³⁹ Interview with Maj. Rob Shaw, US Army, Cambridge, MA, March 28, 2012.

²⁴⁰ Interview with Capt. Matt Noyes, US Army, Cambridge, MA, March 30, 2012.

²⁴¹ Interview with Maj. Matt Mason, US Army, Cambridge, MA, March 28, 2012.

²⁴² Interview with Sgt. Graham Phillips, US Army, Cambridge, MA, February 24, 2012.

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ Telephone interview with senior US defense official (name withheld), April 4, 2012 (saying that the military should communicate “the importance of relationships with Afghan civilians and the consequences of getting them wrong, and the consequences of getting them right”).

²⁴⁶ Telephone interview with Spc. Jacob Sells, US Army, March 20, 2012.

²⁴⁷ Interview with US Army officer #3 (name withheld), Arlington, VA, April 13, 2012 (“Tenure and experience and knowing the places you live . . . [and] getting out of the vehicles [are] very important. . . . If you live in the area, truly live there, not commuting to work . . . actually go out and live. . . . it becomes easier to discern those nuances and you just notice stuff.”); Telephone interview with US Army judge advocate #1 (name withheld), April 2, 2012; Interview with US Marine battalion judge advocate (name withheld), Arlington, VA, April 13, 2012.

was that in some sense soldiers don’t see a need to interact with the local population.”²⁴⁸ Mann argued that combat training was too narrow and said that “a lot of training doesn’t fit the mission. Training needs to be more balanced—including how to engage locals and expand relationships.”²⁴⁹ In addition, leaders should push their troops to take engagement seriously. Erlingur Erlingsson, a former UNAMA political officer, stated,

It is up to individual commanders to really drill [the importance of engagement] into their troops, and I think this is a constant struggle throughout the deployment because it is hard for soldiers to interact with the people. But [leaders should] drill into them that they are dealing with civilians, with innocent people, and a huge part of the mission is to be on the side of the population.²⁵⁰

The US military made some progress on engaging with the local population over the course of its operations in Afghanistan and Iraq. For example, as mentioned above, it developed the realism of its pre-deployment training, which presumably included a more accurate portrayal of the local culture.²⁵¹ In addition, US forces increasingly partnered with local military or security forces with a better understanding of the situation on the ground. JCOA noted, “Discriminating between combatants and civilians in indigenous situations is a challenge for U.S. forces; host-nation forces may be better able to discern actual hostile intent from behavior that is locally normative.”²⁵² Nevertheless, the US military will face new challenges of engagement in future conflicts.

Supplementing troops’ military perspective with the understanding that comes from engagement with the local population can lead to more accurate hostile intent determinations and a reduction in civilian casualties. Taking to heart the successes and failures of the Afghanistan and Iraq conflicts can inform how the military promotes and implements engagement in the future. The military should institutionalize past improvements and look for additional places to improve. It should also be prepared to adapt its methods in order to engage appropriately with the populations of a different country in the next conflict.

²⁴⁸ Interview with Sloan Mann, managing director, Development Transformations, and former USAID official, Washington, DC, April 13, 2012.

²⁴⁹ Ibid.

²⁵⁰ Telephone interview with Erlingur Erlingsson, former political officer, UNAMA, February 17, 2012.

²⁵¹ The US military also sought to improve its understanding of the local population and culture by deploying Human Terrain Teams (HTT) in Afghanistan and Iraq. Part of a program started in 2007, the HTT employed civilian social scientists to “conduct field research of the local population to determine the ‘human terrain’ in order to help the commander assess how actions will be perceived by the local populace.” Human Terrain System, “Human Terrain Teams,” accessed September 27, 2014, <http://humanterrainsystem.army.mil/htt.html>. Reactions to the program have been mixed. Some military officials have credited the HTT with reducing combat and saving military and civilian lives. Some anthropologists, however, have accused the program of violating their field’s ethics, and other observers have criticized the HTT members’ “lack of specific cultural knowledge [of] or expertise” in the countries in which they were operating. Vanessa M. Gezari, “The Human Terrain System Sought to Transform the Army from Within,” *Newsweek*, August 16, 2013, accessed January 10, 2016, <http://www.newsweek.com/2013/08/16/human-terrain-system-sought-transform-army-within-237818.html>. The program was killed in mid-2015. Tom Vanden Brook, “Army Kills Controversial Social Science Program,” *USA Today*, June 29, 2015, accessed January 10, 2016, <http://www.usatoday.com/story/news/nation/2015/06/29/human-terrain-system-afghanistan/29476409/>

²⁵² JCOA, *Reducing and Mitigating Civilian Casualties*, 11.

5. The Need for an Effective Learning Process

While the US military has begun new operations in Iraq and Syria, the end of its earlier combat missions in Afghanistan and Iraq offers an opportunity to reflect on the impact of the US rule of hostile intent on civilian protection. This report seeks to facilitate the process by analyzing successes and failures and highlighting areas for improvement. The report illuminates shortcomings in the existing rule, critiquing the vagueness and breadth of the definition of hostile intent, and shows how tactical directives could be even more effective as enduring guidelines focused specifically on the rule of hostile intent. It also examines how three implementation tools—training, leadership, and engagement with locals—could be better used to minimize the risk of civilian casualties from erroneous hostile intent determinations.

The US military, however, must also do its own evaluation of both past and future conduct. The military should ensure its prior performance in hostile intent situations has been adequately examined in studies of Afghanistan and Iraq. It should build on its existing methodologies and mechanisms and institute a process to track and learn from new incidents. The military should act on its findings, making appropriate changes to the rule of hostile intent and the tools to implement it in the field, and share policies and practices with partner security forces. Finally, it should promote transparency to show good faith and facilitate monitoring of its progress. These steps can advance civilian protection in hostile intent situations in the next US conflict.

Existing Approaches to Learning Lessons

The 2010 *Joint Civilian Casualty Study* represented the first major effort to analyze civilian casualties caused by US forces in Afghanistan and Iraq.²⁵³ A team from Harvard University, the US Defense Department’s JCOA, and the military led the study. Since then, the military has refined its methods for examining civilian casualty incidents and produced additional studies.²⁵⁴ Another outgrowth of the *Joint Civilian Casualty Study* was the US Army’s Tactics, Techniques, and Procedures 3-37.31 on Civilian Casualty Mitigation. Published in July 2012, the ATTP lay out a process that seeks to minimize civilian casualties and reduce the impact of those that occur.²⁵⁵

While the methodology for assessing the military’s civilian protection performance continues to evolve, an analysis of the ATTP illuminates some key elements of an effective process. In particular, mechanisms for learning lessons about hostile intent should involve in-depth investigation of incidents, tracking and analysis of casualties to identify trends, and attention to hostile intent determinations as a major source of civilian harm. The adoption of the ATTP

indicates progress has been made in these areas, and as written, the ATTP have the potential to advance learning from hostile intent incidents.²⁵⁶ The manner in which the military implements the ATTP and responds to their findings, however, will be the ultimate test of their effectiveness.

The ATTP describe a range of legal, moral, and operational reasons for civilian casualty mitigation. They state, “Protection of civilians is at the heart of the profession of arms. It is founded in law and in principles of humanity. In addition, protection of civilians supports strategic and operational objectives.”²⁵⁷ Much of the publication is devoted to describing ways to prevent civilian casualties, and it stresses the importance of the same tools of implementation as this report does—training, leadership, and engagement with the local population.²⁵⁸

The ATTP outline a formal approach to learning lessons about how to reduce civilian harm. They call on Army units to respond to specific civilian casualty incidents with one of three types of investigations that can promote learning. Commanders’ inquiries are expeditious, non-punitive processes designed “to determine the facts of the incident, and to identify lessons for the future.”²⁵⁹ More extensive investigations under Army Regulation 15-6 deal with “serious and credible [civilian casualty] reports and allegations” and can lead to findings of fault, modification of procedures, and/or compensation for victims.²⁶⁰ Criminal investigations are reserved for allegations of criminal conduct.²⁶¹ According to the ATTP, the Army should also take into account independent investigations by such outside organizations as the United Nations or host-country agencies.²⁶² These different levels of investigations can provide important information from which lessons for the future can be drawn.²⁶³

As it conducts its investigations, the military should make clear to its troops that such processes do not necessarily lead to punishment. Reflecting that point of view, the ATTP encourage the military to garner cooperation of troops involved in hostile intent incidents because they have first-hand knowledge of what transpired. The ATTP call on military leaders to “avoid creating an overly punitive environment where the focus is on finding someone to blame for the incident” because such an environment can lead to suppression of information

²⁵³ The study was described as “the first comprehensive examination of US efforts to reduce and mitigate the effects of noncombatant [civilian casualties] during military operations.” Sewall and Lewis, *Joint Civilian Casualty Study*, 1. See, e.g., CALL, *Civilian Casualty Handbook*; JCOA, *Reducing and Mitigating Civilian Casualties*. See also ISAF, *The ISAF Civilian Casualty Avoidance and Mitigation Framework*.
²⁵⁴ ATTP 3-37.31, 1-1 (“[Civilian casualty] mitigation is all measures to avoid or minimize [civilian casualties] and reduce the adverse impact of those that occur.”). The US military has also established mechanisms to learn and relay lessons in the field. During the Afghanistan and Iraq conflicts, for example, departing troops took steps to pass on their expertise to incoming ones. This process, known as “right seat/left seat” for its training rides or more formally as “Relief in Place/Transfer of Authority” (RIP/TOA), could continue to be used in future operations. According to Lt. Col. Matt Lewis, an aviation officer who served in Iraq, “For a while, the new person would watch the old person do their job. And the next week they switch so that the new person does the work and the old person makes sure things go smoothly. And then the old crew leaves. In that process, lessons learned are passed down.” Interview with Lt. Col. Matt Lewis, US Army, Cambridge, MA, April 10, 2012. This process can help improve the reliability of hostile intent determinations if it acquaints new troops with the local culture and combat environment. Outgoing troops, who have already made local contacts, can also serve as a bridge between new units and civilian leaders. The process is generally, however, “informal because you’re passing on what you feel is most important,” a Marine judge advocate told IHRC. Interview with US Marine judge advocate (name withheld), Washington, DC, April 12, 2012.

²⁵⁶ For two early views of the ATTP as written, see Greg McNeal, “Army Publishes New ‘Manual’ on Preventing Harm to Civilians,” *Forbes*, July 19, 2012, accessed January 10, 2016, <http://www.forbes.com/sites/gregorymcneal/2012/07/19/army-publishes-new-manual-on-preventing-harm-to-civilians/>; Jonathan Horowitz, “Avoiding Civilian Casualties: The U.S. Army Lays out its Guidelines,” *Open Society Foundations*, July 25, 2012, accessed January 10, 2016, <http://www.opensocietyfoundations.org/voices/avoiding-civilian-casualties-us-army-lays-out-its-guidelines>.
²⁵⁷ ATTP 3-37.31, 1-1. The ATTP later elaborate on the operational advantages, noting that civilian casualties can lead to “ill will” against US forces, questioning of US operations, and exploitation by enemy forces. Ibid., 1-5.
²⁵⁸ The ATTP explain, “Leadership and training are critical to reinforce desired Soldier attitudes toward [civilian casualties] and shape their actions.” Ibid., 1-9. They call on commanders, as trainers, to “prepare their units to mitigate [civilian casualties] with foresight and agility,” and recommend that training exercises include civilians as well as enemy combatants to avoid development of a “‘shoot first’ mentality.” Ibid., 1-7, 2-2. The ATTP emphasize the power of leadership to influence soldier attitudes, noting that “[civilian casualty] mitigation is most effective when leaders at all levels emphasize its importance at appropriate opportunities,” and that leaders should “emphasize that Army units should avoid causing [civilian casualties] and may have to exercise restraint.” Ibid., 1-8, 2-9. Finally, the ATTP recognize that engagement with the local population can reduce civilian casualties, and they encourage building relationships with local leaders, promoting “cultural respect,” and training on cultural customs and norms. Ibid., 1-11, 2-3. They urge troops to “take care to understand cultural norms and avoid the negative effects of disregarding them.” Ibid., 2-17.
²⁵⁹ Ibid., 2-19.
²⁶⁰ Ibid.
²⁶¹ Ibid., 2-20.
²⁶² Ibid., 2-19.
²⁶³ ISAF forces used an additional type of investigation in Afghanistan. The Joint Incident Assessment Team (JIAT) was “a successful nonpunitive tool to identify the facts surrounding high-profile incidents, to include [civilian casualties].” The JIAT was advantageous because it usually took only 48 hours to interview forces involved and prepare a report for the chain of command, but it was not as comprehensive as a Regulation 15-6 investigation. CALL, *Civilian Casualty Handbook*, 41, 51.

and interfere with learning.²⁶⁴ While the ATTP recognize the value of this approach, IHRC’s research suggests it has not always been followed. For example, Sgt. Devon McGinnis, who served in Afghanistan and Iraq, told IHRC that some troops feared repercussions from providing details to investigators.²⁶⁵ Whether well founded or not, such fears have the potential to interfere with the gathering of complete information about specific incidents. Capt. Bob Hodges, a US Army lawyer and veteran of Afghanistan and Iraq, told IHRC he tried to make the process non-threatening. “Once guys realize you’re there to protect them, they’ll be more honest with you,” he said.²⁶⁶ Lt. Col. Matt Hover, an Army judge advocate who served in both armed conflicts, said that investigators “got better as time went on. When [troops] realized the purpose of the investigation was not a witch hunt, but instead to learn lessons and avoid harming civilians in the future . . . there was more and more sharing across units.”²⁶⁷ While criminal prosecution should remain an option in serious cases, the military should promote information gathering on hostile intent incidents through its mechanisms for learning lessons.

The ATTP also encourage the Army to take a systematic look at both civilian casualties and “near misses.”²⁶⁸ They assert that “[c]ollection, analysis, and dissemination of [civilian casualty] data is vital.”²⁶⁹ The ATTP recommend establishment of a standardized database of incidents that is regularly updated and analyzed to identify patterns.²⁷⁰ This information can illuminate locations, units, or procedures prone to causing civilian casualties as well as effective methods of civilian protection.²⁷¹ Such a systematic examination of casualties can be a valuable tool for minimizing civilian deaths and injuries.

In creating a database on civilian harm, the military should take into account lessons learned from ISAF’s mitigation programs in Afghanistan. ISAF’s Civilian Casualty Tracking Cell (CCTC), established in 2008, was “the first large-scale civilian casualty data tracking mechanism undertaken by a warring party.”²⁷² The CCTC was replaced in 2011 by the Civilian Casualty Mitigation Team, which not only tracked casualties but also analyzed the data and recommended measures to minimize them.²⁷³ ISAF attributed much of its success in reducing civilian casualties to the CCMT.²⁷⁴ The Center for Civilians in Conflict (CIVIC) has noted some areas for improvement and stressed that a tracking mechanism should be in place before a conflict starts.²⁷⁵ ISAF’s efforts to develop similar frameworks for Afghanistan’s national security forces and NATO are important steps in the right direction.²⁷⁶

²⁶⁴ ATTP 3-37.31, 2-23.
²⁶⁵ McGinnis said, “People that do the investigations have often never been in the situation themselves. It’s discouraging because you’re being investigated by someone with no experience. They’re always making examples of people by giving them maximum punishment.” Telephone interview with Sgt. Devon McGinnis, US Army, April 3, 2012. According to CALL, “Soldiers often express concern that they get investigated even when they did everything properly.” CALL, *Civilian Casualty Handbook*, 13.
²⁶⁶ Interview with Capt. Bob Hodges, judge advocate, US Army, Washington, DC, April 13, 2012.
²⁶⁷ Telephone interview with Lt. Col. Matt Hover, judge advocate, US Army, April 5, 2012.
²⁶⁸ ATTP 3-37.31, 2-24 (“Lessons learned do not come solely from [civilian casualty] incidents, but also from occasions in which there was a high risk of [civilian casualties] but they were avoided. ‘Near misses’ can offer valuable lessons and illustrate best practices.”).
²⁶⁹ Ibid., 2-23.
²⁷⁰ Ibid., 2-15.
²⁷¹ Ibid., 2-16.
²⁷² Center for Civilians in Conflict (CIVIC), *Civilian Harm Tracking: Analysis of ISAF Efforts in Afghanistan* (2014), accessed January 10, 2016, 1, http://civiliansinconflict.org/uploads/files/publications/ISAF_Civilian_Harm_Tracking.pdf.
²⁷³ ISAF, *The ISAF Civilian Casualty Avoidance and Mitigation Framework*, 30-31.
²⁷⁴ Ibid., 62.
²⁷⁵ CIVIC, *Civilian Harm Tracking*, 21-22. The CIVIC report also says that a tracking mechanism should be bolstered by “sustained attention and assertion of value” and calls for future tracking to: address civilian harm, rather than just civilian casualties; “be backed by sincere attention to mitigating and reducing civilian harm, not solely collecting data”; and ensure data is standardized and “robust enough for deep analysis.” Ibid.
²⁷⁶ ISAF, *The ISAF Civilian Casualty Avoidance and Mitigation Framework*, 65.

While the ATTP address civilian casualty mitigation as a whole, they recognize that some incidents are related to determinations of hostile intent in particular. They explain that “[s]elf-defense engagements can be particularly prone to [civilian casualties],” and that hostile intent “can be more difficult to discern [than a hostile act], as this involves interpreting the behavior of a potential threat, when no hostile act has been committed.”²⁷⁷ Like IHRC’s interviewees, the ATTP list farmers’ nighttime digging and civilians’ possession of guns as two factors that can lead to misunderstandings about an individual’s intent.²⁷⁸ Discussing of the role of EOF procedures in identifying hostile intent, the ATTP say that EOF incidents “should be analyzed routinely to ensure timely capture of lessons learned.”²⁷⁹ In their guidelines for data collection, the ATTP recommend gathering information about whether hostile intent or EOF procedures were involved.²⁸⁰

This attention to the challenge of hostile intent determinations suggests the US military is developing a more in-depth understanding of the issue. Multiple veterans of Afghanistan and Iraq, who deployed between 2006 and 2010, told IHRC that in their experience, investigators had focused on whether the individual involved had an “honest belief” that he or she was encountering hostile intent.²⁸¹ “More often than not, the soldier gets the benefit of the doubt when determining whether he/she reasonably perceived a threat and acted proportionately in response,” said Army lawyer Lt. Col. Matt Hover.²⁸² While it may be appropriate not to prosecute someone who acted reasonably in self-defense, deference to troops’ determinations of hostile intent reportedly led to abbreviated investigations in some cases. A former UNAMA official criticized the extent of the deference. “[Hostile intent] seems like a very convenient excuse. It obviates the need for a lot of investigation,” he told IHRC.²⁸³ Probing the details of hostile intent determinations gives the military more information on civilian casualty patterns.²⁸⁴ Studying such patterns is crucial to understanding why troops have killed or injured civilians in hostile intent incidents and how the military can prevent those casualties in the future.

The Way Forward

Going forward, the US military should take three steps to guarantee it has a robust lessons learned process that will help minimize the civilian casualties that hostile intent incidents cause. First, as discussed above, the military should investigate and analyze its performance in hostile intent incidents. This report shows that there is much to glean from the conflicts in Afghanistan and Iraq, and the military should ensure it has adequately learned what it can about hostile intent determinations. The military likely has access to additional information that could supplement this report’s findings.²⁸⁵ It should also institute a mechanism that systematically tracks casualties attributable to hostile intent determinations in the future.²⁸⁶

²⁷⁷ ATTP 3-37.31, 2-11.
²⁷⁸ Ibid.
²⁷⁹ Ibid., 2-9 to 2-10.
²⁸⁰ Ibid., B-2, B-4 to B-5.
²⁸¹ Interview with Sgt. Graham Phillips, US Army, Cambridge, MA, February 24, 2012; Interview with US Army intelligence sergeant (name withheld), Cambridge, MA, March 6, 2012.
²⁸² Telephone interview with Lt. Col. Matt Hover, judge advocate, US Army, April 5, 2012.
²⁸³ Telephone interview with former UNAMA official (name withheld), February 17, 2012.
²⁸⁴ CALL’s *Afghanistan Civilian Casualty Prevention Handbook* emphasized the importance of probing civilian casualty incidents generally, noting that “units need to broaden these investigations beyond whether the rules of engagement were followed and try to capture additional information that will help commanders and units learn from [civilian casualty] incidents.” CALL, *Civilian Casualty Handbook*, 49.
²⁸⁵ ISAF’S 2014 civilian casualty mitigation study demonstrates the significance of including military data in a civilian casualty analysis. See generally ISAF, *The ISAF Civilian Casualty Avoidance and Mitigation Framework*. The ATTP note that investigations should look at internal military records as well as the testimony of troops and civilians who witnessed the event. ATTP 3-37.31, 2-20.
²⁸⁶ *The ISAF Civilian Casualty Avoidance and Mitigation Framework* notes that a “blind duplication” of the CCMT in other conflicts “should not be contemplated,” but it says that the principles underlying the CCMT will remain applicable. ISAF, *The ISAF Civilian Casualty Avoidance and Mitigation Framework*, 65.

It could build on the CCMT, but would disaggregate and analyze hostile intent incidents in particular. Such tracking could feed into the ATTP’s civilian casualty database, and it could be facilitated by the creation of a Department of Defense senior advisor on civilian harm mitigation within the Office of International Humanitarian Policy, in the Office of the Under Secretary of Defense for Policy.²⁸⁷

As part of the tracking process, the military should identify patterns in an effort to understand why civilians died in hostile intent incidents, and it should assess the successes and shortcomings of its rule of hostile intent, training, leadership, and engagement with locals. Collecting and analyzing the details of hostile intent incidents will allow the military to recognize dangerous trends in new conflict environments, which in turn can help reduce civilian casualties.

Second, the military should not only identify lessons but also act on them.²⁸⁸ At this point, the military should amend and clarify its rule of hostile intent as written and sharpen its training, leadership, and processes to promote engagement with the local population in order to reduce erroneous hostile intent determinations. With ongoing analysis based on casualty tracking, the military should be able to make further, real time adjustments to its rules and implementation tools during the course of future conflicts. By sharing its policies and practices with partner security forces, the US military could have an even greater impact on civilian protection.

Finally, the military should take all these steps in as transparent a fashion as possible. The ATTP acknowledges the value of transparency, recommending that investigators release “a summary of key lessons.”²⁸⁹ Some observers have criticized the lack of transparency about past investigations, however, noting that findings were released to neither the public nor the victims and their families.²⁹⁰ Transparency allows for better monitoring by internal and external experts, which can produce additional lessons as well as hold the military to account. Transparency also builds public confidence in the military’s intentions. This confidence can advance operational goals such as winning the support of the people living in a warzone and shoring up the backing of the population at home.

By prioritizing an examination of the rule of hostile intent and its implementation, the US military can do much to reduce civilian casualties and the humanitarian impact of future wars. It can ensure that its troops retain the right to self-defense and, at the same time, better protect civilians and minimize the deaths and injuries caused by erroneous determinations of hostile intent.

²⁸⁷ CIVIC has proposed a high-level, two-person Department of Defense team “responsible for addressing and planning for civilian harm in current or future operations.” The team’s mandate would include keeping statistics on civilian casualties and identifying lessons that can help reduce civilian harm in the future. Center for Civilians in Conflict, *Pentagon Advisors to Harmonize ‘Civilian’ Focus*. See also Sewall and Lewis, *Joint Civilian Casualty Study*, 14 (calling for the Office of the Secretary of Defense and the Joint Chiefs of Staff to “assign organizational responsibility for the issue of civilian casualties”).

²⁸⁸ A 2013 JCOA report urged that “[l]essons learned in the past decade should . . . be looked at with an eye toward the application in future conflicts, as well as their continued importance to current operations in Afghanistan and elsewhere.” JCOA, *Reducing and Mitigating Civilian Casualties*, 4.

²⁸⁹ ATTP 3-37.31, 2-23. See also CALL, *Civilian Casualty Handbook*, 44, 51 (noting the importance of sharing key findings with a broader audience, including victims, their families, and their communities).

²⁹⁰ USAID official Sloan Mann said, “When it was really bad, . . . [the military would] keep investigations to an inner circle and not broadcast to the public.” Interview with Sloan Mann, managing director, Development Transformations, and former USAID official, Washington, DC, April 13, 2012. An independent expert on civilian casualty tracking in Afghanistan expressed concern that civilians who reported casualties received minimal information in response. He told IHRC, “There isn’t enough communication about what [the military is] doing and specific findings. . . . What they should be doing is sharing with the people who complained. Very often complaints aren’t borne out, and there aren’t any findings about why that is the case.” The expert recommended “a more transparent, centralized process with public accountability of how complaints are dealt with and which ones are responded to—some overview mechanism and a way of challenging them.” Telephone interview with expert on civilian casualty research in Afghanistan (name withheld), February 17, 2012.

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TACKLING TOUGH CALLS: LESSONS FROM RECENT CONFLICTS ON HOSTILE INTENT AND CIVILIAN PROTECTION

Tackling Tough Calls examines the problem of determining “hostile intent,” which contributed to many US-caused civilian casualties in Afghanistan and Iraq from 2001 to 2014. Troops have the right to fire in self-defense if someone demonstrates hostile intent, but identifying a “threat of imminent use of force” presents significant challenges. This report shows how the military could do more to improve civilian protection in this area without jeopardizing its troops’ lives.

Tackling Tough Calls finds that the military should pay greater attention to the issue of hostile intent before, during, and after combat missions. It bases its recommendations on about 50 interviews with US military personnel, veterans of Afghanistan and Iraq, and other experts as well as extensive research in open sources.

First, the military should clarify the parameters of hostile intent and narrow the definition of the term “imminent.” Building on tactical directives from past conflicts, it should also develop detailed guidelines for interpreting the rule.

Second, the military should maximize the use of existing tools to promote implementation of these guidelines. It should continue to increase the realism of its training by addressing hostile intent more explicitly. It should ensure that leaders on the ground provide troops with clear guidance on how to interpret hostile intent in specific situations. It should enhance troops’ understanding of the context in which they operate through cultural training and relationship building with the local population.

Finally, the military should institute permanent mechanisms to analyze data on civilian casualties, and hostile intent incidents in particular. The lessons learned in all three spheres should inform both future US operations and training of foreign security forces.