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. (JEWEL SAMAD/AFP/Getty Images).

Design
Tutaev Design

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March 2016
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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. 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.

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.” 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.
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 reform and reflection. 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. 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 deaths 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 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. 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. It should 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.

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.” 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.” 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.

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1 ISAF, The ISAF Civilian Casualty Avoidance and Mitigation Framework, 34.
4 ISAF, The ISAF Civilian Casualty Avoidance and Mitigation Framework, 35-40 (analyzing civilian casualty data by incident type).
7 CJCS 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 intro-
duction 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 outlines 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. 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.

13 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 headquarters 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 mortarmen. 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.” 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 death.” Second, the threat must be of an ascertainable nature—i.e., it cannot be one of force protection or any other use of force likely positively to affect the United States, US forces, or other designated persons or property. 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 claimed thousands of civilian deaths and injuries, 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. Three types of operations—escalation of force procedures, especially involving checkpoints and convoys; search and seizure operations, including night raids; and air strikes—are 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 frame, but search and seizure operations remained a common occurrence.

Whatever the casualty numbers one prefers, air operations, 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’s one of the biggest issues we’re confronting by the US military.” 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.” Misidentification, it explained, often stemmed from incorrect perceptions of hostile intent.

The belief that civilians displayed hostile intent was reportedly used as a “common justification” for civilian casualties. 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. 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.”

11 For the definition of SROE, see CJCSI 3121.01B, Enclosure A, para. 1, reproduced in the Operational Law Handbook 2012, 59. For the definition of hostile intent, see ibid., Enclosure A, para. 3(b), 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(a), 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 6, 2010, as amended through November 15, 2015), 107 [hereinafter Department of Defense Dictionary].

12 Annual 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.” Misidentification, it explained, often stemmed from incorrect perceptions of hostile intent.

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.


23 Ibid. (explaining that the related right to self-defense was “certainly a common justification for casualties.”)

24 See Telephone interview with expert on civilian casualty research in Afghanistan (name withheld), February 17, 2012.

25 See Telephone interview with expert on civilian casualty research in Afghanistan (name withheld), February 17, 2012.


27 Ibid., 8.
Making accurate determinations of hostile intent can be difficult for troops. Some of the military personnel interviewed for the International Human Rights Clinic discussed the heightened challenges 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 procedures 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 nations in the future.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 may be lethal force in self-defense. EOF situations frequently arise at checkpoints and roadblocks, where unknown individuals, who could be civilians or combatants, encounter a possible threat. Making accurate determinations of hostile intent can be difficult for troops. Some of the procedures as a “threat assessment process” to evaluate whether approaching individuals are demonstrating hostile intent.30 Troops are instructed to follow “5 Ss” if they encounter a possible threat:

1. Shoot, 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 revaluation of threat;
5. Shoot to disable or eliminate threat.31

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.”32 Army Capt. Michael Harrison, who deployed twice to Afghanistan, said it was “very difficult to assess” the intent of a car speeding towards you.33 “Maybe it can’t read your warning signs. You can’t tell. It’s very hard to differentiate,” he said.34

CIVILIAN CASUALTIES AND THE RULE OF HOSTILE INTENT

IHRC that “[i]f a car continues to speed, the interpretation is that they’ve seen my shot, they probably know it was there, and they are driving with the window down or the radio on, distracted while using a cell phone, or unable to react to or heed visual warnings because they were dining 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), Washington, DC, April 13, 2012 (faulty brakes); Telephone interview with senior US defense official (name withheld), Arlington, VA, April 13, 2012 (disabled by cell phone); Telephone interview with Lt. Col. Matt Hover, judge advocate, US Army, Washington, DC, April 5, 2012 (no glasses); Telephone interview with Capt. Michael Harrison, US Army, Cambridge, MA, April 4, 2012. See also Interview with US Army officer #4 (name withheld), Cambridge, MA, April 4, 2012; Interview with Spc. Jacob Sells, US Army, March 20, 2012 (disabled); Interview with US Army officer #4 (name withheld), Washington, DC, April 13, 2012 (distracted by cell phone); Interview with US Army judge advocate #1 (name withheld), April 2, 2012 (unable to hear); Interview with US Army officer #1 (name withheld), Cambridge, MA, March 7, 2012; Telephone interview with Capt. Bob Hodges, judge advocate, US Army, Washington, DC, April 13, 2012 (distracted by cell phone); Interview with Capt. 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. Graham Phillips, 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; Telephone interview with Erlingur Erlingsson, former political officer, UNAMA, February 17, 2012. See also CALL, Civilian Casualty Handbook, 26; Telephone interview with Erlingur Erlingsson, former political officer, UNAMA, February 17, 2012.


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 react to or heed visual warnings because they were dining 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 officer (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 (disabled); Interview with US Army officer #3 (name withheld), Arlington, VA, April 13, 2012 (disabled by cell phone); Telephone interview with Lt. Col. Matt Hover, judge advocate, US Army, April 5, 2012 (no glasses); Telephone interview with Lt. Col. Matt Hover, judge advocate, US Army, April 5, 2012 (no glasses); Telephone interview with Lt. Col. Matt Hover, judge advocate, US Army, April 5, 2012 (no glasses); Telephone interview with Lt. Col. Matt Hover, judge advocate, US Army, April 5, 2012 (no glasses); Telephone interview with Lt. Col. Matt Hover, judge advocate, US Army, April 5, 2012 (no glasses); Telephone interview with Lt. Col. Matt Hover, judge advocate, US Army, April 5, 2012 (no glasses); Telephone interview with Lt. Col. Matt Hover, judge advocate, US Army, April 5, 2012 (no glasses); Telephone interview with Lt. Col. Matt Hover, judge advocate, US Army, April 5, 2012 (no glasses); Telephone interview with Lt. Col. Matt Hover, judge advocate, US Army, April 5, 2012 (no glasses); Telephone interview with Lt. Col. Matt Hover, judge advocate, US Army, April 5, 2012 (no glasses); Telephone interview with Lt. Col. Matt Hover, judge advocate, US Army, April 5, 2012 (no glasses); Telephone interview with Lt. Col. Matt Hover, judge advocate, US Army, April 5, 2012 (no glasses); Telephone interview with Lt. Col. Matt Hover, judge advocate, US Army, April 5, 2012 (no glasses); Telephone interview with Lt. Col. Matt Hover, judge advocate, US Army, April 5, 2012 (no glasses); Telephone interview with Lt. Col. Matt Hover, judge advocate, US Army, April 5, 2012 (no glasses).
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 military forces of subjective criteria to assess a situation as an imminent threat and justify the use of lethal force.48 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 deaths, although the numbers are not disaggregated in the UNAMA report.49

43 Ibid.
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: 968); 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: 415); 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).
47 Ibid., 36.
50 UNAMA, Annual Report 2014, 78.

CIVILIAN CASUALTIES AND THE RULE OF HOSTILE INTENT

Civilian Deaths from Pro-Government/Force: UNAMA Data*

<table>
<thead>
<tr>
<th>Year</th>
<th>Escalation of Force Incidents</th>
<th>Searches/ Night Raids</th>
<th>Air Strikes</th>
<th>Total Civilian Deaths</th>
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</thead>
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<td>2013</td>
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<td>205</td>
<td>332</td>
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<td>7%</td>
<td>11.3%</td>
<td>51.6%</td>
<td>100%</td>
</tr>
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</table>

* 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

53 Ibid., 2.
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 2008, but predictably, how would you react?” 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.” A former UNAMA official said that “night raids are without a doubt a huge problem” for protecting civilians.65

Two US Department of Defense press releases from 2010 illustrate the link between civilian causalities 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.66 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.67 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.”68

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.”69 This incident shows the danger to bystanders once troops start firing in a hostile intent situation. As its EOD 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.70 The report quoted “one recent night raid” in which “five civilians were killed.” 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.’”71

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.”72 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.”73 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.74

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.75 They can be called in as close air support by ground troops who are responding to a threat, or “ad hoc” cases when a soldier, sometimes in the air, is trying to figure out there’s hostile intent from a thousand feet.76 A US Army lawyer echoed that concern. He said that while troops on the ground might be able to recognize that a civilian is 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

65 Interview with US Army officer #3 (name withheld), Arlington, VA, April 13, 2012.
67 Telephone interview with former UNAMA official (name withheld), February 17, 2012.
68 General McChrystal’s tactical directive on night raids notes: “If 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 conditioned 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 injury, Afghan civilians deeply violation and disdronube, making winning their support that much more difficult.” McChrystal Night Raids Tactical Directive, 2.
70 Ibid.
71 Ibid.
73 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 and seizure operations and civilian casualties from search operations is difficult to obtain due to the multiple security bodies conducting independent operations, as well as military classification of such information.” UNAMA, Annual Report 2012, 36.
75 UNAMA, Annual Report 2010, 32.
81 Telephone interview with former UNAMA official (name withheld), February 17, 2012.
planting an improvised explosive device (IED). Distance increases the chance of erroneous hostile intent determinations and the likelihood opportunity strikes could kill or injure civilians.14

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.15 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.16

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 the decrease in civilian casualties.” 17 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.” 18 It continued: “This is of particular relevance given the contextualized hostile intent identification is based on perceived ‘hostile intent’ rather than the identification of a specific individual.”19

13 Telephone interview with US Army Judge advocate #1 [name withheld], April 2, 2012. See also JDCA, Reducing and Mitigating Civilian Casualties. 14 ICD [including air strike 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].
15 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 hazards of “friendly fire” at times mean that forces resort to air strikes 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.
17 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 air strikes).
18 UNAMA, Annual Report 2014, 93.
19 Ibid.

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 issue 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.”20 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.”21 (While the military is reportedly revising the SROE, the 2005 rules will govern conduct until they are replaced.)22 By contrast, a hostile act involves an actual “attack or other use of force.”23 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.24 (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 use of force must be necessary and proportional.25 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

20 CJCSI 3121.01B, Appendix A, para. 3(c), reproduced in the Operational Law Handbook 2015, 96. According to CALU, “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.’”
21 CJCSI 3121.01B, Appendix 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 U.S. property.”
22 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.
23 CJCSI 3121.01B, Appendix A, art. 3(e), reproduced in the Operational Law Handbook 2015, 97. The rule of self-defense “is always relative to 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., Appendix A, para. 3(e), reproduced in the Operational Law Handbook 2015, 96.
24 Ibid., Appendix A, art. 4(f), 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. Devin 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.”86

The 2000 SRUF, specifically designed for counter-drug operations within the United States, resemble the 2005 SROE in focusing on imminent use of force,95 but they include two examples of imminent threats.96 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.97

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.”98 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.99 While the 2005 SRUF do not list the specific examples articulated in the 2000 SRUF, they reaffirm the test of capability and demonstrated intention.100 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.”101 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.”102 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.”103

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

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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.
91 Interview with US Marine judge advocate (name withheld), Washington, DC, April 12, 2012.
94 For the definition of standing rules on the use of force, see Department of Defense Dictionary, 209.
95 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 3101.02: 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)(a) (hereinafter CJCSI 3101.02). Like the 2005 SROE, the 2000 SRUF state that “[i]n 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.
96 Ibid., Enclosure A, para. 3(a)(6)(b)(1).
97 Ibid., Enclosure A, para. 3(a)(6)(c)(2).
98 Ibid., CJCSI 3121.01B, The 2009 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 U.S 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).
99 Ibid., Enclosure L, para. 4(b). Unlike the 2000 SRUF, the 2005 SRUF use the term hostile intent, which they define as “a determination of imminent threat of the use of force.” Ibid., Enclosure L, para. 4(b).
100 Ibid., Enclosure L, para. 4(b).
102 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.” 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.

**Overbread 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.” Rather than adopt the common meaning of the term imminent, however, the 2005 SROE specify that it can go beyond “immediate or instantaneous.” 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.” 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. Uiring 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]mminent does not necessarily mean immediate or instantaneous.” 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 “muddied 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 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.” The US SROE’s broad definition of imminent also contrasts with that of many of its allies.115 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.116 In this context, NATO’s ROE define imminent as “manifest, instant and overwhelming.”117 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.118 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.”119 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.”

The breadth of the SROE’s definition of imminent increases the threat to civilians who have contact with US forces.120 It places more situations within the scope of an imminent threat, and thus more individuals are vulnerable to being treated as lawful targets.121 Major Montalvo suggests that the United States return to the pre-2005 understanding of imminent in order to encourage restraint and protect civilians.122 Multiple experts interviewed by IHRC recommended that the US military adopt NATO’s definition.123 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,124 have a proven ability to advance civilian protection, and although they should not be seen as a substitute

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109 See also Operational Law Handbook 2015, 84.
110 Telephone interview with US Army judge advocate #1 (name withheld), April 2, 2012.
111 CALL, *Civilian Casualty Prevention* (2010), 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 determinations” due to a “false sense of familiarity with the local population’s culture and enemy techniques, tactics, and procedures.” Ibid.
112 Ibid. 33.
116 Montalvo writes, “[A] broad application of hostile intent and imminence gives a seniorcommander greater authority to engage perceived threats, which increases the risk of civilian casualties.” Montalvo, “When Did Imminent Stop Meaning Immediacy?” 32. In addition, an expanded definition of imminence makes it harder for civilians to predict when action could cause soldiers to believe they are a threat and to respond with lethal force. Merriam, “Natural Law and Self-Defense,” 82. Montalvo, “When Did Imminent Stop Meaning Immediacy?” 32.
117 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.
for improving the SOE’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 Afghan tactical 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.134 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.”135 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 McKiernan wrote that “minimizing civilian casualties is of paramount importance.”136 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.”137 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.”138 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.”139 Allen called for “great discipline and tactical patience” and “even more judicious application of force.”140 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.”141 To do so, commanders should look to “techniques and procedures and, most importantly, the training of forces to minimize the need to resort to deadly force.”142 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.143

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.”144 According to UNAMA, by aerial operations went down significantly—from 552 to 359—between 2008 and 2009.145 UNAMA wrote that McChrystal’s tactical directive appeared to have contributed to this decline.146 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 communities to situations of self-defense when no other options are available.147 In 2012, civilian deaths and injuries from air strikes dropped 42 percent.148

McChrystal and Allen both issued directives specifically on night raids, in March 2010 and December 2011, respectively.149 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.150 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.151 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.152

The Afghan 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
ones discussed above applied only to the conflict in Afghanistan. Despite their success in decreasing civilian casualties, they will have no bearing on EOD 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 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. 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 classifying 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 analyze the same conduct differently depending on whether they were in Afghanistan or Iraq.148 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.”149 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.150 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.”151 For example, Phillips told IHRC that in many parts of Iraq it was commonplace to see local people entering 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.”152

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.153 The individuals IHRC interviewed attested to the value of each of these tools.154 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.155 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.”156 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.157 For example, Army Lt. Col. Matt Lewis, US Army, Cambridge, MA, April 10, 2013 (“I mattered within Iraq depending on where you were. Your calculus had to be different.”).158

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Training, leadership, and engagement with the local population, however, can help troops make more accurate judgments whatever the context.160
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, “A mistake you can make . . . is how the enemy conduct themselves.”163 In some ways, experience makes hostile intent determinations more reliable because as units “become more aware of terrain and the environment . . . [their] 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.164 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, “[If] you take fire every day . . . what you consider suspicious is broader. That weighs into your context and what is hostile intent.”165

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.”166 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.”167 Echoing his sentiments, Army Capt. Michael Harrison, who served in Afghanistan, said that troops remember and learn from the mistakes they make in training.168

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 command 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.”169 The 2010 Joint Civilian Casualty Study similarly called for training on “what constitutes hostile intent.”170 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 EOIf situations “are the areas where you’re potentially going to have doubt that might lead to something.”171 In such situations, according to Brig. Gen. Richard Gross, training can help “bring the irrational [fear] down without bringing awareness down. You want [troops] wide awake and watching, but you don’t want them so hyper and geared up.”172

Pre-deployment training teaches troops rules and gives them practice applying them.173 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.174 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.175 The former explains, “Vignettes put the rules of force into context. Rules can be memorized, but without context, those rules have little meaning or value.”176 It emphasizes that soldiers must understand and be able to apply key concepts, including hostile intent, in “a dynamic, confusing, and dangerous environment.”177 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 situations 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.178 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.179 The simulations force troops to react to challenging situations, including ones involving hostile intent determinations.180

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

163 Telephone interview with US Army judge advocate #1 (name withheld), Arlington, VA, April 13, 2012.
164 Telephone interview with US Marine battalion judge advocate (name withheld), Arlington, VA, April 13, 2012.
166 Interview with US Marine regiment judge advocate (name withheld), Arlington, VA, April 13, 2012.
167 Telephone interview with US Army judge advocate #1 (name withheld), Arlington, VA, April 13, 2012.
168 Interview with Captain, Regan Turner, US Marine Corps, Cambridge, MA, March 29, 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.
172 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 29, 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.
173 Telephone interview with Capt. Robert Hodges, judge advocate, US Army, April 13, 2012. See also Interview with Capt. Regan Turner, US Marine Corps, Cambridge, MA, March 29, 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.
177 Ibid.
178 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.
181 Interview with Capt. Regan Turner, US Marine Corps, Cambridge, MA, March 28, 2012 (they’re constantly being reminded that they need to use lethal force 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.” Pechora Tactical Directive, 2.
182 Sewell and Lewis, Joint Civilian Casualty Study. Troops are trained and whether additional EOD had been taken before choosing to use deadly force. Telephone interview with Lt. Col. Matt Hover, judge advocate, US Army, April 5, 2012.
183 Interview with US Marine regiment judge advocate (name withheld), Arlington, VA, April 13, 2012.
adequately prepare them for the complexities of dealing with the challenge of avoiding and mitigating civilian casualties . . . in Afghanistan.”179

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.180 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 of other-enemy review delving into the concept specifically.”181 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.182 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.”183

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.184 “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.”185 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.186 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.”187 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.”188

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.189 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 and do as great a job as they could,” he told IHRC.190 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.”191 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.”192

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.”193

JCOA similarly recommended the military “[c]ondify [civilian] casualty training best practices for operations beyond Afghanistan.”194

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.195 A military

179 CALL, Civilian Casualty Handbook, 11.
181 Ibid.
182 Ibid.
184 CALL, Civilian Casualty Handbook, 12.
185 Ibid.
187 Ibid.
188 Ibid.
189 Ibid.
192 Ibid.
195 Ibid.
196 Ibid.
lawyer who served in Afghanistan, said troops generally respond better to their unit’s leader discussing issues in small groups than to judges advocating doctrines in a gym.149 Leaders not only relay information but also interpret it for their subordinates.150 A tactical directive, for example, “cannot prescribe the appropriate use of force for every situation that a complex battlefield will produce”1 so leaders in the field have to decide how to apply it. 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.”151

Because of their roles as conduits and interpreters of ROE, leaders are key to the understanding and application of the rule of hostile intent.152 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—squads leaders, platoon leaders, company commanders, battalion commanders, [and] brigade commanders.”153 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.”154 Lt. Col. Matthew 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.”155

Leaders can also influence the implementation of the rule of hostile intent by urging restraint in hostile intent determinations.156 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.”157 An infantry officer who did two tours in Iraq told IHRC, “I tried to tell my soldiers you have to be willing to accept a little bit of risk and trust your judgment.”158 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.”159

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.160 A senior defense official who worked in Afghanistan, said, “Commanders’ knowledge of the local situation, their experience, is key to making decisions in highly ambiguous situations.”161 Second, field leaders generally have the respect of their troops.162 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.”163

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.164 According to Sergeant McGinnis, troops in his unit routinely reviewed hostile intent and EOF procedures during such briefings.165 An infantry officer told IHRC, “We didn’t leave [for an operation] without briefing my soldiers,” and “if there was a reason to modify their own perception of hostile intent, that was always included.”166 Outside of formal briefings, leaders have often served as a resource for troops questions about the ambiguities of the ROEs.167 Troops typically start with their squad leaders, who, if they need support, will move the questions up the chain of command.168 Leaders are also responsible for “knowing[ing] their team,” which includes

149 Telephone interview with US Army judge advocate #2 (name withheld), March 26, 2012. See also Montalvo, “When Did Inherent Stop Meaning ‘Immediate’?” 33 (“It is also important to realize that ROE philosophy is not derived from ROE classes, but from constant interaction between the commander and his subordinate commanders.”). Interview with Capt. Michael Harrison, US Army, Cambridge, MA, April 4, 2012.
151 Telephone interview with McClymonds, US Army, April 5, 2012. McClymonds added that General McChrystal apportioned the role of leaders, stating, “I expect leaders at all levels to scrutinize and limit the use of force like close air support against civilians. If you are going in thinking civilians are hostile, you can’t err on the side of caution. You have to err on the side of civilian casualties.”
153 Telephone interview with US Army officer #1 (name withheld), Cambridge, MA, March 28, 2012 (“I tell them down to command leadership how and why you understand the threat environment.”). In his 2010 tactical directive, General Petraeus emphasized that leaders “appraise, formulate, and disseminate guidance for their subordinate leaders.”
154 Telephone interview with Bob Hodges, judge advocate, US Army, April 1, 2012. Telephone interview with US Army officer #2 (name withheld), April 12, 2012 (“We didn’t leave [for an operation] without briefing my soldiers. It was 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.”). Interview with US Marine battalion judge advocate (name withheld), Arlington, VA, April 13, 2012.
155 See, e.g., Interview with US Army officer #4 (name withheld), Cambridge, MA, March 7, 2012 (“If there were changes, they would be communicated because they were read 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 #3 (name withheld), April 12, 2012 (“We didn’t leave [for an operation] without briefing my soldiers. It was 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.”). Interview with US Marine battalion judge advocate (name withheld), Arlington, VA, April 13, 2012.
156 Telephone interview with Sgt. Devon McGinnis, US Army, April 3, 2012. See also Telephone interview with Spc. Jacob Selts, US Army, March 20, 2012 (Selts 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.”)
157 Telephone interview with Capt. 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.
158 Telephone interview with US Army officer #2 (name withheld), April 12, 2012.
159 Telephone interview with US Army officer #2 (name withheld), April 12, 2012.
160 Telephone interview with US Army officer #2 (name withheld), April 12, 2012.
161 Telephone interview with Spc. Jacob Selts, US Army, March 20, 2012 (Selts 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.”)
monitoring their troops’ state of mind.225 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 “personally 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 EOD procedures and explaining that “[t]he way we’re doing this may seem a little bit strange but it’s for your protection.”219 By contrast, a Marine commander in Kandahar who, by contrast, made it clear to his troops that “they weren’t going to do counterinsurgency actions, leaders can help save military and civilian lives.217 Engagement can help ensure that ordinary actions are not mistaken as hostile.223

**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.224**

**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 “[f]orces civilian casualties result from a misunderstanding or ignorance of local customs and behaviors.”220 Engagement with the local population requires developing an understanding of the culture of the people in the local area. It also involves building relationships with people themselves. Such engagement can help ensure that ordinary actions are not mistaken as hostile.225

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 to understand the culture of the people in the local area and wouldn’t talk to them. As weeks went by more feedback or hits from the local population and by February 2012, ISAF called 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 civilians. Interview with Brig. Gen. Richard Gross, Legal Counsel, Office of the Judge Advocate General, Staff Judge Advocate for the Central Command, US Navy, Arlington, VA, April 13, 2012.

A US Army judge advocate observed, “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 was in black and white rules, and it’s just not black and white.” He added that “the man demonstrated hostile intent. Interview with Capt. Bob Hodges, judge advocate, US Army, Washington, DC, April 13, 2012.

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 rifle.”230 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, “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.”230

**Another factor that complicated hostile intent determinations was the prevalence of guns in Afghanistan and Iraq.234 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 2004 to 2005. “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.”230**
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.” 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,” Shaw said of such incidents. “It’s humbling how it could go either way.”

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 in Iraq in 2007 and 2009. 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 who do what the traffic patterns are, how do people act, the fact that every little kid has an AK-47 toy,” he explained. 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.” While on patrol in Iraq, he saw a child carry a box of trash to the middle of a road, “doing exactly what the training in training would consider IED planting.” 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.”

The military should also encourage troops on the ground to interact and develop relationships with the local population. 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. While other military personnel echoed Sells’s observation, Sloan Mann, who worked as a US Agency for International Development (USAID) official in Afghanistan and Iraq said, “Something I saw in both theaters was that in some sense soldiers don’t see a need to interact with the local population.” 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 efforts to engage locals and expand relationships. 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.”

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 realities of its pre-deployment training, which presumably included a more accurate portrayal of the local culture. 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.” 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.

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236 Telephone interview with Blaneets Erlingsson, former political officer, UNAMA, February 17, 2012.
238 Ibid.
239 Telephone interview with Sloan Mann, managing director, Development Transformations, and former USAID official, Washington, DC, April 13, 2012.
247 Ibid.
250 Ibid. Due to his squad leader’s conduct, Shaw described this incident as “one of [his] proudest moments” as a commander in Iraq. “This, to me, indicated soldiers ‘got it’ and did things because they had to — not because they could,” Emery told Maj. Rob Shaw, US Army, to Bonnie Doherty, IHRC, July 25, 2014.
261 Ibid.
262 Ibid.
263 Ibid. 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”).
264 Ibid.
269 Telephone interview with Spc. Jacob Sells, US Army, April 4, 2012 (“Tenant and experience and knowing the places you live…[getting out of the vehicles are] very important…If you live in the area, truly live there, fully committing 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 (name withheld), April 2, 2012, Telephone interview with US Marine judge advocate (name withheld), Arlington, VA, April 13, 2012.
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, criticizing 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 investigations, 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 public debate has focused on ways to prevent civilian casualties, and it stresses the importance of the same tools of implementing 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 conflict types that can generate investigations, track and analyze casualties to identify trends, and pay specific 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. The manner in which the military implements the ATTP and responds to their findings, however, will be the ultimate test of their effectiveness.

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As it conducts its investigations, the military should make sure 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 that is necessary to prevent future incidents.


254 ATTP 3-37.31, 1-1. The ATTP later elaborate on the operational advantages, noting that civilian casualties can lead to “RIG” against US forces, questioning of US operations, and exploitation by enemy forces. Ibid., 1-5.

255 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” and shape their actions. Ibid., 2-2. The ATTP emphasize the power of leadership to influence soldier attitudes, noting “[t]he critical role of leadership in shaping the attitudes of Soldiers is illustrated.” Ibid., 1-11. They urge leaders “to take care to understand cultural norms and to avoid the negative effects of disregarding them.” Ibid., 2-17.

256 Ibid., 2-19.

257 Ibid., 2-20.

258 Ibid., 2-19.

259 The ATTP described 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. While the ATTP value the recognition 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. 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 that this was the case when he was involved in cases.

The ATTP also encourage the Army to take a systematic look at both civilian casualties and “near misses.” They assert that “[c]ollection, analysis, and dissemination of [civilian casualty] data is vital.” The ATTP recommend establishment of a standardized database of incidents that is regularly updated and analyzed to identify patterns. This information can illuminate locations, units, or procedures prone to causing civilian casualties as well as effective methods of civilian protection. 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.” 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. ISAF attributed much of its success in reducing civilian casualties to the CCMT. 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 begins.

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 learn from hostile intent incidents. The military likely has access to additional information about hostile intent determinations. The military should ensure it has adequately learned what it can about civilian causalities in the future. 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 civilian causalities in the future. The military likely has access to additional information that could supplement this report’s findings. It should also institute a mechanism that systematically tracks casualties attributable to hostile intent determinations in the future.
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.288

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 short-comings 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.289 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.”290 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.291 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 OVC 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 Sewald and Lewis, Joint Civilian Casualty Study, 14 (asking 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 (lodging 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 born 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.
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.