

*Open Society Foundations
Regional Policy Initiative on Afghanistan and Pakistan*

The Cost of Kill/Capture: Impact of the Night Raid Surge on Afghan Civilians



AP Photo/Wally Santana

Open Society Foundations and The Liaison Office

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Executive Summary

Nighttime kill and capture operations (“night raids”) by international military have been one of the most controversial tactics in Afghanistan. They are as valued by the international military as they are reviled by Afghan communities. Night raids have been associated with the death, injury, and detention of civilians, and have sparked enormous backlash among Afghan communities. The Afghan government and the Afghan public have repeatedly called for an end to night raids. International military say they have addressed many of the past concerns with night raids, including improved intelligence and conduct. They argue that night raids are a way to reduce civilian casualties and are an essential part of their military strategy.

The Open Society Foundations and The Liaison Office published an in depth study of night raids in February 2010.¹ Since that time, some night raids practices have improved, but the overall number of night raids has multiplied, bringing this divisive practice into more Afghan homes.² This policy paper will summarize the impact of these changes from both a human rights and a policy perspective.

Increased night raids spark backlash

The number of night raids has skyrocketed: publicly available statistics suggest a five-fold increase between February 2009 and December 2010.³ International military conducted, on average, 19 night raids per night—a total of 1700 night raids—in the three-month period from roughly December 2010 to February 2011, according to the NATO-led International Security Assistance Force (ISAF).⁴ ISAF has not released more up-to-date figures; however, interviews conducted for this report suggest a continuing trend of large numbers of night raids, possibly at even higher rates. In April 2011, a senior U.S. military advisor told the Open Society Foundations that as many as 40 raids might take place on a given night across Afghanistan.⁵

International military officials argue that the increase in night raids has been their most successful strategy in the last year, although they have offered no evidence to support these claims. They argue that absent the ability to continue night raids, insurgent attacks would increase significantly. However, these touted gains have come at a high cost. The escalation in raids has taken the battlefield more directly into Afghan homes, sparking tremendous backlash among the Afghan population. The Afghan government calls the raids counter-productive to reconciliation efforts with insurgent groups, and a threat to Afghan sovereignty, given the limited Afghan control of night raids. Complaints over night raids have marred Afghan relations with international partners, particularly the

United States, and have complicated long-term strategic partnership discussions.⁶

Impact of the tactical directives and other policy reforms

ISAF has repeatedly rejected demands by the Afghan government and public to reduce or cease night raids altogether, and instead has focused on addressing some of the most common complaints about night raids practices. ISAF has issued two night raids tactical directives since the beginning of 2010, as well as other operational guidance. This guidance has resulted in significant improvements including reduced risk of civilian casualties, greater accuracy in selecting targets, reduced property damage, increased use of Afghan National Security Forces (ANSF), and more respectful treatment of women.

However, many of these improvements have been undermined or overshadowed by the surge in night raids. Although intelligence improvements have reduced mistaken night raids on civilian homes, the increased number and scope of night raids put many more civilians at risk than past intelligence flaws ever did. Many more activities may lead individuals to be detained in night raids, including the provision of food or shelter (under duress or not). In many cases, non-combatants appear to be subjected to night raids due to their proximity to insurgent activities, or incidental information about insurgent groups, rather than due to their actual conduct or status. As a result, far more non-combatants are detained in a year. Though the majority of non-combatants are soon released, the experience may result in lasting physical, financial, and emotional harm. International military typically release individuals by first handing them over to Afghan custody, where they can suffer poor conditions or even abuse rising to the level of torture.

In addition, although civilian casualties have been reduced significantly, they still occur, many as a result of mistaken interpretations of “hostile intent.” Further, the increase in the number of raids has not been matched by strengthened accountability or redress mechanisms, such that when wrongful or mistaken detention or civilian casualties do occur, there is often no meaningful response by ISAF. The lack of transparency or strong accountability mechanisms have reinforced Afghan perceptions that international military use night raids to kill, harass, and intimidate civilians with impunity.

Finally, ISAF has made significant efforts to try to satisfy 1) Afghan government complaints about not having control over night raids, and 2) Afghan community requests that international forces take greater account of cultural sensitivities about women’s privacy. However, these reforms have done little to alter Afghan opposition to night raids. In some cases, this is because the measures were under-implemented or did not go far enough. The larger failing, though, has been that these reforms are an inadequate substitute for Afghans’ demands that night raids be significantly reduced, if not halted altogether: demands that are regularly echoed by the Afghan President, Hamid Karzai.

Are night raids worth it?

Without more transparency or supporting evidence, it is difficult to balance the purported benefits of night raids with their very real and obvious costs. What is clear, however, is

that tactical and operational tweaks to night raids practices are not enough to counter dissatisfaction with the practice as a whole. Although significant improvements have been made in the conduct of night raids, public recognition of these improvements has been overshadowed by mounting anger over the higher number of raids. Given the extreme opposition by both the Afghan public and the Afghan administration, the current pace of night raids is not sustainable. While militant extremist groups pose an enormous threat to human rights and security in Afghanistan, the human, political, and strategic costs illustrated by this policy review raise questions about whether over-reliance on night raids is the most effective long-term strategy for effectively countering militancy.

Recommendations to ISAF and U.S. Forces

1. Cease raids that do not discriminate between combatants and civilians; ensure that night raids, which are military operations, are only used against combatants or civilians directly participating in hostilities.
2. Ensure that night operations—in particular mass detention operations at night—target individuals based on their presumed status as a combatant, rather than based on their age, gender, nationality, ethnicity, tribal affiliation, or the geographic area in which they live.
3. Ensure night raids and other night-time military operations are not used as substitutes for criminal proceedings or other methods of intelligence gathering. Ensure that operations that aim to detain non-combatants adhere to law enforcement standards governing the use of force.
4. Implement tactical directive guidance to consider alternative methods of detention wherever possible. Detentions that adhere to regular law enforcement practices are preferred in areas where there is strong government control, or other areas in which Afghan partners have strong capacity to conduct more regular law enforcement detentions.
5. Continue to enforce existing guidance on night raids that have resulted in reduced civilian casualties and improved conduct.
6. Improve outreach and consultation with local communities to the extent possible, before and after night raids.
7. Improve transparency over the criteria for when night raids may be used (as opposed to other means of detention) and over the conduct of night raids themselves. Reinforce accountability measures, including ways for families to find out information about those detained, and the status of investigations into allegations of civilian casualties.
8. Improve compensation standards and procedures with regard to night raids, including compensation for wrongful detention.
9. Work with ANSF to improve their conduct and accountability, in particular with Afghan Special Forces, whose role in night raids may become more prominent after transition.
10. Ensure that Afghan militias or other irregular forces are not used in night raids given their lack of mandate, weak accountability, and history of abuse.

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About the Authors

The brief is part of the Open Society Foundations' Regional Policy Initiative on Afghanistan and Pakistan, which focuses on conflict-related human rights and policy issues, primarily civilian casualties and conflict-related detentions. As a non-governmental organization, the Open Society Foundations work to build vibrant and tolerant democracies whose governments are accountable to their citizens. The Foundations establish and sustain local organizations such as the Open Society Afghanistan that implement initiatives to advance justice, education, public health, and independent media.

The Liaison Office is an independent Afghan non-governmental organization that seeks to improve local governance, stability, and security through systematic and institutionalized engagement with customary structures, local communities, and civil society groups. The Liaison Office's four main areas of activity are: Research, Peacebuilding, Justice, and Livelihoods. The Liaison Office has been funded by various donors from the non-governmental and governmental sectors, international organizations, and foundations.

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INTRODUCTION

The use of night raids has reached a critical juncture in Afghanistan. Long unpopular with Afghan communities, a dramatic upsurge in night raids in the last year has brought Afghan anger on this issue to a boiling point. Public demonstrations, often large and violent, are a common occurrence following night raids that have resulted in alleged civilian harm. For example, following a night raid in Takhar province in May 2011 that killed four, more than 2000 Afghans engaged in a multi-day protest, including an attempt to storm the local international military base.⁷

Night raids are viewed with such hostility that even one night raid in an area can be enough to undo other trust-building efforts. A separate study by the Open Society Foundations found that night raids play a big role in engendering Afghan hostility toward international forces.⁸ The study also found that anger over night raids obscures overall recognition that ISAF and U.S. forces have made efforts to reduce civilian casualties and that they are making good faith efforts to improve stability.

Night raids are often viewed as illegitimate, and even criminal in their nature. A recent study by The Liaison Office on community policing strategies found that in five of six provinces surveyed, citizens named night raids as one of the top crimes facing their community.⁹ As one man from Nangarhar, interviewed in research for this policy paper, said, “They claim to be against terrorists, but what they are doing is terrorism. It spreads terror. It creates more violence.”¹⁰

Attitudes like this create a dilemma for international military forces: while they understand the unpopularity of night raids and the wider danger of losing public support, they see these raids as a central component of their military strategy. They argue that night raids are the most effective means of disrupting insurgent networks, with minimal risk to troops and low civilian casualties. In addition, night raids can be accomplished with few international troops—an important factor given anticipated troop drawdowns.¹¹

As a result, the NATO-led International Security Assistance Force (ISAF) has rejected calls by some (including the Open Society Foundations and The Liaison Office) to eliminate or reduce night raids, and instead has focused on tactical and operational changes that might address the most frequent complaints. This policy paper will analyze the effectiveness of that response strategy.

Over the past year and a half, the International Security Assistance Force (ISAF) has taken a number of steps to modify or curb some night raid practices. Key tactical guidance that has influenced night raids policy since the February 2010 report by the Open Society Foundations and The Liaison Office include the following:

- A tactical directive specific to night raids issued in January 2010, with an unclassified version released in February 2010;¹²
- A update to an existing tactical directive on reducing civilian casualties, issued in August 2010 (no unclassified version released)

- A tactical directive specific to night raids issued in December 2010 (no unclassified version released);¹³
- An update to the tactical directive on reducing civilian casualties, issued in July 2011 (no unclassified version released).

These updates and directives have been reinforced by other guidance and operating procedures that have been periodically disseminated to troops. Another tactical directive specific to night raids is anticipated shortly.

Using the February 2010 Open Society Foundations and The Liaison Office report on night raids as a baseline,¹⁴ this policy paper will assess the success of these reforms, within the context of the overall increase in night raids. This paper is intended as a policy analysis, not a survey study. However, analysis in this report has been informed by the initial 2009 and 2010 research carried out for the February Open Society Foundations and The Liaison Office study on night raids; regular monitoring of policy changes and select incidents by the Open Society Foundations and The Liaison Office; regular consultation with military officials on their policies and practices; and a small sampling of case studies of recent incidents. Between October 2010 and July 2011, 77 interviews were conducted with Afghan community elders, witnesses, and victims of night raids in Nangarhar, Kandahar, Paktia, Uruzgan, Kunduz, Kunar, Helmand, and Laghman provinces. In addition to regular meetings with international military as part of regular monitoring of night raids cases, nine interviews were conducted with international military officials, advisors, or consultants involved in the planning, operations, or investigation of night raids officials. Additionally, eight interviews were conducted with other international and Afghan independent monitors.

This paper will proceed in three parts. The first part will examine how changes since the last report have impacted the accuracy and lawfulness of target selection for night raids. The second part will examine efforts to address complaints about civilian harm, including reductions in civilian casualties, persistent risk factors of civilian harm, and the effectiveness of accountability measures. The final section will assess U.S. and ISAF efforts to respond to broader Afghan policy concerns that night raids be minimized or halted; that where night raids occur the Afghan government have greater control; and that Afghan cultural and religious sensitivities are respected.

Target Selection

In their previous night raids report, the Open Society Foundations and The Liaison Office noted frequent Afghan complaints that night raids were inaccurate, resulting in the use of night raids on innocent civilians' homes. One notable improvement since that time has been fewer reports of mistaken targeting. Many Afghans interviewed said night raids are largely getting insurgents.

Despite this extremely positive step, Afghans still tended to argue that night raids impact many innocent people. This is likely because ISAF efforts to increase night raids and to "widen the net" around insurgents has led to broader targeting strategies, with the result

that many non-combatants with only tangential connections to insurgents are subject to night raids, and detained. In addition, indiscriminate detention practices, such as arresting all fighting-aged males present in a house, and large-scale, on-site detentions of all males in a village, have undermined ISAF's efforts to portray night raids as precise, narrowly targeted operations based on accurate intelligence.

A. Intelligence and targeting of night raids has improved overall

Accuracy of intelligence and targeting—previously a major complaint—has improved in the last year. ISAF now claims that they get their target in 8 out of 10 raids.¹⁵ Though no statistics about the accuracy of raids in years past are available, independent monitors and analysts, who examine cases to determine whether those raided are civilians or combatants, have noted anecdotal improvements in the accuracy of night raids. In an interview published in May 2011, President Karzai's chief of staff, Mohammed Daudzai, noted that better coordination with Afghan officials has indeed reduced “mistakes” and civilian casualties from night raids.¹⁶

This improved accuracy is likely most due to the greater availability of surveillance planes, helicopter support units, and listening devices, including intelligence assets previously allocated to Iraq.¹⁷ The increase in troops throughout 2010, both conventional and special operations forces, is also said to have “disrupted” insurgents' movements and communications networks, possibly leading to gains in intelligence. Reports also note a rise in informants.¹⁸

Anecdotal evidence collected by the Open Society Foundations and The Liaison Office suggest communities have begun to recognize the improvements in accuracy.¹⁹ Despite being wrongfully targeted himself, a landowner from the Mirwais Mina district of Kandahar city acknowledged the overall improved accuracy of raids. “I think most of the night raids [targeted homes] where the Taliban were present,” he said. “But sometimes they killed ordinary people too.”²⁰ Other interviewees whose homes were raided often admitted there was a basis for the raid, such as having had a house guest of unknown (potentially insurgent) affiliation in their homes, having a distant family staying with them who voiced anti-government sentiments, having recently provided food or shelter to Taliban (many civilians report being coerced into providing such assistance), or having spoken with insurgents in days or weeks prior to the raid.

B. Despite improvements, mistakes still occur

Although there may have been improvements in the quality of intelligence leading to raids, mistakes still occur. ISAF notes that in 20 percent of the raids, it does not get who it was after. This could be because the individual escaped before forces arrived at the targeted location, or because the target itself was mistaken.²¹

There have been a number of prominent civilian casualty incidents resulting from night raids that appear to have been due to false information.²² For example, on May 12, 2011, an Afghan National Policeman (ANP) and his 12-year-old niece were killed when the ANP officer's home was mistakenly targeted.²³ In December 2010, a father and adult son

were killed in Surkhrod district, Nangarhar province, in what the family claims was a case of mistaken identity (ISAF has neither admitted that the raid was mis-targeted, nor offered evidence otherwise).²⁴ In the same incident, a second son was abused at point of capture, and then detained for a day and a night before being released without charge and being told that the entire incident was a mistake by the official who interrogated him.

Though efforts to improve intelligence gathering and vetting may help prevent these mistakes, some may be inevitable given the sheer number and pace of raids. Effective transparency and accountability mechanisms are crucial for allowing civilians to voice concerns when they arise.

C. Broader targeting threshold results in frequent detention of civilians

While civilians were often able to offer a reason that explained *why* they were targeted, that does not necessarily mean the raid was lawful. With the pressure to step up night raids, the range of activities that might lead an Afghan to be targeted has increased. One former State department official observed: “Commanders are under pressure to find targets for these raids, because it has become a metric of success.”²⁵ Perhaps as a consequence, night raids have frequently resulted in the detention of those who are not combatants under international law, with those suspected of providing shelter or food, or having incidental information about insurgent activities subjected to night raids. Night raids indiscriminately target innocent “bystanders” who are not “directly participating in hostilities.”

1. Night raids target those who provide food or shelter

In several cases, civilians have complained that they were targeted for a night raid because they had given food or shelter to the Taliban or other insurgents (either voluntarily or under duress). One 41-year-old landowner from the Mirwais Mina district of Kandahar city was detained, along with his brother, son, and other men staying in the guesthouse. “[The international forces] told us at the end, ‘You are not Talib but you have links with Taliban and every time the Taliban are living in your guesthouse and you are giving food and other help.’”²⁶ He was released after a few days.

Another man arrested in Kunduz province in October 2010 said that the Americans who arrested him only asked him about his support for the Taliban, and any information he had about them: “They said ‘You support the Taliban. You feed and shelter them. For this reason we are arresting you and taking you away for more investigation and questioning.’”²⁷

Insurgents frequently use civilian homes as a source of food and shelter, a practice which likely increased as the international military troop levels rose and the pressure on insurgent hideouts grew. International forces are aware of this phenomenon, but troops still tend to arrest all fighting aged males present in these homes even when military officials do not suspect all of the men of being insurgents. International military officials interviewed on this subject said that even if an individual is not the target of a raid, he may still be detained because his involvement in the insurgency is not always clear until

questioned and his information checked out.²⁸ Military officials involved in operational aspects of night raids said that even if that man is known to be a civilian, he will still be detained because he may know valuable information about those captured or other aspects of the insurgency, and would possibly be more willing to divulge such information than a captured insurgent.²⁹

Many of those who said they were detained for questioning because they gave food or shelter to insurgents said they had no choice given the power of Taliban in their region. “For sure 95 percent of the people give food to the Taliban. Everyone gives food because the Taliban are powerful. They go to different people’s houses all the time. Sometimes they tell you before they come, and sometimes they just show up,” said a man detained in a night operation in Kunduz in October 2010.³⁰

A man from the Ghorak district of Kandahar who was held 10 days after being detained during a night raid said, “I can tell you, our entire district is controlled by the Taliban. There is no government or Americans here. We have to have contacts with the Taliban. We go to their courts because we are far from Kandahar city. The Taliban go to homes and get lunch and dinner by force. If anyone rejected giving food to them, they would face many problems.”³¹

Many civilians feel caught between both sides. They do not have a choice other than to deal with the Taliban but doing so might subject them to night raids.³²

2. *Night raids target civilians with incidental information*

In some of these cases, civilians may not have been detained *because* they provided food or shelter to insurgents, but because these activities led international forces to conclude that they possessed information about insurgent activities, or were insurgents themselves. Current patterns of detention suggest many night raids may be heavily (if not primarily) motivated by intelligence gathering.

Individuals have been detained or questioned because they have extended family or tribal links with insurgents, or because they live in an area suspected of significant insurgent activity or popular support. Many of those detained are released after only a few days with no further charge, and appear to have, at best, tangential links to insurgent groups. The frequency of these complaints raise concerns that civilians are being targeted based on mere associations or incidental contact with insurgents, not because they are suspected of direct participation with militant groups.³³

Interviews with military officials and analysts suggest that at least some of these raids may be part of a “networking” strategy of targeting key insurgent leaders. As one U.S. military officer who had been part of the review and authorization of night raids explained: “If you can’t get the guy you want, you get the guy who knows him.”³⁴

Another reason to suspect that some of these raids may be motivated by intelligence gathering is the sheer number of raids. One military official involved in night raid operations suggested to the Open Society Foundations that there are not enough mid- to

high-level Taliban commanders “left” at this point in the war to justify the 20 or more night raids in Afghanistan per night (on average). He suggested that most mid- to high-level commanders who are still alive are probably in Pakistan. The official said that many of the current night raids are likely targeting individuals who the military knows are not insurgents but who might know something about insurgent activities. This could also mean that low level fighters are also now being targeted, which may also raise the question of whether there is sufficient military gain, or necessity, to justify the physical and mental harm to surrounding civilians.

However, this explanation was contested by other military officials whom the Open Society Foundations interviewed. Some military analysts and advisors maintained that night raids continue to hit mid- and high-level commanders. They argued that there are enough of these commanders “left” because the insurgency is replacing commanders quickly, much more quickly, for example, than Afghan security forces can replace their troops. As one former military advisor to General Petraeus noted, “Their bench is deeper than ours.”³⁵

3. Large-scale detentions or “clearance” operations more frequent

Many of those interviewed reported night-time operations that targeted multiple compounds, sometimes extending to an entire village.³⁶ For example, in October 2010, U.S. Special Forces and the Afghan National Army (ANA) conducted a large-scale night-time operation that resulted in the detention of 80 to 100 individuals in Otmanzey village, in Qul Tapa district, in Kunduz province. The Open Society Foundations interviewed several adult males detained in the raid, whose testimony may be characterized as follows:³⁷

Adult male members of households were taken into custody, their hands bound, and brought to the village mosque. An estimated 80 to 100 men and boys were detained in the mosque from approximately 8pm until 3am the next day. A number of techniques were used to select individuals for further questioning at a nearby Special Operations base or temporary/transit facility. A masked informant pointed out individuals using a thumbs up/thumbs down to indicate who among the crowd would be detained for further questioning. Having a beard or worn shoulders (indicating that the individual carried weapons) or non-calloused hands (indicating that the individual was not regularly engaged in farming) were also used to select individuals for further detention. Fifteen persons were eventually taken to the U.S. base for further questioning as a result of this selection process. All were eventually released.

Local government leaders said that similar operations involving large-scale detentions have occurred in other villages in Kunduz in late 2010 and early 2011.³⁸

Other night-time operations that have resulted in the mass detention of individuals have been reported to the Open Society Foundations and The Liaison Office or other

independent monitors. For example:

- In October 2010, ISAF and ANSF forces allegedly entered the village of Mushan, in Panjwai district, Kandahar province, at night. They separated the men from the women and collected the men (approximately 50 to 60) in one house and continued questioning them over a 24 hour period, alleging that those in the village were supporting Taliban fighters. Some of the men were taken away to Kandahar Air Field for further questioning.³⁹
- According to UNAMA/AIHRC reporting, ISAF and ANSF conducted a search and seizure operation in December 2010 in Shah Wali Kot village in Kandahar province, gathering approximately 100 men and boys into one location for on-site detention for two days.⁴⁰ UNAMA and AIHRC reported similar on-site questioning of 30 men in Tangai village, Kandahar province at approximately the same time.

Civilians tend to report these large-scale detentions as “night raids”; however, in many cases what is reported as a large-scale night raid is referred to by the military as a “clearance” operation. Night raids are primarily targeted operations, based on specific intelligence of suspect activity or material. In contrast, clearance operations are often used when international military do not have specific enough intelligence for a night raid, and instead are using the operation to identify the suspected combatant or combatant activity. For example, international military may believe that insurgents frequent a particular village or area, or use a village as a base for bomb-making or other combatant activities, but do not know which individuals or houses in the village are involved. So instead of a targeted raid, they engage in a clearance operation and conduct a more general search of the entire village or area. They surround the town, cutting off potential exit and entry points, and send a large number of troops to conduct house-to-house searches and questioning. Clearing operations can last from a number of hours to a number of days, and might take place in the daytime or at night.⁴¹

The semantics of whether an operation at night time is a night raid or a clearing operation matters less than the level of intelligence upon which it is based, and the degree to which that intelligence (or lack thereof) leads to the indiscriminate detention of non-combatants. The more general the intelligence, the more serious the deprivation of rights, and the more indiscriminate the operation is, the more likely an operation would be to raise legal flags, and also the ire of Afghan communities. In many cases, clearance operations may be based on less specific intelligence, and be less discriminating in whom they target. It is also not clear whether the improved provisions in the tactical directives specific to night raids apply when the military considers an operation to be a clearance operation.

4. Legal concerns: increased night raids risk targeting civilians and indiscriminate detention

- a) Raids should target combatants or those “directly participating in hostilities”

The practices described above suggest that international forces may be using an overbroad definition of combatancy or “direct participation in hostilities” (DPH),

resulting in the targeting of civilians who should be protected from attack under international law.

Because of the kind and degree of force typically used in night raids in Afghanistan, as well as the foreseeability of civilian harm and property destruction, night raids generally constitute attacks under international law. International forces consider night raids to be uses of military force—not police actions—and therefore subject to international humanitarian law (IHL). While IHL permits international forces greater latitude in the use of lethal force than in police actions, the principle of distinction prohibits directing attacks against civilians or civilian objects. In the context of night raids, this means international forces should typically conduct such operations only against legitimate military targets—combatants, or civilians who are directly participating in hostilities.⁴²

In some cases, international forces may wish to question or detain non-combatant civilians through night raids. While few would dispute that individuals, including civilians, may be questioned about criminal or insurgent activities, it is important that the means chosen for questioning are necessary, and sufficiently protective of civilian life.⁴³ The kind and degree of military force used in night raids, particularly the permissive use of lethal force authorized in the military's rules of engagement (ROEs), will almost always be unnecessary to detain civilians not physically threatening international forces or otherwise directly participating in hostilities. Instead, international forces should detain such individuals through alternative, less harmful means, characterized by law enforcement standards and limits on the use of force.

There are ongoing debates about the precise definition of a civilian directly participating in hostilities, however, the International Committee for the Red Cross (ICRC) and other international legal authorities have concluded that DPH requires acts that directly cause adverse military affects such as death, injury, or property destruction.⁴⁴ Under this standard, many acts that may contribute to a general war effort, such as political, financial, or propaganda support, are simply too distantly related to the conduct of hostilities to qualify as DPH.

Civilians who merely possess intelligence or provide support such as shelter and food are not directly participating in hostilities. Under international law, they are protected from attack and cannot be targeted by military operations, including night raids.

Many civilians report being effectively coerced into providing assistance, which is even further reason not to consider such conduct DPH. In such circumstances assistance is akin to self-defense and should not be a basis for depriving civilians of their protected status.⁴⁵

Even acts that are criminalized under Afghan law, such as providing financial or other material support to militants, may not rise to the level of DPH. In such circumstances, military force may not be used as a substitute for criminal proceedings and any efforts to detain individuals suspected of criminal acts must adhere to law enforcement standards.⁴⁶

Though detaining civilians who may have incidentally acquired information about insurgent forces or their activities no doubt provides important military value, mere possession of valuable intelligence does not constitute direct participation in hostilities, transforming a civilian into a legal target. Nor should the passive possession of information, even if related to insurgent activities, constitute an “act” that directly causes adverse military effects and thus DPH.⁴⁷ Those who possessed such information, absent other combatant activities, would still be civilians. Targeting them with a military operation would be unlawful.

Interviews with military officials and civilians suggest that in many cases, intelligence gathering may be a purpose of the raid, but not the sole one. However, given the lack of transparency over the authorization and conduct of night raids, it is difficult to assess whether and how often this line is crossed from intelligence as the secondary objective to the sole basis for targeting. The fact that so many detentions resulting from night raids or clearance operations appear to be used against those with only tangential or informational links to the insurgency raises concerns that international forces are using military force to detain civilians not based on their participation in hostilities but solely to gather intelligence. In such circumstance, alternative, less harmful means should be employed to question or affect any detention, characterized by law enforcement standards and limits on the use of force.

b) Large-scale detentions risk arbitrary detentions, perceived as collective punishment

In addition to the above DPH concerns, large-scale detention or clearing operations raise further concerns about arbitrary detention. Individuals may be detained incidentally as part of a broader operation, often as a matter of military necessity. But operations that deliberately target and round up civilians not themselves suspected of DPH or being security threats, but only in order to subject them to interrogation and screening may constitute an arbitrary deprivation of liberty and constitute inhumane treatment in violation of Common Article 3 to the four Geneva Conventions.⁴⁸

Under international law, detentions must be made on an individualized basis and may not be imposed as collective punishment or based on arbitrary or discriminatory grounds.⁴⁹ Detaining civilians simply because they live in a particular area or are of a certain age, gender, nationality, or ethnicity may be arbitrary or even discriminatory detention in violation of Common Article 3, which expressly requires humane treatment of civilians without any “adverse distinction” including difference of treatment based on race, religion, birth, or other similar criteria.⁵⁰

5. Broader targeting limits recognition of other positive reforms

This broad targeting has limited positive recognition of the improved accuracy of raids, and increased negative perceptions of night raids. Though many interviewees would give examples of houses that were accurately targeted (because insurgents were present or passing through at the time), they remained angry that all men present in the home would also be detained. This undermined appreciation of the overall improved accuracy of raids.

To illustrate this point, one man from Nangarhar province gave an example of a night raid in the Sherzad district in late 2010 that he said resulted in the death of a number of civilians in addition to the targeted Taliban commander: “[ISAF] definitely had a report [accurate tip] because this guy was an insurgent—it was accurate information. But 50 percent of those in the house were civilians. It was this other [civilian] guy’s house, not Mullah Daoud’s. He was forced to take [the Taliban] in.”⁵¹ Afghan complaints often center on the indiscriminate nature of these raids: “If I commit a crime, then they should take issue with me. There is no need to disturb my mother, my sister, my child.”⁵²

Most of the time, those detained primarily for their information value or because they were present in the house when the raid happened (but were not themselves the main target), are released within a week of the night raid. When this happens, civilians often assume the raid was based on faulty intelligence, undermining international forces’ efforts to demonstrate that they take pains to avoid harm to civilians and to ensure that their strikes are accurate, and precise.

ISAF efforts to demonstrate that night raids are limited, precision strikes based on high levels of intelligence also tend to be undermined by detention practices that appear to be indiscriminate, such as detaining and questioning all men in a village during large-scale detentions.

More generally, the broader targeting strategies have significantly increased Afghan anger at night raids. Communities often see raids as deliberately targeting or harassing civilians, in order to discourage communities from providing food and shelter to insurgents, or to pressure them to supply intelligence on the insurgency. This causes significant resentment given the often lethal consequences of refusing Taliban demands for food or shelter. Civilians feel trapped between both sides.

Networking strategies that target on the basis of family or tribal networks may also lead to mistargeting, which angers the population with little valuable strategic benefit. Family linkages in Afghanistan are vast and complex, and it is dangerous to use them as sole grounds for arrests. As one local journalist from Kandahar explained, “Coalition forces should stop arresting innocent people from villages because they suspect Taliban connections. If that is the [criteria], they might as well arrest all southerners because almost all villagers are connected with Taliban in one way or the other. The person who is an active Taliban is either my uncle, cousin, or nephew and so on.”⁵³

Civilian Harm & Accountability

ISAF argues that night raids result in few civilian casualties, and thus are a way to reduce the risk of civilian harm compared with an overall military strategy that relied more heavily on traditional, daytime combat activities. At night, troops have the tactical advantage of surprise, and with night-vision goggles and other advanced surveillance systems, can see more than those being targeted. ISAF claims that these tactical advantages help them catch the targeted individuals more effectively, and with lower risk

of harm to troops or surrounding civilians. In addition, fewer civilians are out and about at night, which also minimizes potential collateral damage, ISAF argues.⁵⁴

Nonetheless, night raids have long been associated with civilian casualties, mistreatment at point of capture or in detention, and property loss. Many of the provisions of ISAF tactical directives have attempted to address these criticisms, with a focus on reducing civilian casualties. Though many of these provisions have resulted in significant improvements, civilian casualties still occur, particularly as a result of misinterpretations of Afghan “hostile intent.” In addition, the increase in night raids and the broader targeting patterns discussed above mean that thousands of non-combatants are subjected to detention every year, often suffering abuse rising to torture in Afghan detention facilities, and incurring heavy financial and emotional tolls on them and their families.

A. Conduct: More restraint, fewer civilian casualties

Independent monitors, detainees, and witnesses of raids have reported fewer instances of death and/or abuse resulting from night raids in 2010 and the first half of 2011. In 2009 the UN reported that 98 civilians were killed in search and seizure operations (mostly night raids), which they stated dropped by 18 percent in 2010.⁵⁵ Considering the dramatic increase in search and seizure operations, this is significant. However, the UN has also stated that it may be underreporting civilian casualties caused by night raids because of the difficulty in accessing areas where they take place.⁵⁶ ISAF says that civilian casualties occurred in less than 1 percent of night raids in 2010,⁵⁷ and has persistently noted that no shots are fired in 80 percent of raids (although no public statistics have been released to support these findings, despite repeated requests).⁵⁸

Some of the provisions in the two ISAF tactical directives paid particular attention to limiting property damage at the site of night raids, and better documentation when property was taken or damaged in order to provide compensation. While Afghans still complain about property damage, they report that damage is often less severe than before. For example, there were fewer complaints of dynamiting doors or shooting through the roofs of homes, and less damage to surrounding property and animals. There were some instances in which individuals were able to recover seized property or receive compensation for it, which almost never happened in the past. Compensation for damaged items from night raids is however, less frequent than compensation for other types of incidents.

1. Reduced harm also due to Afghan community precautions

Fewer civilian casualties are attributable not only to greater care taken by ISAF, but also to actions taken by Afghan communities. Communities the Open Society Foundations and The Liaison Office visited said they had begun to change their behavior to reduce the risk of night raids turning violent. For example, an elder from the Khogiani district of Nangarhar province, which was the site of many night raids in late 2010, noted, “Anybody coming out from the home [during a night raid] is shot, so no one likes to come out whenever troops show up.”⁵⁹

Another man from Laghman province said his uncle was wounded by stray shrapnel from a night operation on a neighbor's home. Though his uncle's wounds were serious, he said they dared not go outside to seek medical help, or even turn on any light to try to treat the wound because past experience had taught them that they would then be targeted.⁶⁰ "Around five months ago in Masemud area, first the American troops shot a rocket and then—it was around 12 or 1 am—everyone came out from their homes to see what had happened and they shot them. So now after that everyone knows when the bombs come to stay in their homes.... Now people are familiar with these incidents and they stay in the house when Americans arrive."⁶¹

B. Civilian casualties still occur, often due to mistaken assumptions about "hostile intent"

Despite improvements in accuracy and conduct during raids, they still kill and injure civilians. Even with significant efforts to curb the risk to civilians from these raids, with the dramatic increase in raids (particularly in the context of insurgent tactics of hiding among the population), civilian casualties and mistaken identity will inevitably occur. Choosing to detain a suspected combatant at night in a family home almost guarantees that other innocent civilians (including women and children) are also present and subjected to the military operation. It may also involve nearby community members.

Night raids may create a hostile situation where one would not otherwise exist. It is not unusual for Afghan homes to be well armed, and if Afghans think they are being attacked, to respond with force. As a result, those who might not otherwise resist arrest or respond aggressively if detained during the day might respond in self-defense when unknown men assault their house at night, leading themselves or other innocent civilians in the home to be killed or injured. On February 12, 2010, U.S. troops killed five civilians, including two women, and injured eight others in a raid in Gardez city, Paktia province. The raid targeted the home of an Afghan national policeman (ANP), reportedly with the intention of detaining a guest who had escaped before the raid. When troops arrived, several men of the house including the ANP officer believed they were being attacked and ran outside.⁶² International forces responded by opening fire, killing the five men as well as two women nearby.

The way that international forces interpret behavior during these hostile engagements may also increase the likelihood of civilian harm. The standard U.S. Rules of Engagement permit U.S. forces to use lethal force in self-defense against individuals who commit hostile acts (for example, firing at troops) or demonstrate hostile intent (something less than a direct use of force).

ISAF troops appear to interpret hostile intent too broadly, without sufficient regard for the complicated and confused circumstances civilians often find themselves in during raids. As a result, the right to use lethal force is too easily triggered, resulting in unnecessary and avoidable civilian harm. Behavior that would seem relatively innocuous in a less tense situation—for example sleeping near a weapon,⁶³ running away from the intruders,⁶⁴ or even merely "stepping out" of a compound during a night raid⁶⁵—have been deemed signs of hostile intent during night raids in Afghanistan, triggering lethal

force. During a March 2010 night raid, an 81-year-old man was deemed to have hostile intent for picking up his cell phone while in bed.⁶⁶

C. Non-lethal impacts are increasing, often overlooked

Discussions of civilian harm during night raids tend to focus on civilian deaths. However, it is important to remember that these raids have many serious non-lethal effects. Injuries may be under-reported, as they raise less public scrutiny or manifest in severity later.

In addition, the focus on civilian casualties due to night raids should not obscure the harm caused by detentions that do not result in death or injury. In the three month period ending in February 18, 2011, 1900 individuals were detained, with “not many” left in custody at the end of that period.⁶⁷ Some of these rapid releases may have been due to a lack of evidence (not a lack of guilt), but it is likely that in many of these cases the individuals released within a week were deemed to be non-combatants who posed no threat. That there should be a number of these cases seems plausible due to the frequency of international forces detaining all males present in a house, detaining mass numbers of individuals in clearance operations, and the concerns discussed above that some non-combatants may be detained for intelligence value.

Though it is positive that those deemed to be non-combatants are quickly identified and released, these numbers may suggest that in an effort to increase the sweep of night raids, thousands of non-combatants are being detained every year. Being held in detention can be a traumatic experience, whether it is temporarily on-site, or for more prolonged periods at international military bases, or for those handed over to Afghan detention facilities. Severe mistreatment, including torture, is widespread in detention facilities of the Afghan National Directorate of Security (NDS), and conditions in all Afghan facilities are generally poor.⁶⁸ Detainees are often not told what charges they are being held for or when they will be released. Those detained for even a few days may suffer significant financial setbacks, and those handed over to Afghan custody when no charge is brought against them often have to pay expensive bribes to be released.

The fear and trauma for those whose family members are detained, or for those who witness these raids can also be significant. One 61-year-old man who experienced a night raid in his home in April 2010, described how armed men shot his son point blank in the chest with “10 or 12 bullets.” He was hooded and corralled into a bathroom with three other relatives, with barely room for the three of them to stand up. When they were finally let out of the bathroom, they were too afraid to move his dead son’s body, lest they be attacked again, so it was left lying on the living room floor until the NDS came to investigate the next morning.⁶⁹

D. Limited progress on accountability and transparency

The increased number of night raids, with a potential to impact a greater number of non-combatants, should be matched by stronger transparency, accountability, and redress

mechanisms—issues that ISAF and U.S. forces have been weak on in the past, particularly with regard to Special Forces activities.

ISAF has made efforts in the last year to try to address complaints about accountability for civilian casualty incidents more generally, including those resulting from night raids. ISAF has continued to support the development of a Civilian Casualty Tracking Cell since it was created in December 2008, as well as other reporting and investigation processes. Incidents that ISAF suspects of resulting in civilian casualties are investigated by the Joint Incident Assessment Teams (JIAT), with investigations supervised by a one-star general or equivalent. Particularly controversial or murky cases may involve a site investigation by the JIAT, often undertaken jointly with Afghan government counterparts. These primarily involve an assessment of any evidence at the site, interviews with those troops involved, and with Afghan local officials.

A Civilian Casualties Working Group was instituted in March 2011 to explore policy changes at an operational or tactical level that could better reduce civilian casualties and complaints. In the late spring and summer of 2011, ISAF demonstrated greater efforts to reach out to international and Afghan civil society by hosting or participating in conferences designed to allow civil society to engage with them on civilian casualty concerns, and taking more meetings with those raising independent concerns.⁷⁰

Though these are positive steps forward, other aspects of accountability have failed to improve, or even worsened. ISAF has appeared less responsive to independent monitors raising civilian casualty concerns than in the past. For example, ISAF has more often than not refused to discuss a number of suspected civilian casualty cases, provide evidence that those alleged to be civilians were in fact combatants, share video or other on-site evidence (which used to be forthcoming in the past), re-examine initial findings where contrary evidence surfaces, or to report the final results of investigations.⁷¹

Public accountability also remains poor. Though press releases are often issued immediately following an incident, often noting if an investigation into civilian casualties is underway, the results of that investigation, or any subsequent information, is typically not made publicly available later on.⁷² When press releases announcing that insurgents are killed or detained have later been proven wrong, public corrections are rarely issued. Civilian casualty totals in the Civilian Casualty Tracking Cell do not always appear to be corrected to admit mistakes in initial reporting.⁷³ ISAF has not released public versions of the significant tactical directives since February 2010.⁷⁴

Accountability issues are particularly weak for night raids because the forces responsible for the vast majority of night raids—the Special Forces Task Force Joint Special Operations Command (JSOC) (formerly under Admiral William McCraven)—are the least transparent of international forces operating in Afghanistan.⁷⁵ As a rule, they do not accept interviews or meetings with independent monitors. Despite greater efforts to integrate them into ISAF-HQ, these forces report back to the Special Operations Command (U.S.SOCOM) based in Tampa, Florida. Despite repeated inquiries, international military officials were not able to confirm that the ISAF tactical directives

applied to these forces, given their different command structure. ISAF officials noted that these forces follow all of the tactical directives in practice, including reporting incidents like suspected civilian casualties immediately.

Some night raids are reportedly CIA operations. Though likely not constituting the majority of night raids, there is zero public accountability over CIA conduct during raids.

In addition, it has been more difficult to raise concerns regarding night raids because of a strong presumption by ISAF and U.S. officials that these raids are accurate and effective. Because they are confident that night raid targeting has improved, ISAF and U.S. officials have shown a tendency to disbelieve allegations of civilian casualties. For example, after a night raid in May 2010 in Surkh Rod, Nangarhar, inquiries by the Afghan government, the UN, the Afghanistan Independent Human Rights Commission (AIHRC), and Human Rights Watch all concluded that this had been a case of mistaken identity, which had led to the deaths of nine civilians. ISAF and U.S. officials steadfastly rejected these claims, and continued to view the raid as a success. It is troubling that in instances like this, separate and unanimous inquiries by so many credible organizations are not sufficient to challenge ISAF's internal assessments, which too often appear to rely upon their own officials rather than interviews with eyewitnesses.

Because of the overall lack of transparency over these night raids, when those involved in civilian casualty incidents or other misconduct are disciplined, these responses rarely—if ever—are publicly acknowledged. The result is a perception of impunity for the entire practice, if not for international forces as a whole.

1. Compensation less common for night raids than other operations

While the payment of compensation in cases of civilian harm has become more prevalent overall in Afghanistan, compensation for victims of night raids is still uncommon. In most cases, payment of compensation (more commonly referred to as “condolences” or “ex gratia” payments because they are non-binding) in Afghanistan still depends on the civilian who was harmed raising a complaint.⁷⁶ Those subject to night raids are often too afraid to request compensation. They may not be able to identify those troops involved in order to make a complaint given the lack of transparency about night raids and the special forces conducting them. The lack of any formal standards for compensating wrongful detention, and a sort of “presumption of guilt” by ISAF when it receives requests from night raids victims also hinder compensation in these cases. Perversely because ISAF has become more accurate in selecting its targets, and minimizing harm, it appears to have a presumption that most claims stemming from night raids are false.

E. “Kill” rather than capture missions still the minority

The Open Society Foundations’ and The Liaison Office’s interviews suggest that the primary aim of most night raids still appears to be search and seizure, although some purely “kill” missions do occur.⁷⁷ Several military officials confirmed that there are some night raids designed to kill rather than capture, although they are the minority.⁷⁸

Under international law, combatants may be lawfully killed or captured, provided all other IHL provisions are respected in doing so. However, given the difficulty of determining who is a civilian and who is a combatant in Afghanistan, repeated problems with mistaken intelligence, and the lack of transparency over how night raids are authorized, “kill” rather than “capture” missions raise additional concerns.⁷⁹

Afghan Government & Community Concerns

Night raids bring the conflict into people’s homes like no other military tactic. Even when conducted with greater restraint, they are incredibly invasive and traumatic for those subjected to them. Both the Afghan government and Afghan communities have repeatedly called for an end to night raids altogether. However, failing that, they have argued that Afghans should at least have greater control and input over night raids. The Afghan government has argued that the lack of Afghan control of these raids is a violation of their sovereignty. They have also argued (together with Afghan communities) that better coordination and Afghan input would reduce mistaken targeting and improve cultural sensitivity.

Afghans have long complained that the offensiveness of night raids is compounded by cultural sensitivities, especially entering the sanctity of women’s quarters and the searching of women by men.⁸⁰ These intrusions may be even more insulting when carried out by foreigners. Afghans have frequently suggested that Afghan troops would be more attuned to cultural and religious sensitivities. (That said, there may be hostility when the Afghans on the raids belong to rival ethnic or tribal groups.⁸¹)

In response, tactical directives and other operational changes have attempted to involve greater Afghan government input into approval processes, and to address many of these cultural sensitivity issues. These reforms have had mixed results, in large part because ISAF has only made efforts to address the way that night raids are authorized and conducted, while ignoring the more significant Afghan request to limit or cease night raids altogether.

A. Mixed results in improving Afghan input and control

A number of the tactical and operational changes since the beginning of 2010 have attempted to address Afghan government complaints that they lack control and input into night raids. Afghan commanders are now part of the so-called “coordination cells” at Bagram Air base and at Kandahar Air Field that must sign-off on all night raids.⁸² Afghan commanders and officials in these cells are often given as much as 24 hours notice of the operations that will take place on a given night and are allowed to review the specific plans for each night raid. They may either veto the raid entirely or demand modifications to the operational plan, for example, if they assess that aspects of the plan will increase risk of civilian harm or outrage.⁸³ Once the plan for a night raid is approved, Afghan commanders within this coordination cell are charged with informing a relevant regional Afghan official—typically the governor of the province. In some cases (though not all) if the governor can not be reached, or does not approve the raid, it has been called off.⁸⁴

Additionally, Afghan forces are present in the vast majority of night raids, and lead at least 25 percent of the raids, a figure likely to increase with transition to Afghan forces.

While these steps suggest improvements in cooperation, Afghan officials have not been satisfied. Senior Afghan officials, including the Afghan National Security Council and President Karzai, have repeatedly argued publicly that this level of consultation still does not give them any meaningful input over whether raids are conducted and if so, when, where, and how they are done.⁸⁵ Given the unpopularity of night raids among the Afghan public, some of these objections may be public posturing. It would be politically unpopular for Afghan officials to openly support night raids.

On the other hand, there are also legitimate reasons why Afghan officials might feel that these reforms do not meaningfully respond to their requests for input and control. Although 25 percent of the raids may be “Afghan-led,” all night raids are initiated through the same international forces-dominated target selection process. Thus, this reform does little to impact overall control of the number of raids or authorization of any given raid. The coordination cells at Bagram and Kandahar Air Field *do* allow a limited number of pre-vetted Afghan officials to be involved in authorizing or vetoing night raids. However, it is notable that these officials do not have input into the initial development of those plans or selection of targets, and they often have less than 24 hours to respond, with access to little information beyond what is presented to them by ISAF. There are also signs that Afghan officials involved in the approval process may feel unduly pressured, such that their “consent” to a raid is not entirely voluntary. ISAF told the Open Society Foundations that when they called Afghan governors to notify them about the raid, the governors often deliberately avoided the calls, suggesting they did not freely take responsibility for the decision.⁸⁶ Finally, local officials—those who are most susceptible to anger from affected communities—are rarely notified in advance through the current process, much less given any approval or veto rights.

B. Local outreach and information sharing still needed

While top-level coordination has improved somewhat (if not to the extent that the Afghan government wants), there is still much to be done in the area of community outreach. Afghan communities have argued frequently that greater consultation with local leaders—both official and unofficial—would improve accuracy, ease tensions with local communities, and result in the more peaceful capture of insurgent suspects. At a minimum, communities demand more open channels of requesting information following a raid, to find out the justification for the raid or the location of those detained.

A provision in the January 2010 tactical directive suggested that international forces leave information behind at the site that would allow communities to find out about those who were detained, or request the return of confiscated property. However, this was not made mandatory until December 2010, and as a result was not widely implemented.⁸⁷ The Open Society Foundations have periodically collected or reviewed these information sheets when they have been left behind: sheets reviewed by the Open Society Foundations have often been illegible or blank. In many cases, interviewees said no information was left behind. Perhaps as a result, communities have persistently

complained to the Open Society Foundations and The Liaison Office that they had no way to raise complaints or find out about those detained.

Ad hoc outreach practices by commanders at a local level may have addressed some community requests for greater consultation. For example, some commanders and communities reported that *jirgas*, or community meetings, were held following a controversial night raid to explain what had happened—a generally positive step.

In a few cases, community elders told the Open Society Foundations and The Liaison Office that international forces coordinated closely with local officials or community leaders in planning a raid. For example, two elders from the Dira Wot district of Uruzgan province said that at the beginning of 2010, night raids caused significant anger in the community but as of February 2011, the U.S. military had begun consulting with a local *jirga* about individual suspects before conducting a raid.⁸⁸ The elders claimed this coordination improved raid accuracy and reduced community complaints.

Another farmer from the Panjwai district of Kandahar province interviewed in March 2011 said that international military had recently begun to bring Afghan police or community elders with them on raids, and that this had reduced the frequency of bad information.⁸⁹ He also noted that the better cooperation enabled families to get information on those detained, which was also a positive step for the community.

In the few areas where local communities were more broadly consulted—either before or after the raid—the Open Society Foundations and The Liaison Office received reports of better accuracy and conduct during the raids. In contrast, in areas where local coordination appeared to be absent, the Open Society Foundations and The Liaison Office continued to hear many of the same complaints about lack of coordination leading to intelligence errors. This suggests that local outreach may be an important factor in itself in addressing resentment toward these raids.

C. Other Afghan community concerns: Fewer complaints about treatment of women, appreciation of greater Afghan force presence

The last two tactical directives have also tried to address broader Afghan community critiques that night raids offend Afghan culture and religion⁹⁰ having foreigners search homes without permission, having men search women's quarters or women, using dogs (which many consider to be unclean animals).

One key response to these critiques has been to require broader Afghan participation in night raids, a reform that appears to have been largely implemented.⁹¹ Many witnesses reported that Afghan forces were present on raids, and said the level of conduct was more respectful to Afghan culture because of this presence. One local researcher noted that the presence of Afghan National Security Forces (ANSF) side-by-side with international military during raids helps diffuse civilians' anger, "They [ANSF] show their sympathy with the people. They decrease the hostility that people feel."⁹² A landowner from Nangarhar whose home had been subject to a night raid in 2009 said, "Now these operations are performed by ANA [Afghan National Army], ANP [Afghan National

Police], and NDS [National Directorate of Security]. They have better conduct and they ask first if they can come in.”⁹³ Others suggested that Afghan soldiers were better at identifying and separating those who needed special care—women, children, the elderly, or those who were sick or disabled.

Troops have also reportedly taken more care to separate women and children from men on these raids. Occasionally, Female Engagement Teams—all-female teams of international forces—are deployed to search women’s quarters and/or speak to women.⁹⁴ In interviews conducted for this report, fewer Afghans complained about the disgrace to women than in previous research periods, suggesting a significant improvement. However, none noted the presence of female soldiers.

The tactical directives also introduced a policy requirement that troops do a “soft knock” or a “call-out” at the beginning of each raid. This was designed to give the individuals an opportunity to come out peacefully and reduce the impression of “breaking and entering.” ISAF claims that this happens in every single raid, however, Afghans reported hearing a call-out in only a few of the cases that the Open Society Foundations and The Liaison Office investigated, suggesting room for improvement either in making this practice more consistent or in doing it in a way that Afghans notice and appreciate.

In response to Afghan complaints that the use of dogs causes offense, the tactical directive limited some of the ways that dogs can be used, without eliminating their use during raids altogether. Civilians still report the presence of dogs, which sometimes cause injury or property damage, and nearly always cause extreme outrage.

1. No “blank check” for Afghan forces

Though the greater integration of Afghan forces on night raids responds to Afghan requests and thus is an overall improvement, this does not mean that using Afghan forces on these raids should have a “blank check,” as noted in the last report by Open Society Foundations and The Liaison Office.⁹⁵ In research for both the previous report and this one, there have been persistent complaints about Afghan forces stealing property,⁹⁶ or committing abuses themselves during night raids. Afghans continue to request that Afghan forces be the ones to carry out raids, but demand that when they do engage in night raids, there be greater accountability for their actions.

To the Open Society Foundations and The Liaison Office’s knowledge, there have been no specific efforts to ensure Afghan forces’ accountability in the context of night raids, and ANSF accountability more broadly remains weak.⁹⁷ Interviewees have frequently requested that international forces make more efforts to ensure that Afghans involved in night raids are held accountable.

Afghans also criticize the lack of accountability of irregular militias participating in night raids. In their previous report, the Open Society Foundations and The Liaison Office noted that complaints about misconduct and lack of accountability were most frequent with so-called “campaign forces”—the name Afghans tended to give to informal militias used as force enablers for military or intelligence officials. Though there are fewer

reports of “campaign forces” on night raids, their use has likely not disappeared. With the development of more government-backed irregular forces including ad hoc groups supported by the intelligence services, or more formal programs such as the Afghan Local Police (ALP), a broader range of armed groups may now be engaging in raids, either with international forces or under their own auspices.⁹⁸

The informal nature of these militias and private security companies has meant that they are even harder to hold accountable when abuses occur. The same is true of the more recently created ALP.⁹⁹ These forces tend to work very closely with U.S. Special Operations Forces, which can mean they are perceived by local communities (and sometimes the national police) as being “untouchable” on account of this association.

D. Failure to seek alternatives to night raids

Many Afghan communities, the Open Society Foundations, The Liaison Office, and human rights organizations, have argued that rather than trying to make night raids more palatable, ISAF should focus on finding alternative detention practices wherever possible. Daytime detentions, more closely resembling regular law enforcement procedures, would seem particularly appropriate for areas of the country in which the Afghan government maintains full control and access.

ISAF maintains that commanders must note whether alternatives are available when they request authorization for a night raid.¹⁰⁰ However, when the Open Society Foundations asked military officials on multiple occasions to give an example of an alternative, they could not. ISAF officials involved in reviewing requests for night raids have admitted that few requests to conduct a night raid are ever rejected, possibly suggesting the level of scrutiny is not that high. In some cases, witnesses or international forces have reported waiting until the first break of dawn or call to prayer—a day raid in name only.

ISAF officials argue that night raids are preferred because detaining someone during the day increases the chance of violent resistance either from the targeted individuals or from surrounding community members, all of which might lead to a firefight or other violence that might harm troops and civilian bystanders alike.¹⁰¹ Though violent resistance in the daytime is possible, ISAF has presented no evidence that this has happened in the past, despite requests. The Afghan National Police and National Directorate of Security arrest individuals on a regular basis in the daytime, without major disturbances.¹⁰²

Many of those interviewed maintained regular, public profiles—some with significant contacts in the Afghan government or military—and likely could have been detained peaceably through other means. In two of the most high profile examples of this, two Al Jazeera journalists were detained in two separate night raids in September 2010.¹⁰³ ISAF alleged that the journalists had crossed the line in their role as journalists by not just talking with insurgents (which many journalists do) but by helping them. Al Jazeera argued that even if ISAF questioned their activities, ISAF did not need to subject the families of both men, including women and young children, to full-force night raids. Both journalists had press passes that were registered with ISAF and gave them access to military bases, which they periodically visited for press conferences or when requested to

by ISAF press officers or other liaisons. As the journalist detained in Ghazni province explained, “I have travelled with American forces to every district. Sometimes [international troops] call us for minor things, and we go even though it’s risky to be seen going to the PRT [“Provincial Reconstruction Team,” an international civil-military base].” He said that if they had called him to come in and talk with them, “I would be very happy to go. Even in the night, I would still go.”¹⁰⁴

Failure to explore whether there are other, less intrusive means for detaining someone¹⁰⁵ is often incomprehensible to the many Afghans who find their lives devastated by these night raids. In another raid in Ghazni province in November 2009 documented by journalist Anand Gopal, two civilians were killed and two were detained in a night raid targeting a government employee, whom the family maintains could easily have been brought in through a regular detention procedure in the daytime: “Did they have to kill my cousins? Did they have to destroy our house?” one of the family members asked. “They knew where Rahman worked. Couldn’t they have at least tried to come with a warrant in the daytime? We would have forced Rahman to comply.”¹⁰⁶

1. Legal concerns: IHL requires identification of less harmful alternatives

Under international humanitarian law (IHL), all feasible precautions must be taken—in both planning and implementation phases—to avoid or minimize harm to civilians.¹⁰⁷ An attack in which the expected civilian loss would be disproportionate to the military advantage gained is unlawful and must be canceled or suspended.¹⁰⁸ When there is a choice of military objectives, the objective selected should be the one expected to cause the least civilian casualties.¹⁰⁹ Collateral harm to civilians is possible in any type of detention operation, of course, whether taking place in the daytime or at night. However, if an action that is less harmful to civilians than a night raid is possible without excessive loss of military advantage or risk to soldiers, then such means should be adopted.

There are also important considerations under human rights law, which continues to apply during periods of armed conflict, though the exact inter-relation with international humanitarian law is not clear.¹¹⁰ At the very least, human rights law provides important guidance particularly for the arrest and detention of civilians during internal armed conflict, including the current conflict in Afghanistan, or other military operations conducted where the force has effective control, such as during belligerent occupations.¹¹¹ In such cases—operations akin to law enforcement actions—human rights law may be binding, and require alternative tactics, ROEs, and different standards for the use of force.

While there may be some situations in which no other detention mechanism is available, the fact that in many cases simple alternatives—for example, calling the Al Jazeera reporters to come on base, as they regularly did—were not even explored raises legal questions of whether ISAF, or more often special operations forces, are systematically ignoring their obligation to avoid or minimize harm to civilians during night raids.

E. Consequences to ignoring larger Afghan demands to limit or end night raids

Despite significant steps to try to address concerns by the Afghan government and public, Afghan attitudes toward night raids are still overwhelmingly negative. In part, as illustrated above, this is because some objectionable practices have been under-addressed. The Afghan government does not think reforms to authorization processes have gone far enough. Afghan communities are troubled that elements of night raids they have long objected to—the invasion of their privacy by foreigners, the use of dogs, the inability of families to find out what happened to loved ones—remain the same.

However, a more significant explanation for persistent negative attitudes is not the ineffectiveness of these smaller operational and tactical tweaks, but the larger failure on the part of ISAF and U.S. forces to seek alternatives to night raids. Until this underlying issue is resolved, even perfect compliance on all issues that cause cultural and religious friction would likely not win Afghan public approval of night raids. Forgoing the use of dogs, or searching Afghan women with international women are inarguably better than the past, and may result in fewer specific complaints. However, they are not a substitute for Afghans' larger preference that night raids be used only as an exceptional measure.

The Afghan government, too, has a dramatically different view of night raids from its international partners. The level of hostility from senior Afghan government officials, including President Karzai, has reached new heights. Criticism of the use of night raids punctuates Afghan official overtures to the United States, both in public and private. This is partly out of frustration with continued coordination failures, but also reflects more broadly the government's declining support for the U.S.-led military strategy, as they call instead for greater pressure on Pakistan to deny insurgent safe havens and a search for political solutions. In this context, the high public cost of night raids becomes much more difficult for Afghan leaders to justify. Marginally more control or input into the authorization process for night raids does little to address Afghan government concerns that the centrality of night raids to the current military policy is taking them in a direction that they fundamentally do not agree with.

Conclusions & Recommendations

Since February 2010, when the Open Society Foundations and The Liaison Office published an initial study on night raids, the tactical and operational changes contained in the two tactical directives and other interim guidance have addressed many Afghan objections to night raids. Conduct during the night raids has improved, reducing civilian casualties, abuse at point of capture, and severe property destruction. Target selection is more accurate. Afghan forces are better integrated into night raids, to some extent addressing concerns about cultural violations and misunderstandings. Reports of night raids disturbing women are down.

While these improvements are significant, the costs of night raids have metastasized and the benefits (in the form of decreased insurgent attacks) have yet to materialize.¹¹² The dramatic increase in the number of night raids, and evidence that night raids or other operations may be more broadly targeting civilians to gather information and intelligence,

appear to have overwhelmed Afghan tolerance of the practice. Afghan attitudes toward night raids are as hostile as ever, if not more so. Anger over night raids obscures not only substantial efforts to improve night raids practices, but overall recognition that ISAF and U.S. forces have made efforts to reduce civilian casualties and address Afghan concerns. The issue stymies efforts to build Afghan trust and confidence in the international-community backed Afghan government, at both a local and national level.

This issue has risen to a strategic level, seriously undermining long-term U.S. relations with the Afghan government. President Karzai has repeatedly lashed out at international forces in public, calling for an end to night operations or attacks on Afghan homes, and likening international forces to invaders rather than allies.¹¹³ President Karzai reportedly views this as a key sovereignty issue, and the cessation of night raids, or at least greater control by the Afghan government, is likely to figure significantly into long-term strategic partner discussions.¹¹⁴

The benefits of the current night raids campaign is difficult to assess from a public standpoint given the lack of transparency. U.S. and ISAF military officials suggest night raids have been the most successful tactic in the last year, and that absent the ability to continue them, insurgent attacks would increase significantly. However, no evidence has been offered to support these assertions, and despite the surge in night raids, insurgent attack levels have continued to increase.¹¹⁵

Yet even assuming the gains are as reported, the current pace of night raids is not sustainable given the extreme opposition by both the Afghan public and the Afghan administration. The tactical and operational changes to night raids practices made in the last year—though significant—have not been able to counter dissatisfaction with the practice as a whole. While militant extremist groups pose an enormous threat to human rights and security in Afghanistan, the human, political, and strategic costs illustrated by this policy review raise questions about whether a heavy reliance on night raids is the most effective long-term strategy for effectively countering that threat.

Recommendations to ISAF and U.S. Forces

1. Cease raids that do not discriminate between combatants and civilians; ensure that night raids, which are military operations, are only used against combatants or civilians directly participating in hostilities.
2. Ensure that night operations—in particular mass detention operations at night—target individuals based on their presumed status as a combatant, rather than based on their age, gender, nationality, ethnicity, tribal affiliation, or the geographic area in which they live.
3. Ensure night raids and other night-time military operations are not used as substitutes for criminal proceedings or other methods of intelligence gathering. Ensure that operations that aim to detain non-combatants adhere to law enforcement standards governing the use of force.

4. Implement tactical directive guidance to consider alternative methods of detention wherever possible. Detentions that adhere to regular law enforcement practices are preferred in areas where there is strong government control, or other areas in which Afghan partners have strong capacity to conduct more regular law enforcement detentions.
5. Continue to enforce existing guidance on night raids that have resulted in reduced civilian casualties and improved conduct.
6. Improve outreach and consultation with local communities to the extent possible, before and after night raids.
7. Improve transparency over the criteria for when night raids may be used (as opposed to other means of detention) and over the conduct of night raids themselves. Reinforce accountability measures, including ways for families to find out information about those detained, and the status of investigations into allegations of civilian casualties.
8. Improve compensation standards and procedures with regard to night raids, including compensation for wrongful detention.
9. Work with ANSF to improve their conduct and accountability, in particular with Afghan Special Forces, whose role in night raids may become more prominent after transition.
10. Ensure that Afghan militias or other irregular forces are not used in night raids given their lack of mandate, weak accountability, and history of abuse.

Notes

¹ *Strangers at the Door: Night Raids by International Forces Lose Hearts and Minds of Afghans*, Open Society Foundations & The Liaison Office, February 23, 2010, [hereinafter: Open Society Foundations & The Liaison Office, *Strangers at the Door*] http://www.soros.org/initiatives/washington/articles_publications/publications/afghan-night-raids-20100222.

² Jon Boone, “Wikileaks Cables: Karzai Pushed to End Afghanistan Night Raids,” *The Guardian*, December 2, 2010, <http://www.guardian.co.uk/world/2010/dec/03/wikileaks-cables-afghanistan-night-raids>.

³ *Id.*

⁴ Emma Graham-Harrison, “Factbox: Night-time Raids in Afghanistan,” *Reuters*, February 26, 2011, <http://www.trust.org/alertnet/news/factbox-night-time-raids-in-afghanistan/>. The article also noted that of the 1700 detained “not many” remained in custody, and that this rate of night raids per night was already an increase on the previous 3 month period’s 17 per day average.

⁵ Interview with COM-ISAF strategic advisor, Kabul city, Kabul province, April 17, 2011. Note that the estimate of 40 night raids is the high end, not the average per night.

⁶ In July 2011, Afghan President Hamid Karzai demanded that ending night raids must be a precursor to any long-term strategic partnership between Afghanistan and the United States. Emma Graham-Harrison, “Long-term Deal with U.S. Must Be on Afghan Terms: Karzai,” *Reuters*, July 26, 2011, <http://www.reuters.com/article/2011/07/26/us-afghanistan-us-idUSTRE76P1U320110726>

⁷ BBC News, “Afghanistan: ‘Three hurt’ in New Anti-Nato Protest,” May 19, 2011, <http://www.bbc.co.uk/news/world-south-asia-13451677>.

⁸ As one man from Wardak interviewed for the study explained, “Even a seven-year-old child hates the foreign military because of their activities. Knocking on homes and searching families at night... [is] a cause for people to stand against the foreign military.” Erica Gaston & Jonathan Horowitz, *The Trust Deficit: The Impact of Local Perceptions on Policy in Afghanistan*, Open Society Foundations (October 2010) at p. 5, http://www.soros.org/resources/articles_publications/publications/policy-afghanistan-20101007.

⁹ The Liaison Office, *Crime and Policing in Afghanistan: Strengthening Crime Response Through Local Providers*, Kabul: The Liaison Office (2011 forthcoming).

¹⁰ Interview with 38-year-old male, Surkhod district, Nangarhar province, February 9, 2010.

¹¹ Announcement by U.S. President Barack Obama.

¹² An unclassified version of the first tactical directive has been released and is available at: <http://www.isaf.nato.int/article/isaf-releases/isaf-issues-guidance-on-night-raids-in-afghanistan.html>.

¹³ Matthew Green, “Petraeus Orders Care over Afghan Night Raids,” *Financial Times*, Dec. 17, 2010, <http://www.ft.com/intl/cms/s/0/2356fa76-0a06-11e0-9bb4-00144feabdc0,s01=1.html#axzz1Mv8ajzPH>.

¹⁴ Open Society Foundations & The Liaison Office: *Strangers at the Door*, *supra* note 1.

¹⁵ Thomas Ruttig and Susanne Schmeidl, 2011, “Talking about Civilian Casualties in Kabul (with comment)”; Afghanistan Analyst Network Blog, 3 July 2011, <http://aan-afghanistan.com/index.asp?id=1893>.

¹⁶ Interview with Mohammad Daudzai, “Kill/Capture”, *PBS Frontline*, May 11, 2011, <http://www.pbs.org/wgbh/pages/frontline/kill-capture/interviews/mohammad-daudzai.html>

¹⁷ Phone interview with international official, June 7, 2011.

¹⁸ Thom Shanker, Elizabeth Bumiller, and Rod Nordland, “Despite Gains, Night Raids Split U.S. and Karzai,” *New York Times*, November 15, 2010, <http://www.nytimes.com/2010/11/16/world/asia/16night.html>

¹⁹ Other independent monitors have also noted broader community recognition of improved accuracy. Interviews with international human rights monitors in Kabul, Afghanistan, [names, titles withheld] on February 9, 2011; February 10, 2011; April 13, 2011; July 4, 2011. See also, Carlotta Gall, “Night Raids Curbing Taliban, but Afghans Cite Civilian Toll,” *New York Times*, July 8, 2011 (Elders and local Afghans said the raids were generally precise and caused fewer civilian casualties than before, according to Georgette Gagnon, director of the human rights unit of the United Nations mission in Afghanistan.) <http://www.nytimes.com/2011/07/09/world/asia/09nightraids.html?ref=carlottagall&pagewanted=all>.

²⁰ Interview with 41-year-old male, Kandahar city, Kandahar province, April 14, 2011.

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- ²¹ See, e.g., Matt Robinson, “Flash, Bang, But Afghan Night Raid Comes Up Empty,” *Reuters*, February 24, 2011, [hereinafter: Robinson: “Flash, Bang”] http://photoblog.msnbc.msn.com/_news/2011/02/24/6122551-flash-bang-but-afghan-night-raid-comes-up-empty (noting that in a night raid the journalist participated in the target was not there, either because of mistaken intelligence or because he got away).
- ²² Mistaken intelligence has happened frequently in ISAF operations, not limited to night raids. For example, a recent case study of a targeted killing that took place in Takhar province, Afghanistan, in September 2010, criticized the U.S. military for failing to crosscheck intelligence on the individual targeted with publicly available facts about that person. Kate Clark, “The Takhar Attack: Targeted Killings and the Parallel Worlds of U.S. Intelligence and Afghanistan,” *Afghan Analysts Network Blog*, May 10, 2011, <http://www.aan-afghanistan.org/index.asp?id=1691>.
- ²³ Sharifullah Sahak & Alissa Rubin, “For Second Time in 3 Days, NATO Raid Kills Afghan Child,” *New York Times*, May 14, 2011, http://www.nytimes.com/2011/05/15/world/asia/15afghan.html?_r=1.
- ²⁴ Interview with 22-year-old male, Jalalabad city, Nangarhar province, February 5, 2011. See also, Emma Graham-Harrison, “NATO’s ‘Successful’ Afghan Night Raids Come with High Civilian Cost,” *Reuters*, February 24, 2011, <http://www.trust.org/alertnet/news/feature-natos-successful-afghan-night-raids-come-with-high-civilian-cost/>
- ²⁵ Former State department contractor, Matthew Hoh, who was familiar with the targeting process while based in Zabul province in 2009, said the increase in night raids was inevitably due to a relaxation of standards for targeting such that even those tangentially related to the Taliban might now be targeted. Gareth Porter and Shah Noori, “Understating Afghan Civilian Deaths,” *CounterPunch.com*, March 19, 2011, <http://www.counterpunch.org/porter03182011.html>.
- ²⁶ Interview with 41-year-old male, Kandahar city, Kandahar province, April 14, 2011.
- ²⁷ Interview with 26-year-old male, Gul Tapa district, Kunduz province, May 23, 2011.
- ²⁸ Interview with Col. Paul Harkness, Kabul city, Kabul province, Afghanistan, June 9, 2010. Phone interview with military officer, May 26, 2011; Interview with defense contractor, Washington, D.C., May 15, 2011.
- ²⁹ Interview with defense contractor, Washington, D.C., May 15, 2011; Interview with COM-ISAF strategic advisor, Kabul city, Kabul province, April 17, 2011.
- ³⁰ Interview with 24-year-old male, Gul Tapa district, Kunduz province, May 23, 2011.
- ³¹ Interview with 43-year-old male, Panjwaii district, Kandahar province, April 10, 2011.
- ³² See also Emilie Jelinek, “Paktia’s Lost Promise,” *FP.com*, July 21, 2011, http://afpak.foreignpolicy.com/posts/2011/07/21/paktias_lost_promise (describing an incident in which armed Taliban demanded shelter in the middle of the night from a civilian family, despite their protests, leading to a night raid that killed three and injured two of the civilian family).
- ³³ This pattern has also been identified by other monitors working on these issues. For example, an Afghanistan Analysts Network (ANA) investigation into a series of night raids in Nangarhar province from October to November 2010 suggests the raids—some of which resulted in fatalities—were seeking information from those who had contact with a local religious cleric and shadow governor named Maulawi Yusuf. Fabrizio Foschini, “Because the Night Belongs to Raiders: Special Ops in Nangrahar,” *Afghan Analysts Network Blog*, Oct. 1, 2010, <http://aan-afghanistan.com/index.asp?id=1424>.
- ³⁴ Interview with former COM-ISAF staff, Washington, DC, May 27, 2011.
- ³⁵ Phone interview with former COM-ISAF strategic advisor, May 31, 2011.
- ³⁶ See also, United Nations Assistance Mission to Afghanistan & Afghanistan Independent Human Rights Commission, *Annual Report on Protection of Civilians in Armed Conflict 2010*, March 2010, at pp. 31 - 32 [hereinafter: UNAMA/AIHR 2010 report].
- ³⁷ Interview with 33-year-old, Kunduz city, Kunduz province, May 23, 2011. Interview with 24-year-old, Kunduz city, Kunduz province, May 23, 2011; Interview with 26-year-old, Kunduz city, Kunduz province, May 23, 2011.
- ³⁸ Interview with elder, Kunduz city, Kunduz province, May 25, 2011.
- ³⁹ Interview with 43-year-old male, Panjwaii district, Kandahar province, April 10, 2011.
- ⁴⁰ See also, UNAMA/AIHR 2010 report, *supra* note 36, at pp. 31 - 32.
- ⁴¹ There may also be deliberate detention operations, more akin to night raids, during these clearing operations.

⁴² Under Article 51(3) of Additional Protocol I, “Civilians shall enjoy the protection afforded by this Section unless and for such time as they take a direct part in hostilities.” Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 51(3) [hereinafter: “Additional Protocol I”]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non- International Armed Conflicts [hereinafter: “Additional Protocol II”], 8 June 1977, Art. 13(3), <http://www.icrc.org/ihl.nsf/FULL/475>; ‘Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (Adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009)’ *International Review of the Red Cross* No. 872, December 2008, <http://www.icrc.org/eng/resources/documents/article/review/review-872-p991.htm>.

⁴³ There is ongoing academic debate about the scope of authority for detentions in non-international armed conflict, and how many of the established detention standards of international armed conflict—including, for example, the authority to intern civilians for “imperative reasons of security” under the Fourth Geneva Convention—may be treated as analogous. See, e.g., Jelena Pejic, “Procedural Principles for Internment/Administrative Detention in Armed Conflict and other Situations of Violence,” *Int’l Rev. of the Red Cross*, Volume 87, Number 858 (June 2005), p. 380, http://www.icrc.org/eng/assets/files/other/irrc_858_pejic.pdf [hereinafter: Pejic: “Procedural violations”] (arguing that some of the standards of international armed conflict apply by analogy in non-international armed conflict, including, for example the principle that intelligence value alone is not normally sufficient basis for internment).

⁴⁴ Nilz Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities*, International Committee of the Red Cross, 01-07-2009 Publication Ref. 0990, May 2009, <http://www.icrc.org/eng/resources/documents/publication/p0990.htm>.

⁴⁵ *Id.* at p. 61.

⁴⁶ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, <http://www2.ohchr.org/english/law/firearms.htm>; Code of Conduct for Law Enforcement Officials, Adopted by General Assembly resolution 34/169 of 17 December 1979, <http://www2.ohchr.org/english/law/codeofconduct.htm>.

⁴⁷ There is also support in recent U.S. law and practice for interpreting IHL as limiting the power to detain for intelligence purposes. In *Hamdi v Rumsfeld*, the U.S. Supreme Court recognized that the power to detain is intended to prevent combatants from returning to the battlefield, not to gather intelligence. *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (“Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized.”). The criteria used by U.S. Detention Review Boards (DRBs) in Afghanistan also reflect this legal position. DRBs are expressly prohibited from keeping individuals in detention based solely on their intelligence value. Memorandum from Deputy Secretary of Defense: Policy Guidance on Review Procedures and Transfer and Release Authority at Bagram Theater Internment Facility (BTIF), Afghanistan (U), July 2, 2009, at p. 2, http://www.aclu.org/files/pdfs/natsec/bagram20100514/07bagrampolicy_30-92.pdf

⁴⁸ Article 3 common to the four 1949 Geneva Conventions provides that all individuals should “be treated humanely without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.” Arbitrary deprivation of liberty has been found to be a violation of Common Article 3 as a form of inhumane treatment: “State practice establishes [prohibition on arbitrary deprivation of liberty] rule as a norm of customary international law applicable in both international and non-international armed conflicts. It should be noted that common Article 3 of the Geneva Conventions, as well as both Additional Protocols I and II, require that all civilians and persons hors de combat be treated humanely, whereas arbitrary deprivation of liberty is not compatible with this requirement.” See International Committee of the Red Cross, Customary IHL Database: “Rule 99: Deprivation of Liberty,” available at http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule99 (last accessed Aug. 14, 2011).

⁴⁹ Collective punishment prohibited under Additional Protocol II, Art. 4 (2)(b). Case-by-case determination. Pejic: “Procedural violations,” *supra* note 45 at p. 380. See also *Prosecutor v. Delalic*, No. IT-96-21-A, ¶ 327 (February 20, 2001).

⁵⁰ *Id.*

⁵¹ Interview with male [age unknown], Jalalabad city, Nangarhar province, February 7, 2011.

⁵² Interview with male [age unknown], Maidan Shar, Wardak province, March 25, 2010

⁵³ Interview with male [age unknown], Kandahar city, Kandahar province, Nov. 22, 2010.

⁵⁴ Interview with Col. Paul Harkness, Kabul city, Kabul province, Afghanistan, June 9, 2010.

⁵⁵ UNAMA/AIHRC 2010 report, *supra* note 36.

⁵⁶ See, e.g., Gareth Porter and Shah Noori, "U.N. Reported Only a Fraction of Civilian Deaths from U.S. Raids," *Inter Press Service*, March 17, 2011, <http://ipsnews.net/news.asp?idnews=54883> (citing AIHRC Commissioner Nader Nadery that the UNAMA/AIHRC report only included statistics and case studies based on cases they were able to investigate thoroughly); UNAMA Protection of Civilians, Mid-Year Report, July 2011, page 25. ("Given both limitations associated with the operating environment and limited access to information, UNAMA may be under-reporting the number of night raids involving civilian casualties.") Interview with international human rights monitor [name, title withheld] in Kabul city, Kabul province, February 10, 2011 (discussing under-reporting of night raids because many of the areas in which they take place are inaccessible and the civilian deaths are difficult to verify).

⁵⁷ See, e.g., Carlotta Gall, "Night Raids Curbing Taliban, but Afghans Cite Civilian Toll," *New York Times*, July 8, 2011 (noting that "Military officials say that they get their target 80 percent of the time, and that less than 1 percent of the raids lead to civilian casualties."). ISAF generally tracks civilian casualties according to whether the death or injury was the result of "direct fire," "indirect fire," "close air support," etc. It does not aggregate casualties resulting from night raids specifically. This may explain why it does not release statistics on civilian casualties in night raids, although it does raise a question as to where the 1 percent statistic originates.

⁵⁸ In particular, it seems methodologically unconvincing that the statistic about no shot fired in 80 percent of night raids has remained the same for over a year, despite changes in the number of operations, and tactics used over time. See, e.g., Quil Lawrence, "Afghan Deaths Reignite Controversy Over Night Raids," *National Public Radio*, May 24, 2010, <http://www.npr.org/templates/story/story.php?storyId=127090878> (a May 2010 story noting ISAF statements that in 80 percent of night raids no shots fired); Robinson: "Flash, Bang," *supra* note 21 (a February 2011 story noting ISAF statements that in 80 percent of night raids no shots fired); <http://www.pbs.org/wgbh/pages/frontline/kill-capture/night-raids/> (a May 2011 story noting ISAF statements that in 80 percent of night raids no shots fired).

⁵⁹ Interview with male [age unknown], Jalalabad city, Nangarhar province, February 7, 2011.

⁶⁰ Interview with 30-year-old male, Mehter Lam city, Laghman province, February 8, 2011 (also noting that his uncle subsequently died from his wounds, a shrapnel wound to the arm).

⁶¹ *Id.*

⁶² A spokesman for ISAF at the time noted that it did not matter whether the men who ran outside were firing or not for a determination of hostile intent. "If you have got an individual stepping out of a compound, and if your assault force is there, that is often the trigger to neutralise the individual. You don't have to be fired upon to fire back." Jerome Starkey, "Nato 'Covered Up' Botched Night Raid in Afghanistan that Killed Five," *The Times*, March 13, 2011.

⁶³ Interview with 61-year-old male, Surkhod district, Nangarhar province, February 9, 2011. "I don't remember any calling out or anything. Just when they saw my son they shot him. My son-in-law then woke up from the sleep and started running away and saw the Americans and they shot him. My son was holding the gun. He had a special gun, not like a regular one but the type you shoot birds with. They directly pointed at my son and shot him. He was sleeping at the time. In his chest there were 10 or 12 bullets. Then they told me to raise my hands."

⁶⁴ In an incident in May 2011, a 12-year-old girl was shot when she ran away from an intruding force during a night raid. According to an ISAF statement following the incident: "An individual ran out the back of the compound toward the outer security perimeter and was killed when the security force mistakenly identified what they suspected was a weapon on the individual. . . . Later, the force discovered the individual was an unarmed Afghan female adolescent." Alissa R. Rubin, "Girl, 12, Killed in NATO Raid on Wrong Afghan Home," *New York Times*, May 12, 2011. See also Interview with 38-year-old man, Jalalabad city, Nangarhar province, February 9, 2011 (describing how international military shot after a 12-year-old boy who ran away when they entered the house and yard).

⁶⁵ A spokesman for ISAF at the time noted that it did not matter whether the men who ran outside were firing or not for a determination of hostile intent. "If you have got an individual stepping out of a compound, and if your assault force is there, that is often the trigger to neutralise the individual. You don't have to be fired upon to fire back." Jerome Starkey, "Nato 'Covered Up' Botched Night Raid in Afghanistan that Killed Five," *The Times*, March 13, 2011.

⁶⁶ The concern that a man picking up his cell phone might be activating a bomb remotely or calling for back-up has frequently been used as a justification for shooting someone who otherwise has no hostile intent. Alissa J. Rubin, “Bombs Kill 13 Afghans; Elderly Man Dies in Raid,” March 21, 2010, *New York Times*, <http://www.nytimes.com/2010/03/22/world/asia/22afghan.html>.

⁶⁷ Emma Graham-Harrison, “Factbox: Night-time Raids in Afghanistan,” *Reuters*, February 26, 2011, <http://www.trust.org/alertnet/news/factbox-night-time-raids-in-afghanistan/>. Similarly high volumes of detentions took place in late 2010 and through the summer of 2011, though specific statistics on the number of those detained were not available, despite repeated requests.

⁶⁸ Andrea Prasow, “Afghan Torture Is No Secret,” *National Post*, May 4, 2010.

<http://network.nationalpost.com/NP/blogs/fullcomment/archive/tags/National+Postost/default.aspx>. Judgment: *R (Evans) v SS Defence*, <http://www.judiciary.gov.uk/NR/rdonlyres/60E1560B-7E8A-4C3C-A886-C309B35237AD/0/revansvssjudgment.pdf> (singling out the NDS in particular in evaluating complaints of widespread mistreatment and torture at Afghan detention facilities).

⁶⁹ Interview with 61-year-old male, Surkhod district, Nangarhar province, February 9, 2011.

⁷⁰ See, e.g., Thomas Ruttig and Susanne Schmeidl, 2011, “Talking about Civilian Casualties in Kabul,” *Afghanistan Analyst Network Blog*, July 3, 2011, <http://aan-afghanistan.com/index.asp?id=1893>.

⁷¹ In the past, ISAF was sometimes willing to share cockpit video or other material they believed established the combatant nature of those killed in ISAF military operations. In the last year and a half those requests have routinely been refused. Interview with international human rights monitor in Kabul city, Kabul province, February 9, 2011; Interview with international human rights monitor in Kabul city, Kabul province, April 13, 2011.

⁷² The last redacted investigation report released, related to a February 2010 airstrike in the border area of Uruzgan/Daikundi provinces. Headquarters United States Forces Afghanistan, Press Release: U.S. Releases Uruzgan Investigation Findings (100528-NR-019), May 28, 2010, Kabul, Afghanistan, <http://www.isaf.nato.int/article/isaf-releases/u.s.-releases-uruzgan-investigation-findings.html>.

⁷³ Full records of the ISAF civilian casualty tracking cell data was released publicly in a special report by Science magazine, “Civilian Casualties in Afghanistan: Data and Documents,” *Science*, March 11, 2011, vol. 331, no. 6022, pp. 1256-1260, <http://www.sciencemag.org/content/331/6022/1256/suppl/DC1>. OSI analyzed the databases and found that many incidents in which ISAF has admitted to civilian casualties were not recorded in the civilian casualty counts for that period of time. For example, a night raid on February 12, 2010 in Gardez city, Paktia province in the southwest (SW) area of operations resulted in the death of 5 civilians, and other injuries. The ISAF database has recorded zero civilian casualties for the month of February in the entire southwest area, despite ISAF belatedly admitting the civilian casualties that resulted from the Gardez incident. See, “NATO Admits to Killing 5 Civilians in Afghanistan,” *VOANews*, April 5, 2010, <http://www.voanews.com/english/news/asia/NATO-Admits-to-Killing-5-Civilians-in-Afghanistan-89926357.html>. Other examples of incomplete tracking appear throughout the database records.

⁷⁴ The last directive to be released publicly was the January 2010 tactical directive on night raids, An unclassified version of the first tactical directive has been released and is available at: <http://www.isaf.nato.int/article/isaf-releases/isaf-issues-guidance-on-night-raids-in-afghanistan.html>.

⁷⁵ Night raids might also be carried out in smaller numbers by ISAF Special Operations Forces (including U.S., British, Australian, Canadian, or other countries’ Special Forces), or by U.S. Special Forces belonging to Combined Forces Special Operations Component Command (CFSOCC).

⁷⁶ Chris Rogers, Campaign for Innocent Victims in Conflict (CIVIC) Worldwide, *Addressing Civilian Harm in Afghanistan: Policies and Practices of International Forces*, CIVIC Worldwide, April 2010, available at <http://www.civicworldwide.org/afghanistan>.

⁷⁷ Phone interview with military officer, May 26, 2011

⁷⁸ Phone interview with former COM-ISAF strategic advisor, May 31, 2011; Interview with COM-ISAF strategic advisor, Kabul city, Kabul province, April 17, 2011; Phone interview with military officer, May 26, 2011.

⁷⁹ Though the Open Society Foundations’ and The Liaison Office’s research did not find a significant increase in “kill” missions, it is worth noting that other international commentators have suggested that domestic U.S. legal battles over detention authority in sites like Guantanamo have created pressure on the Obama Administration to kill rather than capture suspected terrorists found in Afghanistan, Pakistan, or other sites abroad. John Yoo, “From Guantanamo to Abbottabad,” *Wall Street Journal*, May 4, 2011, (“Mr.

Obama would rather kill al Qaeda leaders—whether by drones or special ops teams—than wade through the difficult questions raised by their detention.”); Kenneth Anderson, “Targeted Killing in U.S. Counterterrorism Strategy and Law,” May 11, 2009, Hoover Institution, at 7 (“the political costs for any U.S. administration in taking and holding detainees are now enormous. . . . Politically, the most powerful institutional incentive today is to kill rather than capture them.”); Tara McKelvey, “Inside the Killing Machine,” *Newsweek*, February 13, 2011 (describing comments by former chief lawyer for the CIA, John Rizzo, about critiques of detention process under the Bush Administration “The detainees, by and large, survived, Rizzo observes; today, high-level terrorism suspects often do not.”).

⁸⁰ While many Afghans interviewed shared their belief that international forces do not understand Afghan culture and religion, many Afghan complaints transcend culture and religion. As one man from Wardak said, “This is not about me being Afghan and you being international; or me being Muslim or not. If I came to your home in the middle of the night, while you and your family were sleeping, searched the home, scared all of the children, what would you think of me?” Interview with male [age unknown], Maidan Shar, Wardak province, March 25, 2010.

⁸¹ For example, Pashtun communities in Khas Uruzgan district of Uruzgan province have frequently complained about night raids conducted by Hazara forces (either independently or jointly with international forces). This issue has exacerbated long-standing tensions between Hazara and Pashtun communities in the area. See also The Liaison Office, *The Dutch Engagement in Uruzgan: 1996-2010*, Kabul: The Liaison Office (2010).

⁸² Thom Shanker, Elizabeth Bumiller, and Rod Nordland, “Despite Gains, Night Raids Split U.S. and Karzai,” *New York Times*, November 15, 2010, <http://www.nytimes.com/2010/11/16/world/asia/16night.html> (“NATO officials in Kabul say that representatives from the Afghan ministries of defense and interior, and from Mr. Karzai’s own national directorate of security, work inside the operations center and approve each mission.”); Josh Partlow, “Karzai Wants U.S. to Reduce Military Operations in Afghanistan,” *Washington Post*, November 14, 2010 (“On each mission, Afghan commandos accompany U.S. troops and Afghan officers work with the Special Operations command at Bagram Airfield to choose targets, military officials said”). Several current and former military officials have also told OSF and TLO that in some cases, the decision to conduct a raid and the authorization for it is more immediate, with the information learned in one raid leading to a second night raid on a different target the very same night. It is not clear what the Afghan involvement in authorization of these types of raid is; however, they appear to happen infrequently. Interview with COM-ISAF strategic advisor, April 17, 2011; Phone interview with former COM-ISAF strategic advisor, May 31, 2011.

⁸³ Interview with Col. Paul Harkness, Kabul city, Kabul province, Afghanistan, June 9, 2010.

⁸⁴ *Id.*

⁸⁵ In October 2010, the Afghan National Security Council Afghan officials announced that this level of consultation gave them no meaningful control. Amir Shah & Heidi Vogt, “Afghanistan: Consult System on Ops Not Working,” *Associated Press*, Oct. 18, 2011, http://www.wivb.com/dpps/military/Afghan-Consult-system-on-military-ops-not-working_3614649. In November 2010, Afghan President Karzai called for an end to night raids. Joshua Partlow, “Karzai Wants U.S. to Reduce Military Operations in Afghanistan,” *Washington Post*, Nov. 14, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/13/AR2010111304001.html>. In May 2011, President Karzai ordered the Defense Ministry to bring night raids under their control. Hamid Shalizi, “Karzai Wants Afghans to Take Control of Night Raids,” *Reuters*, May 28 2011, http://www.realclearworld.com/news/reuters/international/2011/May/28/karzai_wants_afghans_to_take_control_of_night_raids.html.

⁸⁶ Interview with Col. Paul Harkness, Kabul city, Kabul province, Afghanistan, June 9, 2010

⁸⁷ *Id.*

⁸⁸ Interview with male [age unknown], Kabul city, Kabul province, March 13, 2011; Interview with male [age unknown], Kabul city, Kabul province, March 13, 2011.

⁸⁹ Interview with male [age unknown], Kabul city, Kabul province, March 12, 2011.

⁹⁰ But see *supra* note 80.

⁹¹ Though many witnesses noted that Afghans were part of the forces, they rarely described them as in the lead. Instead, witnesses reported that international forces often take the lead in night raid operations and have not been limited to a “perimeter role,” as ISAF officials have suggested.

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- ⁹² Interview with local rights monitor, Jalalabad city, Nangarhar province, February 6, 2011.
- ⁹³ Interview with man [age unknown], Jalalabad city, Nangarhar province, February 7, 2011.
- ⁹⁴ Robinson: “Flash, Bang”, *supra* note 21 (noting that in a night raid the journalist participated in, a Female Engagement Team of female soldiers dealt with the women in the home). See also Thom Shanker, Elizabeth Bumiller, and Rod Nordland, “Despite Gains, Night Raids Split U.S. and Karzai,” *New York Times*, Nov. 15, 2010, <http://www.nytimes.com/2010/11/16/world/asia/16night.html>. These teams have also been criticized for having an intelligence gathering function which could potentially endanger the women they interact with.
- ⁹⁵ Open Society Foundations & The Liaison Office: “Strangers at the door”, *supra* note 1, at p. 12.
- ⁹⁶ For example, one man from Kandahar province who overall spoke more approvingly of night raids said, “When they search Americans do not steal property or money, but the ANA and Police, they do. . . . We wish the police not to steal and do not take bribers to release prisoners.” Interview with male [age unknown], Kabul city, Kabul province, March 12, 2011.
- ⁹⁷ Oxfam, Campaign for Innocent Victims in Conflict, Human Rights Research Consortium, & Peace Training & Research Organization, Joint Briefing Paper: No Time to Lose: Promoting the Accountability of the Afghan National Security Forces, May 10, 2011.
- ⁹⁸ Human Rights Watch, “Just Don’t Call It a Militia” - Impunity, Militias, and the Afghan Local Police, September 12, 2011, <http://www.hrw.org/node/101507> [hereinafter “HRW: Militia Report”].
- ⁹⁹ Martine van Bijlert, 2011, “Khas Uruzgan Violence and ISAF Press Releases,” *Afghanistan Analyst Network Blog*, June 26, 2011; <https://www.afghanistan-analysts.net/index.asp?id=1846>, and HRW: *Militia Report*, *supra* note 98.
- ¹⁰⁰ Interview with Col. Paul Harkness, Kabul city, Kabul province, June 9, 2011.
- ¹⁰¹ In contrast to ISAF statements many community elders and Afghan civilians interviewed argued that if international forces had come during the daytime or sent for them, they could have detained and/or questioned the individuals peacefully. See, e.g., Interview with elderly male [age unknown], Tirin Kot, Uruzgan province, July 4, 2011 (suggesting that a more peaceful alternative to night raids would be for international forces to secure or seal off the targeted area at night, then after daybreak search the house and detain individuals after requesting permission from elders).
- ¹⁰² ISAF has sometimes argued that regular law enforcement is not possible in many areas because ANSF do not have control of all areas or sufficient capacity to carry out these detentions through regular law enforcement. This argument would be more convincing if night raids were only used in contested areas or areas known to have a weak ANSF force presence. The fact that night raids occur regularly in major provincial capitals including Kabul city and Jalalabad, in which ANSF forces are strong, suggests that this is not the main reason for the lack of alternative detention practices.
- ¹⁰³ Bashir Ahmad Naadem, “Al Jazeera Journalist Freed in Kandahar,” *Pajwok Afghan News*, Sept. 24, 2010, <http://www.pajhwok.com/en/2010/09/24/al-jazeera-journalist-freed-kandahar>.
- ¹⁰⁴ Interview with Rahmatullah Nekzad, Ghazni local journalist for Al Jazeera, Kabul city, Kabul province, Sept. 26, 2010.
- ¹⁰⁵ In some cases the signal intelligence might not suggest the individual’s occupation, or public profile as clearly as it might have in the Al Jazeera case. Thus, ISAF might not know that the person is so easily detainable by other means. If so, the fact that ISAF does not check out such basic, public details of a person’s life before authorizing the potential use of lethal force on the family home is legally questionable, an issue raised more generally with regard to targeted killings. Past efforts to reduce civilian casualties from international military operations have included requirements to do a full pattern of life analysis before targeting. If these requirements are not already part of the restrictions applicable to night raids, there are strong grounds for including them.
- ¹⁰⁶ Anand Gopal, “Afraid of the Dark in Afghanistan,” *TomDispatch.com*, Jan. 28, 2010, http://www.tomdispatch.com/blog/175197/tomgram%3A_anand_gopal,_afraid_of_the_dark_in_afghanistan/
- ¹⁰⁷ Additional Protocol I, Art. 57(1).
- ¹⁰⁸ Additional Protocol I, Art. 57 (2)(b).
- ¹⁰⁹ Additional Protocol I, Art. 57(3).
- ¹¹⁰ For more on the applicability of human rights law during periods of armed conflict, see generally, Noam Lubell, “Challenges in Applying Human Rights Law to Armed Conflict,” *Int’l Rev. of the Red Cross*, Volume 87, Number 860 (December 2005). Rule of Law in Armed Conflict Project Website, “Interaction between Humanitarian Law and Human Rights in Armed Conflicts,” <http://www.adh->

geneva.ch/RULAC/interaction_between_humanitarian_law_and_human_rights_in_armed_conflicts.php (last accessed August 1, 2011). In addition, most relevant for this issue in Afghanistan, the United States generally contests the extra-territorial application of human rights treaties absent a specific provision. See generally, Michael Dennis, “Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation,” 99 *Am. J. Int’l L.* 119 (2005).

¹¹¹ Some scholars have noted that three situations in which human rights law might be relied on to a greater extent during periods of armed conflict are: occupation, non-international armed conflict, and counter-terrorism. See Michael N. Schmitt, “Investigating Violations of International Law in Armed Conflict,” *Harv. Nat’l Sec. J.*, Vol. 2, Issue 2, 51 - 56 (2010) (noting also that “The instance and scope of applicability will depend in great part on whether the situation involves an incident directly related to the conduct of the armed conflict or one where the nexus with the conflict is attenuated.”). See generally, Robert J. Delahunty & John Yoo, “What Is the Role of International Human Rights Law in the War on Terror?” 59 *DePaul L. Rev.* 803 (2010). Noam Lubell, “Challenges in Applying Human Rights Law to Armed Conflict,” *Int’l Rev. of the Red Cross*, Volume 87, Number 860 (December 2005), 746 – 750 (arguing that because IHL is less developed with regard to non-international armed conflicts, human rights law might be relied upon more heavily: “where IHL treaties are silent, human rights law might be offered as an answer”).

¹¹² The Afghan NGO Safety Office—a widely trusted non-governmental security monitor that regularly tracks security incidents—found a 119 percent increase in insurgent attacks from June 2009 to June 2011. Kate Clark, “Civilian Casualties 1: Progress in the War or a ‘Perpetually Escalating Stalemate’?” *Afghan Analysts Network blog*, July 21, 2011, <http://aan-afghanistan.com/index.asp?id=1957>.

¹¹³ Joshua Partlow, “Karzai Wants U.S. to Reduce Military Operations in Afghanistan,” *Washington Post*, November 14, 2010.

¹¹⁴ *Id.* Emma Graham-Harrison, “Long-term Deal with U.S. Must Be on Afghan Terms: Karzai,” *Reuters*, July 26, 2011, <http://www.reuters.com/article/2011/07/26/us-afghanistan-us-idU.S.TRE76P1U320110726>.

¹¹⁵ See *supra* note 112 (noting 119 percent rise in insurgent attacks since the “surge” in troops and in night raids).