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تعزيز وحماية جميع حقوق الإنسان، المدنية والسياسية والاقتصادية والاجتماعية والثقافية، بما في ذلك الحق في التنمية

إضافة

تقرير المقرر الخاص المعني بحالات الإعدام خارج نطاق القضاء أو بإجراءات موجزة أو تعسفاً، السيد فيليب ألتون\*

البعثة التي قام بها إلى أفغانستان\*\*

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## موجز

إن أفغانستان غارقة في نزاع مسلح يُقتل فيه كل يوم مدنيون بأعداد مرتفعة بشكل لا يمكن قبوله. وقد قُتل في عام ٢٠٠٨ عدد من المدنيين يقدر بـ ١١٨ ٢ شخصاً نتيجة للنزاع المسلح، وسُجّلت في عام ٢٠٠٧ نسبة إضافية قاربت ٤٠ في المائة. وجميع حالات الوفيات هذه ليست حالات لا يمكن تفاديها. والمدنيون يواجهون يوماً بعد يوم انعدام الأمن، فيما يحمل معظم أنشطتهم اليومية في طياته خطر الموت. وهم يُغتالون على أيدي الطالبان أو يُرمون بالرصاص على نقاط التفتيش والقوافل على أيدي الجنود الأفغان أو الجنود الدوليين. وهم يُنسفون في هجمات انتحارية متهورة تنفذ في أماكن عمومية، أو يُقتلون في ضربات جوية سيئة التخطيط أو غير متناسبة مع مقتضيات الحال على أيدي القوات الدولية. أو يذهبون ضحية معلومات خاطئة ويُقتلون في غارات تشنها على المنازل دوائر المخابرات الدولية لا تتولى أية قيادات حكومية أو عسكرية المسؤولية عنها.

وكان شغل المقرر الخاص الشاغل أثناء بعثته لتقصي الحقائق في أفغانستان في أيار/مايو ٢٠٠٨ فهم كيفية حدوث عمليات القتل هذه، والتقدم بتوصيات ترمي إلى التقليل من عدد الضحايا المدنيين، كيفما تمت وأياً كان فاعلها. ولذلك الغرض، اعتمد المقرر الخاص نظرة للنزاع محوراً للمدنيون وسعى إلى فهم كيف تسفر تكتيكات كل طرف عن قتل المدنيين، وكيف أن سلوك طرف من الأطراف يزيد من احتمال قتل المدنيين على أيدي الطرف الثاني، وكيف أن المدنيين يقعون في شرك الكفاح من أجل تفادي المواجهات العسكرية. وكل واحدة من الجهات الفاعلة العسكرية في النزاع تلقي باللائمة على الطرف الثاني في قتل المدنيين. غير أن الحقيقة هي أن الطالبان، والقوات الأفغانية، والقوات العسكرية الدولية كلها مسؤولة عن عمليات القتل غير المشروعة وكل واحدة منها مسؤولة عن تخفيض أعداد المدنيين الذين يُقتلون في النزاع.

وفيما يتصل بعمليات القتل العديدة المرتكبة على أيدي الطالبان، يتعين على قيادة الطالبان أن تصدر أوامر واضحة تدعو مقاتليها إلى احترام حقوق الإنسان والقانون الإنساني، ولا سيما بغية وضع حد لاستخدام الدروع البشرية، واغتيال المدنيين، واستخدام الهجمات الانتحارية، التي تنتج عنها أعداد غير متناسبة من الخسائر في الأرواح في صفوف المدنيين. وعلى مناصري حقوق الإنسان الدخول في حوار مع القيادة في جهد يرمي إلى النهوض بهذه الأهداف. وهذا أمر شائع في النزاعات الداخلية وفي العصيان المسلح في جميع أنحاء العالم. وأفغانستان ليست استثناءً.

وفيما يتصل بعمليات القتل على أيدي القوات الأفغانية والقوات الدولية، لا بد للقوات من إعادة النظر في إجراءات توجيه ضربات الجوية وشن الغارات. ولا بد من تطوير إجراءات للتأكد بموثوقية من الأهداف بشكل أكثر فعالية، ويجب أن تسهر القوات على ألا تسفر أساليب هجومها عن خسائر في أرواح المدنيين تكون مفرطة مقارنة مع ميزتها العسكرية. وبالإضافة إلى ذلك، يحتاج الأمر إلى إيلاء القوات الدولية قدراً أكبر بكثير من العناية لتشجيع الشفافية والمساءلة في عملياتها وتحرياتها. ويجب أن تكون تقديرات الخسائر في أرواح المدنيين في النزاع علنية. وفضلاً عن ذلك، لا بد للقوات الدولية من السهر على أن يتسنى للأفغانيين الحصول بسهولة على المعلومات عن تقدّم التحريات والمحاکمات في عمليات القتل. ويجب عدم السماح لموظفي المخابرات الأجانب الذين لا يمكن مساءلتهم الخوض في العمليات العسكرية.

وقد كانت نتيجة برامج التعويض للقوات الحكومية والقوات الدولية حصول العديد من الأفغان عن تعويض عن خسائرهم. غير أنه يمكن تحسين هذه البرامج، ولا سيما من خلال تحسين تنسيقها وتطبيقها بشكل مرن. وعلاوة على ذلك، يجب أن يبحث القادة بشكل فعال عن الضحايا وأسرهم، ويجب أن يراعي البرنامج العقوبات التي تواجهها المرأة بشكل خاص في الوصول إلى هذه البرامج.

وبالإضافة إلى عمليات القتل ذات الصلة بالتزاع، يتطرق المقرر الخاص أيضاً لعمليات القتل غير المشروعة التي تحدث في سياق إنفاذ القانون أو في سياق خاص، أو التي يرجع سببها إلى نقائص في نظام العدالة الجنائية. أولاً، فإن الأفغان يُقتلون بشكل غير شرعي على أيدي الشرطة وموظفين مسلحين آخرين يعملون تحت سلطة المسؤولين الحكوميين. ونادراً ما تحقق الحكومة في هذه الأحداث الجسيمة. وبتقدم جهود الشرطة الإصلاحية من الحيوي التركيز على إنشاء قوة شرطة وطنية حقاً، وقطع الصلة بين الشرطة والمليشيات والقبائل الخاصة والسياسيين. ثانياً، فإن عدداً كبيراً من الأفغان، ولا سيما من النساء، ظلوا ضحايا ما يسمى بـ "القتل دفاعاً عن الشرف". والدولة تقصّر إلى حد كبير في التحقيق في هذه الاغتيالات ومقاضاة مرتكبيها. ثالثاً، وبشكل عام، فإن نظام العدالة الجنائية معيب إلى حد كبير، والفساد وعدم الكفاءة متفشيان. فمرتكبو هذه الجرائم الأقوياء أو الأثرياء يظلون أحراراً. وهناك حاجة ملحة إلى اتخاذ إجراءات لمكافحة حالات الفساد الخطيرة في صفوف المسؤولين الحكوميين، كخطوة أولى في التقليل من الفساد الذي يبتلي به النظام. رابعاً، تعني النقائص في نظام العدالة الجنائية أن احتمال أن يُحكم على أشخاص أبرياء بالإعدام مرتفع. ولأسباب العدالة والقانون الدولي، لا بد من فرض وقف لتنفيذ عقوبة الإعدام.

وكثيرون جداً هم المدنيون في أفغانستان الذين عايشوا الصراع والوحشية طوال جزء كبير من حياتهم. ومعظمهم فقدوا العديد من أفراد أسرهم في النزاعات المتتالية. إن الأفغان يستحقون مصيراً أفضل بكثير. ورسالة هذا التقرير هي أن العديد جداً من عمليات القتل التي تحصل الآن في أفغانستان يمكن تجنبها. ويجب أن تتخذ حكومة أفغانستان، والقوات الدولية، والطالبان، إجراءات عاجلة لتخفيض المعدلات المذهلة التي يقتل بها المدنيون من غير لزوم وبشكل غير مشروع في أفغانستان.

**Annex**

**REPORT OF THE SPECIAL RAPPORTEUR ON EXTRAJUDICIAL, SUMMARY  
OR ARBITRARY EXECUTIONS, PHILIP ALSTON, ON HIS MISSION TO  
AFGHANISTAN (4-15 MAY 2008)**

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## I. Background

1. Afghanistan is experiencing armed conflict across a broad swath of its territory. In legal terms, this is a non-international armed conflict between the Government, supported by international military forces (IMF), and various armed groups.<sup>1</sup> The Government's forces include the Afghan National Army (ANA), which works closely with the international forces, the Afghan National Police (ANP), a fragmented organization that bears the brunt of the insurgency's anti-government violence, and the National Directorate of Security (NDS), an Afghan intelligence service which conducts its own operations in addition to passing information to other national and international actors. The international military forces are divided into the International Security Assistance Force (ISAF), which plays a counterinsurgency role and itself consists of a number of national contingents commanded by NATO (since August 2003), and Operation Enduring Freedom (OEF), which plays a counterterrorism role and is led by the United States. The armed groups against which these national and international forces are arrayed exhibit varying degrees of coordination and integration and are widely referred to as "the Taliban", although they are sometimes referred to as "anti-government elements" (AGEs).<sup>2</sup> While extrajudicial executions committed in the context of the armed conflict are the primary focus of this report, independent causes of unlawful killings rooted in the systems of policing and criminal justice are also addressed.

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<sup>1</sup> The "international" armed conflict in Afghanistan began on 7 October 2001 (the date of the US led invasion of the country), and is usually considered to have ended with the establishment of the transitional Afghan Government in June 2002. From that date, the armed conflict became of a "non-international" character inasmuch as the international forces are fighting on behalf of the Government.

<sup>2</sup> It may also be noted that there are a range of armed opposition groups that tend to be referred to collectively as "Taliban" by locals and foreigners alike. (Although, this recognition is part of why the term "anti-government elements" (AGEs) is increasingly used.). The relationships between these groups are not always clear. Some groups may work in alliances, but the extent of cooperation implied may remain unclear. Similarly, the leaders of some originally independent groups may have been incorporated into the Taliban's leadership *shura*, but the extent to which this implies actual coordination or obedience to the dictates of Mullah Omar, the Taliban leader, may nevertheless be difficult to discern. The views of informed interlocutors on the extent of this diversity and its implications for civilian protection varied. Some contended that speaking of "the Taliban" was a solecism and that there were too many distinct chains-of-command for efforts to influence "the Taliban" to be sensible or meaningful. Other interlocutors suggested that Taliban are well-known for obeying orders from the top and that the *Layeha* and the rule against beheading civilians, including those working for the government, had been followed across large parts of Afghanistan, meaning that pressure on the leadership of the core Taliban could be productive and that focusing on subtle variation between groups and factions obscures more than it reveals. This report is agnostic as to the relative merits of these perspectives. I will refer throughout to "the Taliban" for the simple reasons that this is the general usage and that few of those victims and witnesses with whom I spoke were capable of pin-pointing the affiliations of the perpetrators of any particular incident.

## **II. Conflict-related killings**

### **A. Adopting a civilian-centric perspective**

2. Afghanistan is not an easy country in which to be a civilian. Everyday activities are life threatening, and civilians are killed by all sides to the conflict. My concern is to reduce all unlawful killings, however or by whomever they are committed. This requires an assessment of how all parties to the conflict can modify their conduct so as to reduce the insecurity the war poses to the civilian population.

3. The violence experienced by Afghan civilians is quite different from that experienced by others in Afghanistan. Although the Taliban may draw some distinctions, expatriates are targeted by insurgents largely regardless of their individual conduct, and they are generally protected or at least left alone by the Government and international forces. Thus, expatriates experience violence as unilateral and indiscriminate and look upon security largely as a matter of physical protection (e.g., walled compounds) and physical avoidance (e.g., not driving into an area known for roadside bombs). In contrast, the typical Afghan civilian in a conflict-affected area experiences violence and pressure from all sides.<sup>3</sup> The most visible aspects of the conflict are the military engagements between the parties: raids on compounds suspected of housing insurgents, air strikes on suspected Taliban encampments, suicide attacks on military convoys, ambushes and armed confrontations, and so on. In this aspect of the conflict, civilians are seldom deliberately targeted but they may be killed as “collateral damage” or targeted based on false information that they are combatants.

4. In the following analysis, consideration is given to: (i) military tactics employed by each side which may lead directly to civilian deaths; (ii) the behaviours or methods of warfare adopted by one side which can affect the behaviour of the other side, and exacerbate civilian killings; and (iii) the competition for civilian support.

### **B. Military operations**

#### **1. Air strikes and human shielding**

5. In 2008, 64% of civilian casualties (552 people) caused by pro-Government forces were due to air strikes and close air support for troops in contact with Taliban fighters. These deaths have galvanized

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<sup>3</sup> One example of conflating the security situations of Afghans with that of internationals is the frequent references to the UN Department of Safety and Security (UNDSS) access map as providing meaningful insights into the general level of violence in a given region. But UNDSS personnel stressed to me the limited purpose of that map and its inadequacy as a recorder or predictor on other issues. Thus, threats to the civilian population should be assessed independently from threats to expatriates. Civilian protection efforts must be guided by analytic tools specific to that purpose.

widespread outrage against international military action. Civilian casualties may result from attacks on those mistakenly believed to be combatants, or because of collateral damage. IHL provides that attacks on legitimate military objectives may be lawful even when they result in civilian deaths, as long as they are proportional.<sup>4</sup>

6. These rules also apply in situations such as that in Kunar province, where the Taliban fires rockets from residential areas directed at international forces bases and the latter then respond by firing back at the source. I heard no claim that the international forces deliberately held the civilian population accountable for these attacks, but the perception was that their responses displayed insufficient concern for civilian casualties. One official opined that while the local people did not “support” the AGEs they were in no position to interfere when armed men decided to fire from the area. He stated that for the international forces to return fire served no useful military purpose inasmuch as the AGEs would slip away immediately after firing and return across the border to Pakistan. The international forces have procedures for vetting targets and selecting an appropriate method of attack. I was not provided specifics on procedures, and am in no position to assess their formal compliance with international law. But regardless of the written procedures, it is not clear that sufficient caution is shown *in practice* to ensure that attacks are not indiscriminate and that civilian casualties will not be excessive in relation to the military advantage anticipated.

7. IHL also requires each party to the conflict to take certain steps to limit the risk to civilians of attacks by the opposing party.<sup>5</sup> These requirements are routinely disregarded by the Taliban. While there

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<sup>4</sup> With respect to the proportionality requirement, the “expected” resulting “incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof” must not be “excessive in relation to the concrete and direct military advantage anticipated” (Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (2005) (hereinafter, ICRC Study), Rule 14). With respect to the required precautions in carrying out an attack, the general rule is that “constant care” and “[a]ll feasible precautions” must be taken “to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects” (ICRC Study, Rule 15). This general rule is supplemented by a number of more specific rules. These include rules requiring that a party to the conflict make the “choice of means and methods of warfare” such as to minimize such harm to civilians (ICRC Study, Rule 17), do “everything feasible to assess” whether the proportionality requirement will be satisfied (ICRC Study, Rule 18), and “give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit” (ICRC Study, Rule 20). Furthermore, even as an operation is underway, there is an obligation to do “everything feasible to cancel or suspend an attack if it becomes apparent” that the target is not a military objective or that the proportionality requirement would not be satisfied (ICRC Study, Rule 19). On the issue of verifying that the target is a legitimate military objective, the rule is that each “party to the conflict must do everything feasible to verify that targets are military objectives” (ICRC study, Rule 16).

<sup>5</sup> Customary international humanitarian law prohibits “the use of human shields” (ICRC Study, Rule 97) meaning the “intentional collocation of military objectives and civilians or persons *hors de combat* with the specific intent of trying to prevent the targeting of those military objectives” (ICRC Study, Rule 97, discussion p. 340). In addition to this prohibition, each party also has various affirmative obligations.

are cases in which Taliban fighters have warned civilians to leave an area prior to an attack, I received multiple witness accounts of the Taliban intentionally using civilians as “human shields” to deter attacks on their forces. In some instances, the Taliban have launched rocket-propelled attacks at IMF bases, convoys or other military targets from civilian compounds and villages, thereby making it difficult for international forces to respond militarily — via return fire or air strike — without causing civilian casualties or damaging civilian objects. Human shielding is also employed when the Taliban are in direct military engagement with international ground forces, and fire upon soldiers from homes or compounds. In this situation, the presence of civilians within the compound — generally a family or group of families — has been used by the insurgents to deter return fire from international or ANA ground forces located nearby.<sup>6</sup>

8. The Taliban also sometimes hide from the IMF in civilian homes. Witnesses in Kandahar, for example, told me that it was common in certain areas for the Taliban to ask families to hide them within their homes and compounds. One woman recounted how her relatives refused to do so, and asked the Taliban not to enter, saying that they feared being killed in potential cross-fire. But the Taliban entered the home by force. In the absence of direct military engagement such actions are less likely to lead to civilian casualties, but in other circumstances endangerment will occur and various binding IHL obligations will be violated.

9. The Taliban should end the use of human shields and avoid locating its forces in areas populated by civilians. Nonetheless, Taliban usage of human shields does not affect the international forces’ obligation to ensure that air strikes do not cause a loss of civilian life excessive in relation to the military advantage of killing the targeted fighters.

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There is a general obligation to “take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks” (ICRC Study, Rule 22). The specific implications of this rule in the context of non-international armed conflicts are open to some interpretation; however, the rules required in international armed conflicts provide guidance. These rules include that each party must “to the extent feasible, avoid locating military objectives within or near densely populated areas” (ICRC Study, Rule 23) and “to the extent feasible, remove civilian persons and objects under its control from the vicinity of military objectives” (ICRC Study, Rule 24).

<sup>6</sup> For instance, one witness with whom I spoke in Kandahar lost 17 family members in an airstrike when the Taliban used his home to launch attacks on the international forces. During the evening, 15-20 Taliban insurgents came to the witness’s home, armed with AK-47s and rockets. The witness noticed airplanes flying overhead. Some of the Taliban told the family members to hide them, and others fired at the planes. They would not let the family leave the house. The witness told me that his sister-in-law begged the Taliban to stop firing at the planes from the home, fearing the planes would drop bombs on the family while attempting to strike the insurgents. Shortly after, she took her children out into the courtyard believing it would be safer, but they were all killed in the ensuing air strike.

## 2. Raids

10. Night-time raids on housing compounds are routinely used by the international forces to capture individuals suspected of links to the Taliban. The international forces generally conduct a raid in one of two ways.<sup>7</sup> The most common method, employed without any prior warning or request to enter, is to blow off a housing compound's door with explosives. The other method is to land on a roof in a helicopter and then climb down into the house on ladders. Night raids are always dangerous for civilians. Many Afghans keep guns for personal protection from criminals, and to assure their self-protection within their own homes and compounds. Given that it is common for people to sleep with guns due to fear of intruders and local attackers, there is a high likelihood that they will fire on anyone, including troops, breaking down the compound's door at night. The results can be devastating.<sup>8</sup>

11. Raids must be conducted in accordance with the stringent safeguards required by international human rights and humanitarian law.<sup>9</sup> A commander in the international forces with whom I spoke defended surprise night raids as the safest available method, because sleeping men could be apprehended before they had a chance to respond with violence. But Afghans with whom I spoke maintained that such

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<sup>7</sup> During raids, the international forces are often accompanied by ANA units, and, in many cases, ANP forces will secure the perimeter. In some areas, the NDS will perform prior surveillance. There are also raids conducted directly by the Afghan security forces, including the NDS. While the NDS collects and analyses intelligence, it also has an operational dimension. NDS officials informed me that they are authorized to conduct arrest operations and do so, especially in the areas of counterterrorism, organized crime, and counter-espionage. I did not gather information on the conduct of these raids.

<sup>8</sup> The most common complaints that I heard regarding night raids fall outside my mandate — that they are an invasion of privacy and the sanctity of a family's home, and result in women being treated inappropriately by foreigners. Many Afghans with whom I spoke indicated that these were some of their greatest concerns with respect to the conduct of the IMF, and expressed a strong desire for more cross-cultural training for the IMF, and for raids to be led by Afghan forces.

<sup>9</sup> The applicable body of law will depend on a raid's objective. If the raid is targeting a legitimate military objective, such as a combatant, then the raid is primarily governed by the same IHL governing other attacks, including rules and principles pertaining to verification of the target, proportionality, precautions in attack, and military necessity (*see* endnote 4). Thus, for example, when the IMF plans a raid, "everything feasible" must be done "to verify" that the target is a military objective (ICRC Study, Rule 16). And, in choosing the means and methods of conducting a military raid or detaining a combatant, the IMF must "take all feasible precautions" with a "view to avoiding, and in any event to minimizing, incidental loss of civilian life" (ICRC Study, Rule 17), and must "do everything feasible to assess whether the attack may be expected to cause incidental loss of civilian life ... which would be excessive in relation to the concrete and direct military advantage anticipated" (ICRC Study, Rule 18). If the raid's target is not a legitimate military objective -- e.g., if the target is a civilian who is not directly participating in hostilities — the operation is governed by international human rights law. In a law enforcement context, lethal force may be used only when it is clear that an individual is about to kill someone (making lethal force proportionate) and there is no other available means of detaining him or her (making lethal force necessary). (*See* A/61/311, paras. 33-45; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Principle 9; Code of Conduct for Law Enforcement Officials, art. 3.)

raids unnecessarily endangered the targeted individual's relatives and gave examples in which they believed that the target could readily have been captured in a less dangerous manner.<sup>10</sup>

12. Raids for which no Government or military command appears ready to acknowledge responsibility are especially problematic. In January 2008, two brothers were killed in a raid in Kandahar City led by international personnel. Well-informed Government officials confirmed that the victims had no connection to the Taliban. Despite clear indications of international involvement no international military commander would admit that his soldiers were involved.

13. I also examined raids in Kandahar and Nangarhar provinces involving international and Afghan forces. The identity of the international forces has yet to be confirmed. In Nangarhar the Afghan forces were probably the Shaheen Unit working with armed international personnel and in Kandahar the Afghans were working with international forces out of the Ghecko military base. The Minister of Defense, the head of NDS and ANA commanders confirmed that these force did not fall under their command. It is virtually certain that some or all of these units are led by personnel belonging to international intelligence services. The result is that, in the name of restoring the rule of law, heavily-armed internationals and their Afghan counterparts are wandering around conducting raids that too often result in killings and being held accountable by no one.

### **3. Intelligence gathering and false tips**

14. While air strikes and raids on legitimate military objectives cause many civilian casualties, too many attacks also target civilians who are mistakenly believed to be combatants.<sup>11</sup> This seem to happen because the IMF were too hasty in concluding that suspicious activity was connected to the Taliban and too credulous in interpreting information provided by civilians.

15. A number of civilians from conflict-affected areas with whom I spoke — including elders, witnesses to specific incidents, and the family members of victims — alleged that the international

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<sup>10</sup> For example, witnesses to raids and family members of suspects suggested that suspects could have been picked up from their place of work or while walking to work, where women and children would be at significantly less risk of being exposed to the threat or use of force.

<sup>11</sup> Pursuant to the rules of international humanitarian law applicable to non-international armed conflicts, attacks may only be directed at legitimate military objectives (ICRC Study, Rule 7). In addition to certain objects (*see* ICRC Study, Rule 8), legitimate military objectives may include combatants and civilians taking a direct part in hostilities (ICRC Study, Rules 1, 6). Combatants are “members of the armed forces of a party to the conflict” (excluding those forces’ “medical and religious personnel”) (ICRC Study, Rule 3). Many of those who belong to or are aligned with a party to the conflict — whether the Government or an armed opposition group — are neither combatants nor would be considered to be directly participating in hostilities while carrying out their roles. (When an individual is a civilian immune from attack, this does not mean that they may not be detained for violations of national law; however, the rules governing such law enforcement operations are principally provided by international human rights law rather than by international humanitarian law.)

forces' ignorance of local practices sometimes resulted in civilians being targeted based on only superficially suspicious conduct.<sup>12</sup>

16. Residents of communities struck by the IMF often complained that attacks had been undertaken on the basis of fabricated information provided by individuals pursuing personal grudges.<sup>13</sup> Numerous Government officials also claimed that civilian casualties had often been caused by international forces acting on false tips. One governor stated that there were people in his province who make a business of acting as intermediaries who would give false tips to the international forces in return for payment from individuals holding grudges. A number of security officials raised the issue in more general terms.<sup>14</sup> Civilians from conflict-affected areas confirmed that there is a tendency for attacks on persons wrongly believed to belong to the Taliban to work as self-fulfilling prophecies when those targeted decide to cultivate some countervailing source of military support.<sup>15</sup>

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<sup>12</sup> I heard multiple accounts of individuals who were irrigating fields at night — a common practice to prevent the evaporation of scarce water — being targeted by ground forces and in air strikes. The witnesses believed that these killings took place because international forces had jumped to the conclusion that a man moving about at night must be an insurgent. I received similar allegations about persons targeted while traveling at night (in one case, the individual was going to a hospital to obtain medication for a woman who had gone into labor) and others who were camping in remote areas because they were engaged in herding or road construction. Elders and other witnesses also claimed that international forces would misinterpret guns carried for self-defense as demonstrating that an individual was an insurgent and explosives possessed for road construction or gemstone mining — a significant industry in Nuristan — as evidence that an individual was involved in producing roadside bombs. One witness pleaded that the international forces should look at the ground reality in the area: “We are poor, we graze sheep, we have emergencies and need to walk at night — but we cannot.”

<sup>13</sup> An elder from Nuristan accused a district governor of feeding false information to international forces leading them to raid his local opponents. An elder from the Korengal Valley in Kunar asserted that “resistance” to the Government was stimulated by an IMF attack on the home of a prominent local leader. No compensation was provided and the leader responded by aligning himself with AGEs and facilitating attacks on the international forces. A witness from the Ghani Khel district of Nangarhar described a similar incident based on false information. An individual from the Maywand district of Kandahar claimed that Afghan interpreters for the international forces would extort money by threatening to label as Taliban those who would not pay. Air strikes and raids would follow.

<sup>14</sup> One senior official who claimed that reports of civilian casualties were frequently exaggerated stated that sometimes local residents genuinely perceived the victims as civilians involved in family feuds even when, in his view, those “feuds” were part and parcel of the conflict between the Taliban and the Government.

<sup>15</sup> Similarly, several elders from Nuristan province stated that communities closely observe who receives development assistance from the Provincial Reconstruction Teams (PRTs) and that those who do not receive assistance may come to fear that they are thought to be AGEs and thus flee the area rather than wait to be attacked.

17. Understandably, the international forces do not detail why particular targets were selected. Publicly releasing the source of intelligence information would often be tantamount to imposing a death sentence on the source. But this also makes it extremely difficult to confirm the authenticity or otherwise of intelligence relied upon. This does not mean that the problem should be ignored.<sup>16</sup> Government officials at all levels repeatedly argued that tighter cooperation between the international forces and the NDS in vetting targets and planning operations was the surest path toward reducing civilian casualties caused by false tips.<sup>17</sup> The merits of corroborating intelligence with as many sources as possible were not disputed by international military commanders, although one characterized the NDS's information as being more copious than reliable.

18. Existing procedures for ensuring that strikes targeting Taliban fighters are based on reliable information are insufficient to ensure respect for IHL requirements.<sup>18</sup> The current approach renders civilians vulnerable to attack and pushes personal and tribal rivals into opportunistic participation in the armed conflict.

#### **4. Suicide attacks**

19. In the four months prior to my visit, 214 of the estimated 381 civilians killed by the Taliban were killed in suicide attacks.<sup>19</sup> Both the number of suicide attacks and the number of civilians killed during such attacks have increased as the conflict has progressed: 2006 (123 attacks; 237 killed), 2007 (160 attacks; 321 killed), first four months of 2008 (34 attacks, 214 killed).<sup>20</sup>

20. Taliban suicide attacks are often employed in a disproportionate or indiscriminate manner, and large numbers of civilians are injured or killed as a result. Because they are carried out through a suicide body-borne or vehicle-borne IED ("incendiary explosive device") by insurgents who feign civilian status, Afghan and international forces are hard pressed to distinguish potential suicide bombers from civilians, leading to the accidental killing of civilians.

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<sup>16</sup> One witness whom I interviewed stated that, in his area, people trying to get their personal enemies attacked would sometimes go to the District Governor, but that he knew too much to believe their stories, would sometimes go to the Provincial Governor, but that he too was hard to persuade, and would then go to the international forces, who would conduct raids without adequately verifying the information received.

<sup>17</sup> I discussed the existing coordination mechanisms with a number of Governors and security officials. While arrangements vary, typically there is a weekly meeting bringing together the Governor and senior representatives of the international forces, ANA, ANP, and NDS, among others. This weekly meeting is sometimes supported by a standing body of lower-level representatives. Called a Provincial Coordination Committee (PCC), similar mechanisms also exist at the regional level and, less often, at the district level. All concerned stated that whether these mechanisms work well depends largely on the personal relationships and trust among the participants, and many of the Government officials with whom I spoke stressed with concern that the international forces continued to conduct some operations without prior consultation.

<sup>18</sup> ICRC Study, Rule 16. *See* further endnotes 4 and 9.

<sup>19</sup> UNDSS recorded 381 civilian casualties during the first four months of 2008 (214 of these were a result of suicide attacks).

<sup>20</sup> UN, UNDSS Afghanistan (8 May 2008).

21. Suicide bombing, as a method of attack during an armed conflict, is not prohibited *per se*.<sup>21</sup> But a suicide attack violates IHL when it targets civilians, may be expected to result in disproportionate civilian casualties, or is carried out in a perfidious manner.

22. Data on suicide attacks from January 2007 to March 2008 indicates that 15% of attacks targeted civilians, including government officials, and thus violated IHL. In addition, many of the attacks on legitimate military objectives disregarded the principle of proportionality by taking place in public areas where there are large numbers of civilians. Thus, although the suicide attack may target an IMF convoy or a member of the ANA, large numbers of civilian bystanders are often wounded and killed in a manner wholly excessive to any possible anticipated military advantage. The organizers of such attacks simply fail to take all feasible precautions to minimize incidental loss of civilian life. The manner in which suicide attacks have been employed also appear to have become more reckless in recent years.

23. Many Taliban attacks also involve perfidy, a prohibited method of warfare.<sup>22</sup> The Taliban regularly violate the prohibition against perfidy by feigning a civilian or other protected status for the purpose of carrying out suicide attacks. The Taliban's perfidious acts render everyday activities for Afghan civilians highly dangerous. In addition to the deaths caused directly, perfidy affects the behaviour of international and Afghan troops vis-à-vis Afghan civilians. In this way, violations by one side make it more difficult for the other side to comply with its legal obligations. Thus, in many situations the IMF will have no reliable way of assessing whether an unknown person approaching is a civilian, or a Taliban member intending to attack. This heightens the caution with which IMF soldiers approach ordinary Afghans, and necessitates the IMF taking precautions to protect themselves.

## 5. Force protection

24. The risk posed to the lives of IMF/Afghan soldiers by perfidious attacks has led the international forces to instruct civilians to keep at a distance from convoys and patrols. Defensive measures by soldiers will generally not be taken against vehicles and civilians who maintain the required distance and who do not otherwise pose a threat. Self-defensive measures may be taken against those who get too close. However, even when force is used in self-defense, it must comply with IHL norms, and, although perfidious attacks may increase the likelihood of mistakes, they do not justify any lowering of these standards for resorting to lethal force.

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<sup>21</sup> Just as it does not violate humanitarian law for a Taliban fighter to drive up to a checkpoint and shoot at a soldier, it does not violate humanitarian law for a Taliban fighter to drive up to a checkpoint and blow up both the soldier and himself.

<sup>22</sup> Perfidy is a deception that is designed to lead one party to the conflict to believe that they must accord protected status to an enemy. AP 1; ICC. And see J Ashley Roach, "Ruses and Perfidy Deception During Armed Conflict", 23 U. Tol. L. Rev. 395 (1991-1992).

25. Often the IMF or Afghan forces engaging in force protection act lawfully in self-defense. Sometimes, however, the evidence strongly suggests that IHL is violated. For example, on 4 March 2007, a convoy of US soldiers was ambushed. One soldier was wounded when a vehicle-borne IED hit the convoy. The soldiers responded by killing 19 Afghans and wounding 50 others in the space of a twenty kilometre retreat from the site of the suicide attack. A witness with whom I spoke saw the convoy approaching and pulled over to let it pass. But the convoy opened fire. He was shot and injured, and relatives in his vehicle were killed. A US military investigation concluded, without publicly providing any reasoned analysis, that the soldiers had acted appropriately.<sup>23</sup>

### **C. Struggling for the loyalty of the civilian population**

#### **1. Neutrality**

26. The Government and its international supporters need civilian support to build a strong state.<sup>24</sup> The Taliban similarly need civilian support. As the parties to the conflict compete for the cooperation of local civilians, individuals are subjected to conflicting demands, often including threats of violence, regardless of what choices they make.<sup>25</sup> The kinds of killings that are happening in this war also wound the living and trap them in a struggle to retain their civilian neutrality.<sup>26</sup>

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<sup>23</sup> See Part II.D.

<sup>24</sup> Civilians can provide information on the identities and locations of Taliban fighters, tip off international forces to the locations of IEDs, provide information on the identities of other civilian collaborators and informants, block or facilitate the recruitment of fighters, and so on.

<sup>25</sup> International humanitarian law governing non-international armed conflicts, including article 3 common to the Geneva Conventions of 1949, prohibits the killing of anyone “taking no active part in the hostilities” including not only civilians but also combatants “who have laid down their arms” or who have been placed *hors de combat* by injury or “any other cause”. Common Article 3 also prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples”. The content of these guarantees may be found, at least in part, by reference to the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights. Furthermore, humanitarian law always prohibits “[a]cts of threats of violence the primary purpose of which is to spread terror among the civilian population” (ICRC Study, Rule 2).

<sup>26</sup> I was told of one man who was beheaded by the Taliban after having been warned in a “night letter” posted in the community’s mosque to stop supplying information to the international forces. Although he appears to have fallen under suspicion due to his own conduct, the community’s elders had previously decided to keep the Taliban fighters out after having received a warning from the international forces. The latter had told them that if the Taliban continued to launch attacks from their area, they would retaliate, and civilians might well die. But, while the elders succeeded in angering the Taliban, they were unable to convince the international forces of their intentions. Indeed, I was told that the international forces mistook for Taliban the community search party looking for the missing man and fired on them. Another incident also illustrates the difficulty for civilians to navigate the conflicting demands of the parties to the conflict. Witnesses informed me that the presence of Taliban fighters in their village had resulted in attacks by the international forces, targeting both actual fighters and others who had been wrongly accused. They stated that, for this reason, a *jirga* of local elders decided that the community would hinder and deter Taliban infiltration. They decided that the house of anyone found supporting AGEs would be burned down and he would be handed over to the government. It was unclear, however, whether the international forces

## 2. Taliban assassinations and “night letters”

27. The Taliban routinely resorts to assassinations to coerce and punish civilians. In 2008, 271 such executions were committed. These killings are the tip of an iceberg of intimidation, epitomized by the “night letters” distributed to civilians. Some letters are displayed in public places — nailed to a mosque door, a school, or in a public market — and contain general directives or threats to the local population.<sup>27</sup> One Kunar witness told of a letter justifying attacks on local school students and on all non-Muslims. Others are sent to specific addressees. A Kandahar woman told of letters instructing her son to stop working for the ANP. He was later killed by suspected Taliban. In Kunar, a night letter was been posted in the village’s mosque threatening three people. Subsequently, two were assassinated and the third fled the country.<sup>28</sup> Directives issued by the Taliban leadership to its fighters expressly authorize the execution of civilians.<sup>29</sup>

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believed that the *jirga*’s decision was *bona fide* and the community was subsequently raided by international forces, resulting in two civilian deaths.

<sup>27</sup> In addition to the accounts that I received from witnesses, I reviewed a large number of night letters and other information gathered in Afghanistan. Threats made by the Taliban in person, by telephone, and through night letters and other publications have attempted to induce compliance with social norms favored by the Taliban and to deter various forms of collaboration with the Government, the international forces, and other actors. Persons threatened and targeted have included mullahs in Ulema Councils that advise the Government, members of Provincial Councils (especially female members), teachers, students attending school (especially female students), elders perceived to be collaborating with the Government, drivers supplying food to the international forces, persons employed by the Government, and persons working for non-governmental organizations. A night letter in Kandahar referred to earlier general pronouncements that people should not work for the Government or NGOs and went on to warn that a specific individual’s family members must cease to work for NGOs or be killed. Persons belonging to the ANA and persons suspected of passing information to Government or international forces have been routinely targeted. A night letter in a mosque in Khost read, “Anyone who reports any pending suicide bomber attacks will face death. Do not maintain links with the government as well as with the international forces.” A night letter in Kunar read, “Don’t cooperate with the government, don’t spy, don’t be recruited to the military or police.” Current and former members of the ANA have been abducted and killed. (While ANA combatants are legitimate military objectives, a party to a conflict is prohibited from killing someone that they have detained. In some instances, the Taliban has prohibited movement between areas that they control and areas controlled by the Government. Thus, in parts of Kandahar province, the Taliban has instructed people to travel to Pakistan rather than to Kandahar City to purchase goods or to obtain medical care. Some night letters have also attempted to impose social norms. (For instance, one in Kunar instructed locals not to shave.)

<sup>28</sup> The East and the South see different patterns of abuse by the Taliban. In the East, night letters tend to be fairly general admonitions not to cooperate with foreigners; whereas, in the South, night letters tend to be more specific warnings that particular individuals must desist from particular activities. And, in the East, individuals labeled as collaborators are more likely to receive multiple warnings and even to be released after being detained by the Taliban, while, in the South, such individuals are more likely to be beheaded. Statistical evidence on assassinations show that they are far more common in the South and Southeast than in the East. The Taliban administers some kind of “judiciary” in a few areas, but most “punishments” are decided upon directly by Taliban fighters. These are only generalizations — individualized warnings, harsh intimidation, and beheadings take place in both regions with alarming frequency — but, nevertheless, these differences suggests that the proper approaches to reducing the risks war poses to the civilian population might also differ in some respects between the two regions.

Informed interlocutors provided a number of explanations for these differences:

1. In the South, the Taliban is more hard-line ideologically. (Insofar as this is true, it may be, in part, because the South is dominated by the same Taliban leadership that exercised authority over much

### 3. Intimidation by international forces

28. Civilians experience far more pervasive and violent intimidation by the Taliban, elders and others, especially in Kunar province, claimed international forces had threatened collective consequences for failures to cooperate.<sup>30</sup> In one instance, international forces were cited as saying that unless various weapons were brought to them within 24 hours, they would demolish several villages. The villagers refused, and a funeral ceremony was then attacked by a helicopter, killing six people. International forces in Kunar province would not meet with me, so it was not possible to obtain their response. Arguably, if

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of the country in the late 1990s, while the East sees a greater diversity of armed actors — including Hezb-i Islami and groups directly linked to Al-Qaeda. In both regions, however, locals generally refer to all of these simply as “Taliban”.)

2. In the East, tribal structures are stronger, making it easier for communities to resist Taliban coercion and infiltration.
3. The Taliban’s more ruthless repression in the South reflects the fact that it is more dependent on the local population’s cooperation there than in the East due to differences in geography and terrain. In the South, Taliban fighters must live amongst the local population and rely on them not to tip off the government or international forces as to their locations or identities; whereas, in the East, they can reside in Pakistan, only periodically crossing the border to make attacks. (The Southern provinces, including Helmand and Kandahar, also border Pakistan but, in contrast to the East, populated areas are separated from the border by large expanses of inhospitable and sparsely-populated desert.) The East’s terrain is also extremely rugged in contrast to the relatively flat South.

In the South, interlocutors also identified a difference in the kind of Taliban abuse between areas newly seized by the Taliban and areas under the sustained control of the Taliban. In the former, the Taliban is apt to kill elders who had previously collaborated with the Government and the international forces. In the latter, victims have more often been suspected spies. These are identified largely through circumstantial evidence, such as possession of US dollars. A number of those with whom I spoke were deeply fearful that speaking with a foreigner might lead others to label them as spies.

<sup>29</sup> A copy of the Taliban’s *Layeha*, or Book of Rules, signed by the “highest leader of the Islamic Emirates of Afghanistan”, was obtained by two journalists who met with a Taliban commander in late 2006. For example, with respect to teachers and NGO workers, the manual provides the following rules:

24) It is forbidden to work as a teacher under the current puppet regime, because this strengthens the system of the infidels. True Muslims should apply to study with a religiously trained teacher and study in a Mosque or similar institution. Textbooks must come from the period of the Jihad or from the Taliban regime.

25) Anyone who works as a teacher for the current puppet regime must receive a warning. If he nevertheless refuses to give up his job, he must be beaten. If the teacher still continues to instruct contrary to the principles of Islam, the district commander or a group leader must kill him.

26) Those NGOs that come to the country under the rule of the infidels must be treated as the government is treated. They have come under the guise of helping people but in fact are part of the regime. Thus we tolerate none of their activities, whether it be building of streets, bridges, clinics, schools, madrases (schools for Koran study) or other works. If a school fails to heed a warning to close, it must be burned. But all religious books must be secured beforehand.

The Book of Rules clarifies that these “rules are obligatory” and that “[a]nyone who offends this code must be judged according to the laws of the Islamic Emirates”. (“A new layeha for the Mujahideen” (29 November 2006) at < <http://www.signandsight.com/features/1071.html>> (translated from version in *Die Weltwoche* (16 November 2006)).) One informed interlocutor stated that at least in the South, where the control of Mullah Mohammad Omar is most direct, these rules do appear to influence the conduct of fighters on the ground.

<sup>30</sup> There is no exception to the rule prohibiting attacks directed at civilians who are not directly participating in hostilities. Indeed, the international humanitarian law applicable to non-international armed conflicts expressly prohibits any “resort to belligerent reprisals” as well as any other “countermeasures against persons who do not or who have ceased to take a direct part in hostilities” (ICRC Study, Rule 148).

villagers have Taliban in their midst they will inevitably be endangered by military operations no matter what safeguards are adopted. Nonetheless there is reason for serious concern that international forces take a cavalier attitude toward such safeguards precisely because they view the civilian population as complicit with the Taliban.

#### **D. Transparency and accountability in international force operations**

29. The international forces in Afghanistan should take seriously the principles of accountability and transparency, the importance of which they so frequently proclaim in other contexts.<sup>31</sup> I saw no evidence that the IMF commit widespread intentional killings in violation of human rights or IHL. But their response to alleged civilian casualties combines great seriousness of intent and adherence to the applicable law with surprisingly opaque and unsatisfactory outcomes.

30. First, when I asked relatives or witnesses which particular international force had carried out the killing, even those who had tried to follow up their cases at PRTs and other military bases were often unable to answer. Seeking clarification from the international forces is like entering a maze, one that I also experienced myself.<sup>32</sup>

31. Second, the situation is even worse when it comes to the accountability of individual soldiers. There is a dual system, involving both the ISAF and national commands, for incidents in which there are grounds to believe that unlawful force may have been used. An ISAF commander will convene a Mission Review Board in response to formal allegations, internal information that raises concerns, or even a newspaper report on an incident. The perspective of this inquiry is not legal, but addresses incidents that may undermine the mission. The board evaluates whether the force used was appropriate. Findings go to the ISAF commander and the command of the relevant national contingent. The responsibility for prosecuting any crime committed then belongs to the sending country. There is, however, no requirement

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<sup>31</sup> Human rights law imposes a duty on States to investigate alleged violations of the right to life “promptly, thoroughly and effectively through independent and impartial bodies” (Human Rights Committee, general comment No. 31, “Nature of the legal obligation on States Parties to the Covenant” (2004), (CCPR/C/21/Rev.1/Add.13), para. 15.) This duty is entailed by the general obligation to ensure the right to life of each individual. The right to life is non-derogable regardless of circumstance (ICCPR, art. 4(2)); thus, armed conflict and occupation do not discharge the State’s duty to investigate and prosecute human rights abuses. It is undeniable that during armed conflicts circumstances will sometimes impede investigation. Such circumstances will never discharge the obligation to investigate — this would eviscerate the non-derogable character of the right to life — but they may affect the modalities or particulars of the investigation. On a case-by-case basis a State might utilize less effective measures of investigation in response to concrete constraints. For example, when hostile forces control the scene of a shooting, conducting full forensic examinations may prove impossible. Regardless of the circumstances, however, investigations must always be conducted as effectively as possible and never be reduced to mere formality. (E/CN.4/2006/53, paras. 33-43.)

<sup>32</sup> One ISAF commander explained that while he could confirm whether a particular operation was conducted by conventional ISAF troops and then clarify which national contingent they belonged to, he would have to pass the case up the chain of command to clarify whether it had been conducted by ISAF special forces, and that I would have to ask the commander in charge of Operation Enduring Freedom (OEF) to determine whether and which coalition forces were responsible.

that the outcomes of these national processes of investigation, discipline, and prosecution be reported back to ISAF. The result is that *no one* in Afghanistan systematically tracks the outcome of investigations and prosecutions.<sup>33</sup> This is a wholly unsatisfactory situation.

32. The international forces operating in Afghanistan have a responsibility to make sure that there is a coherent, unified system of accountability which Afghans and others can follow. However messy this system may be on the inside, composed as it is of multiple mandates and of disparate national military justice systems, it is essential that those pieces add up to a coherent whole.

33. Third, the international forces do not publicly provide information on civilian casualties. Clearly, it is often difficult to reliably ascertain a precise figure because it is not always possible to determine whether particular individuals were civilians or Taliban fighters. But instead of a wall of silence, statistics should be provided accompanied by appropriate caveats and explanations of any uncertainty. The absurdity of the current situation is captured in the response by NATO to the preliminary findings I issued at the conclusion of my mission to Afghanistan. NATO's spokesman stated that "the suggestion that international military forces have killed 200 civilians uses a figure that we reject and is far too high" but he then refused to provide any alternative estimate.<sup>34</sup> This is a wholly unsatisfactory situation.

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<sup>33</sup> I met a witness in Jalalabad who lost family members in the 4 March 2007 incident in which soldiers responded to a suicide attack on their convoy by shooting at a number of people over the next 20 kilometers of road (see above Part II.B.5). He was surprisingly open-minded about the responsible soldiers being tried by their sending country, but he was angry that he had not been provided with any information as to whether the soldiers involved had come before a court martial, whether they had been convicted or acquitted, and whether there were ongoing proceedings. Then I visited the regional commander, and he didn't know either. He explained that it was the previous unit that was responsible for that incident and they had taken all the relevant files with them when they rotated back to the United States. To his credit, he recognized that this was a problem. Another regional commander with whom I spoke suggested that it was not such a problem whether the status of investigations and prosecutions could be tracked because compensation was the main concern. As he acknowledged, the bottom line is that those wishing to know the final outcomes of any prosecutions must read the local newspapers in all of the troop-sending countries.

In fact, at the time of my visit, a Court of Inquiry into the 4 March incident was proceeding in the United States. Shortly after I returned from Afghanistan, the US military released a short statement on this incident, indicating that a US military commander had conducted a "thorough review of the report of a Court of Inquiry" and had determined that the soldiers had "acted appropriately and in accordance with the rules of engagement and tactics, techniques and procedures in place at the time in response to a complex attack". Unsurprisingly, this conclusory and unsubstantiated response to such a serious incident was met with dismay in Afghanistan. Afghans have a right to ask on what basis this conclusion was reached. But all of the documents produced by the Court of Inquiry have remained classified. The record of proceedings has not been released. The 12,000 page report of the Court of Inquiry including recommendations and factual findings has not been released. The US Government has even disregarded the existing regulation stating that the convening authority should ensure that an executive summary of the report be made public in order to provide information on the investigation's findings and recommendations. Aside from the question of whether the decision not to initiate courts-martial was justified, the manner in which the US military justice system operated in this case was entirely inconsistent with principles of public accountability and transparency. Regrettably, this is no aberration; it is the norm.

<sup>34</sup> NATO Statement, 15 May 2008.

34. Fourth, the international forces should also cooperate more fully with outside efforts to investigate alleged abuses. There is some cooperation in the investigations of incidents between the Government and the international forces. As one senior Government official explained to me, the Government will verify the facts on the grounds, and these findings will then be correlated with ISAF's information on how the operation was planned and conducted. These two sources of information result in a more complete understanding of whether and why civilians were killed. It is regrettable that the findings of these investigations are not made public. Moreover, while the international forces do respond to particular allegations of abuse provided to them by other actors (such as UNAMA and the AIHRC), they have the capacity to do so in a much more substantive manner. This should include the expedited declassification and more comprehensive sharing of relevant information, including video footage (such as gun tapes) and mission story-boards (step-by-step descriptions of how an operation progressed).

### **E. Compensation for victims**

35. The Government provides some payments (approximately US\$1,900) to civilians killed by AGEs, but this program is uneven, and operates in a highly unsatisfactory manner. The various international forces have implemented diverse programs for compensating civilian victims of military operations. Such payments are consistent with international law requirement for reparations for human rights or IHL violations.<sup>35</sup> Governments have generally cited the rationale of “winning hearts and minds” and eschewed any notion of obligation. But the fact remains that reparations are increasingly often paid to the families of those killed, even in lawful attacks, and this goes well beyond the practice in previous conflicts. Publicly-available records are insufficient for estimating the proportion of victims who receive

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<sup>35</sup> See ICCPR, Art. 2(3); Human Rights Committee, General Comment 31, “Nature of the General Legal Obligation on States Parties to the Covenant” (2004), para. 16; Henckaerts & Doswald-Beck, *Customary International Humanitarian Law* (ICRC 2005), Rule 150. As a matter of customary international humanitarian law, “A State responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused.” (ICRC Study, Rule 150.) While the modalities of this obligation under IHL continue to be clarified, “There is an increasing trend in favour of enabling individual victims of violations of international humanitarian law to seek reparation directly from the responsible State.” (ICRC Study, volume 1, page 541.) This interpretation is, moreover, obligatory pursuant to the international human rights law requirement to “ensure that any person whose rights . . . are violated shall have an effective remedy” (ICCPR, art. 2(3)(a); Human Rights Committee, general comment No. 31, “Nature of the legal obligation on States Parties to the Covenant” (2004), (CCPR/C/21/Rev.1/Add.13), para. 16.) The injury for which reparation is due includes both material and moral damage, and the reparation therefore “shall take the form of restitution, compensation and satisfaction” (Draft Articles on State Responsibility, arts. 31, 34). Because restitution — “re-establish[ing] the situation which existed before the wrongful act was committed” would be “materially impossible” in the case of an individual's death, the requisite reparation will comprise compensation and satisfaction (Draft Articles, art. 35). The compensation “shall cover any financially assessable damage” (Draft Articles, art. 36), and the satisfaction “may consist in an acknowledgment of the breach, an expression of regret, a formal apology or another appropriate modality” (Draft Articles, art. 37). In practice, the monies and goods provided for deaths in Afghanistan typically carry elements of both compensation and satisfaction, helping to compensate for the loss of a productive member of the family and serving as an expression of regret.

payments. However, informed interlocutors suggested that victims do routinely obtain payments, although doing so is not always easy, and the payments are not always fair or timely.

36. Women, in particular, face obstacles, as illustrated by interviews with many women in Kandahar who lost male relatives in air strikes, Taliban attacks, or IMF convoy shootings. Their incomes had been eliminated or drastically reduced. Some had received monetary assistance from the Afghan government or ISAF, but many did not know how to even begin to seek such aid. If they are lucky, their families support them. Some enter the workforce, and receive second-class wages. Others will have no way to access education or employment and will be forced to beg to feed their children. Compensation can be especially important for women, and payment programs should be designed with their unique circumstances and needs in mind.

37. Among the international forces, the US is the most systematic in providing compensation. Commanders are authorized to make “condolence” or “solatia” payments and frequently do so. The maximum payment amount provided for a death on either basis is roughly \$2,500. A British commander informed me that they make *ex gratia* payments, with the amount determined by general guidelines and negotiation with the *shura* of the victim’s village. Some of the other national contingents within ISAF run similar programs. But some governments have held back. One concern has been that offering payments would inherently constitute an admission of legal liability. This concern is baseless, as demonstrated by the experiences of governments who do make such payments. Another concern expressed has been that for their military contingents to offer payments would encroach on “humanitarian space” by involving soldiers in the provision of “aid”. This is unpersuasive: such payments are an integral part of responsible military action rather than an ancillary humanitarian activity. The existing payment programs are extremely promising and, in many respects, unprecedented. The flaws lie in the overall system’s excessively discretionary and fragmentary character, which mean that whether payment is provided for a particular civilian’s death depends on the national contingent involved, the attitudes of local commanders and Government officials, and the ability of the surviving family to navigate the process for obtaining a payment.

#### **F. Influencing the Taliban**

38. There have been limited efforts to respond to the Taliban’s perpetration of extrajudicial executions and other human rights abuses. Tribal elders, in particular, emphasized the importance of finding ways to influence the Taliban’s conduct. While there was a general consensus that doing so would be difficult, a number of possible approaches were proposed.

39. Some suggested that Islamic scholars could take actions that would constrain the Taliban’s freedom to resort to tactics violative of Islamic and international law. While the Taliban’s own clerical network is unlikely to be influenced, my interlocutors felt that scholars could exercise a more indirect

influence. One measure suggested was for especially respected clerics to release *fatwas* condemning the Taliban's resort to abusive tactics.<sup>36</sup> Another was for Islamic scholars to familiarize tribal elders with the precepts of Islamic law governing the conduct of hostilities. This would better equip them to persuade local commanders to desist from abusive tactics, to reduce broader support for such tactics, and to discourage young men from engaging in these methods of warfare.

40. Views varied on the relevance of a strategy "naming and shaming" in relation to the Taliban. One interlocutor suggested that since the Taliban has denied responsibility for particular suicide attacks causing heavy civilian casualties, there might be a reputational concern with the public. It would follow that credibly documenting and publicizing violations could affect conduct. Another interlocutor argued that this analysis disregarded the structure of Taliban decision-making on military action and public relations. Although some senior Taliban might disavow particular attacks to minimize political fallout, commanders on the ground lacked external or internal incentives to modify their behavior to avoid adverse media reports. This reasoning would suggest that incentives for compliance are strong enough to induce *post hoc* damage control but too weak to encourage actual reforms. There is evidence, however, that reputational concerns have led to some efforts to ensure actual compliance rather than merely feign it after the fact. The Taliban's leadership has promulgated directives prohibiting particular abusive tactics — such as beheadings<sup>37</sup> — and these have been at least partially respected by fighters on the ground. In my view, more extensive credible naming and shaming efforts are appropriate.

41. Many interlocutors, especially elders, were frustrated by what they perceived as inadequate efforts by governments and inter-governmental organizations to respond to Taliban abuses. Many argued that Pakistan should do more to rein in those Taliban residing in its territory. It was also repeatedly suggested that the United Nations and the Organization of the Islamic Conference (OIC) should do more to condemn Taliban abuses and put pressure on states in a position to affect the Taliban's conduct. While some expectations seemed unrealistic, the palpable disillusionment with efforts to date should provide a wake-up call.

42. Others argued that there was a need for international actors to engage directly with the Taliban to understand the rationales for its abusive tactics and to apply targeted pressure for change. Prominent elders in the South told me directly that the problem with visits by international envoys was that they only spoke to one side. An international military commander expressed surprise that I was not speaking with Taliban representatives. In general, when I conduct country visits and fact-finding missions, I speak with

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<sup>36</sup> Some interlocutors expressed frustration that clerics from Al-Azhar University (in Egypt) in particular had not more forcibly called attention to the incompatibility of some Taliban tactics with Islamic law. They opined that, even if the Taliban's leadership might disregard Al-Azhar's authority, the respect accorded the views of the Grand Imam and other clerics there by the wider society in which the Taliban operates in Afghanistan and Pakistan would nevertheless constrain the Taliban's freedom of action.

<sup>37</sup> In February 2008, Mullah Mohammad Omar issued a directive ordering the Taliban not to behead people, and this was seen to have some impact on conduct on the ground.

armed opposition groups, but I did not speak with any formal representatives of the Taliban or other armed groups during my visit.<sup>38</sup> In retrospect, this was a mistake. Taking account of information provided by such sources would permit a more nuanced understanding of Taliban and other AGE strategies. While some of the explanations and justifications provided for engaging in abusive tactics would be self-serving and deceitful, there is no reason to assume that the Taliban could never be persuaded to modify its conduct in ways that would improve its respect for human rights. And purely humanitarian contacts have had a positive impact in the past.<sup>39</sup>

43. One senior official succinctly summarized Government concerns. While the Government itself can engage with any and all domestic groups, he felt that international engagement with the Taliban would reduce the Government from being a sovereign to being a mere faction in a civil war. It is true that this concern might apply to political negotiations to resolve the conflict. Does human rights engagement to ameliorate the conflict's effects on civilians warrant the same concern? First, while such contacts could indeed be pursued in ways that might somehow "legitimize" these groups, contact in order to request its views on particular incidents, criticize its conduct, and urge better human rights and IHL compliance does not "legitimize" that group. Second, in many other countries Governments have permitted human rights actors to engage with armed opposition groups. The bottom line is that the international community does have human rights expectations to which it holds the Taliban and other armed groups. It criticizes them for conducting suicide attacks, assassinating teachers, and other acts incompatible with those fundamental human rights expectations. These expectations operate to protect people, rather than going to issues of legitimacy. The international community must do all it can to promote human rights compliance by all actors. I thus recommend that, in the future, human rights proponents should develop contacts with the Taliban and other armed groups.

### **III. Police reform and militias**

44. In most parts of the country, the police are the face of the Government. In many districts where they are the *only* government officials seen by the people, the perceived legitimacy of Government depends almost entirely on them. Legitimacy will follow if they maintain law and order for all, but not if they extort, intimidate, and kill. All too often, the police do not truly represent the interests or diversity of

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<sup>38</sup> Initially, I assumed that security concerns, largely of the armed groups' own making, would make doing so impossible. I was also aware that various actors had reservations about the political implications of doing so. Ultimately, I felt I had no option but to abide by these reservations despite the fact that realistic opportunities were presented to me.

<sup>39</sup> In 2003 and 2004, Afghanistan was close to eliminating polio when Taliban fighters and others concluded that the polio vaccine was actually designed to cause infertility and limit the growth of the Muslim population worldwide. For this reason, they began executing nurses and doctors and forcing those transporting vaccines to drink them. In 2007, persons close to the Taliban leadership in Quetta were contacted to explain the vaccination program's purpose. In September 2007, a letter was produced by a Taliban leader in Quetta which permitted the WHO, UNICEF, and the Ministry of Health to vaccinate hundreds of thousands of children.

the community. They are drawn dominantly from the members of one tribe or the followers of one commander.<sup>40</sup> For ordinary Afghans, this means that police function not as enforcers of law and order, but as promoters of the interests of a specific tribe or commander.

45. These problems were especially visible in the South, where elders from conflict-affected areas stated that police abuses were tempting people to support the Taliban. A senior Government official listed the security threats in his province as coming both from the Taliban and from criminal elements among the Government security forces. An international military commander stated bluntly that the police in his area of operations are corrupt and predatory and that the people have no experience of the police delivering services, but only of confiscating their goods and money. Indeed, persons in and out of Government stated that to obtain ANP posts, individuals routinely pay amounts exceeding the salary, expecting to use their posts for personal benefit.

46. These realities have not, however, been adequately recognized by the Government or the international community.<sup>41</sup> Opportunities to remove corrupt and abusive individuals from the state's security forces and power structures have consistently been missed. The pay-and-rank reform program designed to transform the ANP from a force thick with militias and local thugs into a professional, national police force had some undeniable successes, but its implementation grew half-hearted over time. Similarly, candidates linked to illegal armed groups were not disqualified in the 2005 elections despite an elections law requiring precisely that.

47. A key reason for these failures to act is acceptance of a false dichotomy between "stability and security" and "human rights", and a tendency to prioritize the former. In fact, this understanding is deeply flawed. As one senior official told me, many AGEs in his area had joined the Taliban precisely because of the torture, abuses, and misguided strategies of his predecessor. It must be recognized that human rights respect by Government security forces is *necessary* in order to ensure security and stability.

48. What does this mean for policy? There are, of course, myriad development plans, sectoral strategies, training programs, and so on, covering every component of the Government's security forces. But several considerations are crucial.

49. First, Afghanistan needs a police force that can play both a law enforcement and para-military role. There is a well-known debate between those who favor two different models of policing. Some

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<sup>40</sup> As one senior foreign military official responsible for ANP training candidly stated, "police are often nothing but militias".

<sup>41</sup> One illustration will suffice. I examined a recent incident in which police are alleged to have massacred a group of men from a rival tribe. Those killed may or may not also have been sympathetic to the Taliban. Following extensive discussions with all parties it seems unlikely that we will ever know precisely what actually happened. But the point is that no-one in the Government has any interest in investigating, much less prosecuting, those responsible. And the international community seems unprepared to change that situation.

focus on one designed to prevent and respond effectively to burglaries, thefts, domestic disputes, and murders. Others favor constructing a police force that can hold territory by fighting “anti-government elements”. But this way of framing the issues is not helpful. Any police force that does not deal effectively with the crimes that plague people in their everyday lives will be discredited. And any police force that works in conflict-affected areas must be prepared to engage with insurgents.<sup>42</sup> The ANP must have the ability to survive if they are to be able to carry out any of the ordinary policing activities. Training must thus encompass both aspects.

50. Second, training alone will not fix Afghanistan’s police force. Training is important but people who have an interest in summarily executing their enemies don’t stop doing so simply because they’ve read the Universal Declaration of Human Rights or received instruction in an escalation of force protocol.

51. However, the Focused District Development (FDD) program has, in an unexpected manner, pointed the way toward genuine reform. The program takes an entire district’s police force to another location to receive intensive training. While they are being trained, the Afghan National Civil Order Police (ANCOP) moves in to police the district. They have generally been well-received. Why? The answer may lie partly in their training, but the dominant factor seems to be that the ANCOP police do not have any connection to local tribes, commanders, or warlords. There are a number of plausible approaches, ranging from a more comprehensive pay-and-rank reform effort to the construction of a national gendarmerie. But any serious effort to reform the ANP must focus on establishing a police force that represents the interests of communities rather than the narrow interests of particular tribes, warlords, and politicians.

52. Third, the Government must stop establishing and legitimizing more militias. It seems that the now abandoned “auxiliary police” program amounted to little beyond legitimizing existing militias by giving them Government uniforms. It is not clear, however, that the lessons of that experience have truly been learned and an ongoing “social outreach program” is quite worrying.<sup>43</sup>

53. Fourth, the police must be better trained and equipped with a view to reducing the unacceptable rate at which police officers die, which is almost five times that of the military.

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<sup>42</sup> According to officials from the Ministry of Interior, in 131 of Afghanistan’s 365 districts, the ANP is the only security force present.

<sup>43</sup> A senior Government official explained to me that the “social outreach program” of the Independent Directorate for Local Governance (IDLG) is intended to mobilize the local population for its own protection. He explained that there will never be enough ANP or ANA to perform tasks such as protecting schools in conflict-affected areas and that the “social outreach program” involves asking a local tribal leader to do so. As a side benefit, he noted, building such bridges between the Government and local militias would generate intelligence on the infiltration of anti-government elements, the location of IEDs, and so on. But this approach seems likely only to increase the risk to the local population and to lead to the empowerment of favored groups within a community to extort, intimidate, and kill their opponents.

54. Finally, the problem of killings by the police and other armed personnel acting under the authority of Government officials has been largely overlooked. This should end. While there are no reliable figures on the number of such unlawful killings, known cases clearly indicate that the overall number is high. There is a crying need for a system which ensures that when the police and/or their political masters are accused of multiple killings an independent investigation is launched. The killing of nine and the wounding of 42 unarmed protesters in Sheberghan (Jawzjan province) on 28 May 2007 by either the ANP or the Governor's private bodyguards provides a classic example.<sup>44</sup> Local and national political interests have conspired to ensure that no effective investigation was undertaken. The technique is to let time pass until the evidence has faded and other political concerns have claimed the limelight. The matter can then be quietly filed away. The victims and their families are simply ignored.

55. Local police are, not unusually, incapable of meaningfully investigating themselves.<sup>45</sup> A national police investigative task force should be established for this purpose. The investigative powers of the AIHRC should also be strengthened and the local and national government should have a time limit within which to respond in detail to the Commission's findings.

#### **IV. Criminal Justice System**

##### **A. Overview**

56. In addition to the many killings of Afghan civilians which occur in the context of the armed conflict, Afghans also face insecurity from a general lack of law and order. Very few criminal murder

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<sup>44</sup> I spoke with members of civil society who investigated the incident, a number of witnesses to the demonstration, and to those wounded in the shooting. I received credible accounts from some of those who were shot whilst running away from the protest area. When the AIHRC prepared a detailed but damning report on the incident, the response of the Government was to ignore it and set up separate inquiries. These inquiries appear to be going the way of most such efforts.

<sup>45</sup> According to statistics provided by the Ministry of Interior (MoI), in year 1386 of the Afghan calendar (21 March 2007 – 21 March 2008), the General MoI's Directorate of Internal Affairs addressed 436 cases, referring 351 officers and 12 generals being reported to the Prosecution Office. According to the Attorney General, during the year prior to my visit, prosecutions had resulted in the jailing of 17 police officers, all of whom were involved in one case. After serving 20 months, they were released pursuant to a judgment by the Court of Appeals. These cases would not, however, appear to concern issues arising under the mandate. While the MoI was able to provide statistics on civilian casualties due to Taliban and IMF attacks, with respect to those caused by ANP, it reported only that "There are no statistics of arbitrary executions by the National Police reported by any sources." The NDS also monitors the ANP for abuses. However, according to an NDS official, however, no action is taken on abuses reported, whether they are reported to the MoI or to more senior Government officials.

cases are properly investigated or prosecuted and few perpetrators are convicted.<sup>46</sup> This impunity is due to failings in the functioning of the criminal justice system. Although practice varies considerably, the criminal justice system's formal structure is similar to that of many civil law countries.<sup>47</sup> Generally, police report crimes to the prosecutor, who investigates on his own or in collaboration with the police.<sup>48</sup> If the prosecutor finds sufficient evidence against the suspected perpetrator, he submits an indictment to the District Court.<sup>49</sup> The decision of the District Court may be appealed to the Provincial Court.<sup>50</sup> Recourse to the Supreme Court may be had if the lower court's decision involved legal error or was based on unlawfully collected evidence.<sup>51</sup> The Supreme Court may also appoint a committee to revise a decision based on newly discovered evidence.<sup>52</sup> Despite these formally appropriate procedures, I received many complaints that killings are not investigated, that prosecutions are not pursued, and that the judiciary corruptly exonerates many individuals.

<sup>46</sup> The Ministry of Interior provided statistics on the number of crimes that were detected by the ANP, that were delivered to a prosecutor, and that resulted in a judicial verdict. For all offences, the MoI reported that 100% of cases detected were referred to a prosecutor.

Offence	Year 1384 (21 March 2005 – 21 March 2006)		Year 1385 (21 March 2006 – 21 March 2007)		Year 1386 (21 March 2007 – 21 March 2008)	
	Detected by ANP	Judicial verdict	Detected by ANP	Judicial verdict	Detected by ANP	Judicial verdict
<b>Murder</b>	1547	25	1431	45	1359	11
<b>Corpse found</b>	38	0	51	0	58	0
<b>Robbery</b>	257	9	255	23	260	4
<b>Theft</b>	2161	61	2144	121	2283	41
<b>Armed theft</b>	196	5	201	0	64	1
<b>Abduction</b>	260	7	252	10	218	3
<b>Injury</b>	2171	157	2201	129	4115	56
<b>Fire</b>	97	3	107	31	101	9
<b>Drug smuggling</b>	265	0	235	0	163	0
<b>Goods smuggling</b>	59	0	133	0	336	0
<b>Extortion</b>	138	0	101	0	65	0
<b>Embezzlement</b>	74	0	103	0	47	0
<b>Bribery</b>	36	0	34	0	44	0

The figures given for judicial verdicts obtained were provided by the MoI rather than by the judiciary, and the true figures are likely higher. According to the MoI, "It's worth mentioning that the continuous efforts of this organ to obtain the exact number of all three courts' decisions about criminal cases have not ended with an acceptable result, due to a lack of coordination and interest of the judicial organs with police in most of the provinces. . . . There are usually tangible mistakes in this regard."

<sup>47</sup> The system's formal structure is laid out in the *Interim Criminal Procedure Code of 2004* (ICPC) together with other statutes and the Constitution. However, it is generally acknowledged that there is weak compliance with some of this code's detailed provisions. Moreover, many cases are dealt with in customary legal systems.

<sup>48</sup> ICPC, arts. 21, 23.

<sup>49</sup> ICPC, art. 39.

<sup>50</sup> ICPC, arts. 25, 63.

<sup>51</sup> ICPC, arts. 71.

<sup>52</sup> ICPC, arts. 81, 83.

57. Part of the problem at the early stages of crime detection and investigation is that there is a lack of cooperation between the police and the prosecutors. Constitutionally the police engage in “detection” and the prosecutors in “investigation”. This appears not to work well in practice. In the past, it has been suggested that the Minister of Interior (who can issue orders binding on the police) and the Attorney General (who can issue binding orders on the prosecutors) meet as part of a committee, agree on how to cooperate on the combined process of detection and investigation, and simultaneously issue the appropriate orders. This has not come to pass.

## **B. Corruption and Impunity**

58. While specific reforms to the justice system are essential, corruption is the common thread running through many of the problems. It is routine among police, prosecutors, and judges. To their credit, this was candidly acknowledged by Government officials. Senior Government officials described corruption as being so “widespread” as to be “unbelievable”, and admitted that they had corruption within their offices. According to many Afghans with whom I spoke, the problem is as blatant as it is rampant. One interlocutor told me that, as you approach a courthouse, you will be approached by persons with some link to the judge who will inquire as to your problem and solicit bribes. It was widely affirmed that when wealthy or powerful people do get convicted, they will not spend long in prison. With respect to the police, one senior foreign police trainer noted that, while individual police could be properly trained, the entire policing system was so corrupt that putting a new officer into the system was like “throwing people into a cesspool and expecting them to stay clean”. The result is a system which provides a thoroughly unacceptable degree of impunity to those accused of killings.

59. On a day-to-day basis, it is the Attorney General who has the authority to proactively monitor corruption, and to monitor the operations of other government agencies. This can involve both periodic visits to investigate offices and the long-term presence of a representative of the Attorney General’s office in the offices of another government agency. These may provide corrective guidance when officials are ignorant of their legal obligations and, when necessary, commence prosecutions. In 2007, this had led to the prosecution of 300 officials, 95% of whom were prosecuted for corruption. There have not, however, been any prosecutions of senior officials. The Government’s anti-corruption efforts have also included a number of specialized commissions, including, most recently, the High Office of Oversight and Anti-Corruption. Thus far, however, all governmental anti-corruption initiatives have been routinely undermined by political considerations when powerful figures have been implicated.

60. Pervasive corruption cannot be eliminated overnight, but there is a pressing need to establish a visible and credible mechanism with the power to subpoena witnesses and evidence, and to launch prosecutions. Above all, it must be designed to withstand the inevitable pressures of both corrupt politicians and those in government who feel obliged to turn a blind eye to corruption so as not to jeopardize their ability to govern. Independent corruption agencies have been successfully established in

many states including Nigeria, Hong Kong and Australia. A series of carefully targeted prosecutions of egregious cases would be beneficial in terms of sending the necessary message. While this will require international funding, national ownership is indispensable. There is also a need for the international community to recognize that, insofar as international aid money provides the resources on which much of this corruption thrives, it has a responsibility to use mechanisms, such as high-level appointment review boards, to support Government anti-corruption efforts.

### **C. Women and the criminal justice system**

61. Problems in the criminal justice system are multiplied exponentially for women. In Kandahar, a female member of my team asked a roomful of women where, or to whom, they could lodge a complaint if they faced abuse within the home, or feared for their lives. The room erupted with ironic laughter. For many of them, abuse or social stigmatization would result from simply going outside the home. Even if they could leave, they would be too ashamed to make their concerns public. And if they did complain to the police, they did not believe any action would follow. They felt they would only be punished further, or be imprisoned for “running away”. In short, far too many women at risk of being abused or killed simply have nowhere to turn.

62. Women’s referral centres, recently set up in Jalalabad and Parwan, appear to be making a real difference. Such initiatives warrant strong support from the government and the international community. Prosecutions of crimes against women would also be assisted by setting up in the Attorney-Generals office a strong special office for female victims.

### **D. Honour killings**

63. “Honor killings”<sup>53</sup> occur with impunity in parts of Afghanistan. In the eastern region, for example, one source had documented 40 honor killings between January 2007 and December 2008. The actual number is certainly far higher due to fear of reporting such cases. The victims are predominantly women, although men are also killed. Rarely are perpetrators investigated and prosecuted.

64. In Jalalabad, Nangarhar province, I spoke with a family member of a boy and girl (cousins) who allegedly had sexual relations outside of marriage. They were invited to a “dinner” by their uncles and, when sleeping, were shot and killed. The boy’s body was sent to his father. The girl’s was buried without any funeral prayers. No family members complained to the police. The police knew about the deaths, but did not investigate, claiming that they could not do so without a complaint from the family.<sup>54</sup> In

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<sup>53</sup> The killing of a family member on suspicion of engagement in any actions deemed dishonorable, ranging from mere association with the opposite sex to sexual relations or running away from home.

<sup>54</sup> Article 476(1) of the *Penal Code of 1976* provides that in certain crimes against the person committed by a family member, an action may only be brought based on a complaint by the victim. Following a highly questionable interpretation of this provision, there have been cases in which the fact that the (dead) victim has not “chosen” to bring a complaint against the perpetrator has served as a basis for refusing to prosecute.

Kandahar, a female colleague spoke with many women who told her that honor killings occur in their neighborhoods, but are rarely reported or investigated. One young woman, found to be pregnant, was strangled by her father and brother. No investigation or prosecution ensued. Other women were killed for attempting to flee their homes, often because of domestic violence. Women in the family of the deceased victim of an “honor killing” are typically too afraid of their own families to make a complaint to police. And they know that the police are unlikely to carry out an investigation, or that if they do, bribery will ensure impunity for the perpetrators. I received reports of a number of cases in which police did attempt to carry out investigations, but senior Government officials interfered with or prevented the investigations. Like any other murders, international law requires that these killings be investigated, prosecuted, and punished.<sup>55</sup>

#### **E. Death penalty**

65. Shortly before my visit, the Supreme Court submitted some 100 existing death sentences covering the preceding six years to President Karzai, whose approval is required for the carrying out of the sentences. There are strong reasons for the imposition of a moratorium on executions, quite apart from the larger debate over whether Afghanistan should abolish the death penalty. Even the police, prosecutors, and judges acknowledge that corruption and incompetence are widespread and that the criminal justice system is incapable of ensuring respect for due process rights. Thus, convictions often follow trials that are inherently unfair and unreliable. Those sentenced to death often had no access to lawyers, and were convicted following trials in which no evidence was produced or no defence witnesses called. And, while some well-informed interlocutors did not think that any genuinely innocent person has yet been sentenced to death, others felt certain that there are innocents on death row. Proceeding with executions in these circumstances would clearly be unjust and violate international legal standards.

#### **V. Transitional justice and preserving evidence from past crimes**

66. I visited the site of the Dasht-e-Leili mass graves in northern Afghanistan. I witnessed what informed interlocutors believe to be the remnants of the mass graves of an estimated 2,000 Taliban fighters who had surrendered to the Afghan Northern Alliance and US Special Forces in 2001. The site appeared to have been disturbed, and it seemed likely that bodies had been removed. This was confirmed

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<sup>55</sup> In most situations, the isolated killing of individuals will constitute a simple crime and not give rise to any governmental responsibility. But once a pattern becomes clear in which the response of the Government is clearly inadequate, its responsibility under international human rights law becomes applicable. (*See* E/CN.4/2005/7, paras. 71-75.) This is because human rights law obligates governments to investigate, prosecute, and punish crimes that impinge upon the rights of its people. (ICCPR, art. 2(1).) When doing so is obstructed by existing laws or practices, governments are obligated to change these. (ICCPR, art. 2(2).) As the Special Rapporteur has repeatedly observed, governments that fail to punish murders because they are “honor killings” are violating international human rights law. (*See* E/CN.4/2000/3, paras. 78-84; *see also* the report of the Special Rapporteur on violence against women, its causes and consequences on her visit to Afghanistan in 2005, E/CN.4/2006/61/Add.5.)

by reports issued subsequent to my visit.<sup>56</sup> There is an urgent need to preserve and document evidence of what took place there, both in terms of understanding how those 2,000 surrendered men died, and in determining who is responsible for recent attempts to remove evidence from the site. It is necessary that this site, and other mass graves throughout Afghanistan, be secured and investigated to address impunity for past crimes, and to facilitate reconciliation grounded in a shared understanding of the abuses that have been perpetrated and suffered by all sides.

## **VI. Recommendations**

67. The Government of Afghanistan, the international military forces and the Governments who send them, and the Taliban and other anti-government elements all have a responsibility to take urgent action to reduce civilian casualties and to end unlawful killings in Afghanistan. My recommendations follow:

### **Killings by the international and afghan military forces**

68. The international forces should review procedures to ensure that air strikes and close air support are delivered only when sufficient measures have been taken to verify the identity of the target and that the incidental loss of civilian life would not be excessive in relation to the anticipated concrete and direct military advantage.

69. The international and Afghan forces should review the circumstances in which they conduct unannounced night-time raids, to identify situations in which alternative measures less dangerous to other residents might be employed

70. Air strikes, raids and other attacks should never be based solely on conduct considered “suspicious” or on unverified “tips”. Rather, the Government and IMF should review intelligence sharing arrangements, develop procedures for more reliably vetting targets, and ensure that attacks are only conducted based on adequately verified information.

### **Killings by the Taliban**

71. The Taliban should cease employing means and methods of warfare that violate international humanitarian law, and result in the unlawful killing of civilians. The Taliban leadership should issue clear orders to those carrying out attacks to abide by international law. This particularly includes the following:

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<sup>56</sup> See e.g., Physicians for Human Rights, “PHR Demands that Authorities Fulfill Responsibilities toward Afghan Mass Graves” (December 2008).

(a) To stop threatening and assassinating civilians in all circumstances, including for their alleged failure to cooperate with the Taliban or for their decision to cooperate with the Government.

(b) To cease using civilians as “human shields” to deter attacks by international and Afghan military forces.

(c) To stop targeting civilians in suicide attacks, and cease engaging in perfidy (unlawful deception) during such attacks, including by disguising themselves as civilians, soldiers or police.

72. A serious effort should be made – including by human rights groups and inter-governmental institutions – to pressure and persuade the Taliban and other armed groups to respect human rights and humanitarian law. This effort should include developing contacts with them for the sole, dedicated purpose of promoting respect for human rights. Such efforts should be undertaken subject to security feasibility and in conformity with the provisions of Security Council resolution 1267.

#### **IMF Responses to civilian casualties**

73. The international forces should ensure that allegations that soldiers have committed unlawful killings are fully investigated, and ensure that soldiers who have committed unlawful killings are prosecuted.

74. The international military forces should cooperate more fully with outside efforts – especially those of UNAMA and of the Afghanistan Independent Human Rights Commission – to investigate killings. This should include the expedited declassification and more comprehensive sharing of relevant information, including video footage and mission story-boards.

75. At the conclusion of military investigations into killings of civilians, information on the findings and reasoning should be made public. Such information should be provided to the families of the victims. In particular, the reasoning of the US Court of Inquiry decision on the 4 March 2007 Nangarhar incident should be made public.

76. The international forces should ensure that, despite the complexity of multiple mandates and disparate national criminal justice systems, any directly affected person can go to a military base and promptly receive information on who was responsible for a particular operation, or what the status is of any investigation or prosecution. To this end:

(a) Where the actions of soldiers are investigated or prosecuted within the troop-sending country, the progress of national processes of investigation, discipline and prosecution should be reported back to ISAF headquarters in Afghanistan.

(b) The progress and outcomes of national processes of investigation or prosecution should be centrally tracked by ISAF.

(c) This information should be made available to the various regional commands, to the Provincial Reconstruction Teams under their command, and provided to directly affected persons when requested.

77. When a raid is conducted by foreign intelligence personnel and Afghan forces outside the ANA's chain-of-command, the responsible Government should publicly clarify its involvement when allegations of abuse are made.

78. The international military forces should provide public information on the estimated numbers of civilians killed and wounded in air strikes, raids, and other military operations.

### **Compensation for victims**

79. The various domestic and international compensation programs should be better coordinated. This might usefully involve a high-level policy body that would help the various programs to operate in a complementary fashion and an operational, information-sharing body that would allow for greater consistency and that would help prevent individual cases from falling through the cracks.

80. Even where compensation programs involve *ex gratia* payments that carry no admission of legal liability, the discretion of commanders in deciding whether to grant compensation should be more limited, and general guidelines for making payments should be clearly set out.

81. Commanders should seek out victims and their families rather than waiting to receive a complaint or request. In particular, the obstacles women face in accessing compensation and other payments should be taken into account in implementing such programs.

### **The Afghan National Police**

82. Ending unlawful killings by the police should be a priority. To that end, there should be a concerted effort to reform the police:

(a) Human rights training, while important, will not be sufficient to prevent abuses that are driven by the links between police officers and particular tribes, commanders, and politicians. These links must be broken in order to establish a national police force that serves and protects the entire community.

(b) Continued efforts to reconstruct the police force as a truly national and professional force are vital. The "focused district development" training should be strongly supported.

(c) All efforts to supplement the police by establishing or legitimizing local militias should be abandoned.

83. Impunity for killings by police must be urgently addressed:

(a) The interminable dragging out of government investigations and inquiries into alleged police killings until such episodes are effectively forgotten reinforces impunity. Instead of setting up *ad hoc* inquiries that go nowhere, a national police investigative task force is needed.

(b) In addition, the Afghanistan Independent Human Rights Commission's investigative powers should be strengthened and the Government should have a time limit within which to respond to its findings.

84. The debate over whether the police force should play a primarily "law enforcement" or "paramilitary" role is unhelpful. At this stage the police are clearly obliged to play both roles and should be structured and trained accordingly so that they can provide security to the populations they serve.

### **The Criminal Justice System**

85. The proper investigation of crimes is hampered by poor coordination between police and prosecutors. The relationship between police and prosecutors needs to be improved: The Minister of Interior and the Attorney General should agree on how to cooperate on the combined process of detection and investigation of crimes, and simultaneously issue the appropriate orders to police and prosecutors.

86. The situation of half of the population – women – in relation to killings is largely ignored. The criminal justice system must be made accessible to them:

(a) Initiatives such as women's referral centres should be supported and encouraged.

(b) A special office for female victims should be created by the Attorney-General.

87. So-called "honour killings", which occur in very large numbers, must be treated as the murders that they so clearly are. Police should investigate such cases whether or not the family has made a specific complaint to the police.

88. Measures should be taken to address the corruption that obstructs justice at all levels of the criminal justice system:

(a) An independent anti-corruption agency should be established by the Government, with international support, and endowed with the necessary powers and resources to prosecute important cases at all levels of government and the judiciary.

(b) Insofar as international aid money provides the resources on which much corruption thrives, the international community has a responsibility to assist the Government with anti-corruption efforts through a range of mechanisms, including the use of high-level appointment review boards.

89. It is widely agreed that the criminal justice system is not currently capable of reliably respecting fair trial standards. To avoid the execution of innocent persons, the Government should impose a moratorium on the application of the death penalty.

**Transitional justice and preservation of evidence of past crimes**

90. Mass grave sites, including the site at Dasht-e-Laili, must be secured and preserved by the Government of Afghanistan with international assistance. Investigations into the cause of death of persons whose bodies are buried there, as well as investigations into any allegations of attempts to remove such evidence, are necessary. Failures to do so will result in continued impunity for those responsible for past abuses, and will undermine the ability of Afghans to obtain an accurate historical record of past crimes that is so necessary to facilitate reconciliation in Afghanistan.

## APPENDIX

### PROGRAMME OF THE VISIT

1. I visited Afghanistan at the invitation of the Government from 4-15 May 2008. I travelled to Kabul, Parwan, Kunar, Nangarhar, Kandahar, Helmand, and Jowzjan. I am deeply grateful to the Government of Afghanistan for the full cooperation I received.
2. From the Government of Afghanistan, I met with the Minister of Foreign Affairs, the Attorney-General, the Minister of Defence, the Minister of Justice, the First Deputy Minister of Interior, the Deputy Minister for Security, the National Security Advisor, the Chief of Counter-Terrorism, the Chief of Internal Affairs, the Chief of Policy, and the Chief Justice of the Supreme Court. I met with Afghan National Army, Afghan National Police, and National Directorate of Security officials throughout the country. I also met with various provincial and district level officials, including the Governor of Kunar, the Governor of Jowzjan, the Deputy Governor of Kandahar, the Deputy Governor of Nangargar, the Deputy Governor of Helmand, and the District Governor of Sirkhane.
3. From the international military forces, I met with a large number of ISAF and OEF military officials, including the Deputy Commander of Regional Command (East)/Combined Joint Task Force 101 (OEF), the Deputy Commander of Regional Command (South), the Commander of Task Force Helmand, the Commanding General of the Combined Security Transition Command-Afghanistan (CSTC-A), and the Deputy Commander, Security/Deputy Chief of Staff, Operations, ISAF.
4. I also met with a range of members of the diplomatic community.
5. I spoke with many representatives from international, national, and local civil society organizations. I also met with the commissioners of the Afghanistan Independent Human Rights Commission, and staff throughout its field offices. I met with journalists, elders from conflicted affected areas, and conducted interviews with a victims, witnesses, and family members of victims of human rights abuses committed by the full range of actors. My female staff member met with a variety of local women's civil society groups, and many female victims and witnesses.
6. I met with representatives from many UN and other inter-governmental institutions and agencies, including the UN Children's Fund (UNICEF), the International Organization for Migration (IOM), the UN Refugee Agency (UNHCR), the UN Development Fund for Women (UNIFEM), and the UN Department of Safety and Security (UNDSS). I also met with the Special Representative and Deputy Special Representative of the Secretary-General for Afghanistan. I am indebted to the UN Assistance Mission in Afghanistan (UNAMA) and especially the Human Rights Unit for facilitating my mission and for their superb professionalism.

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