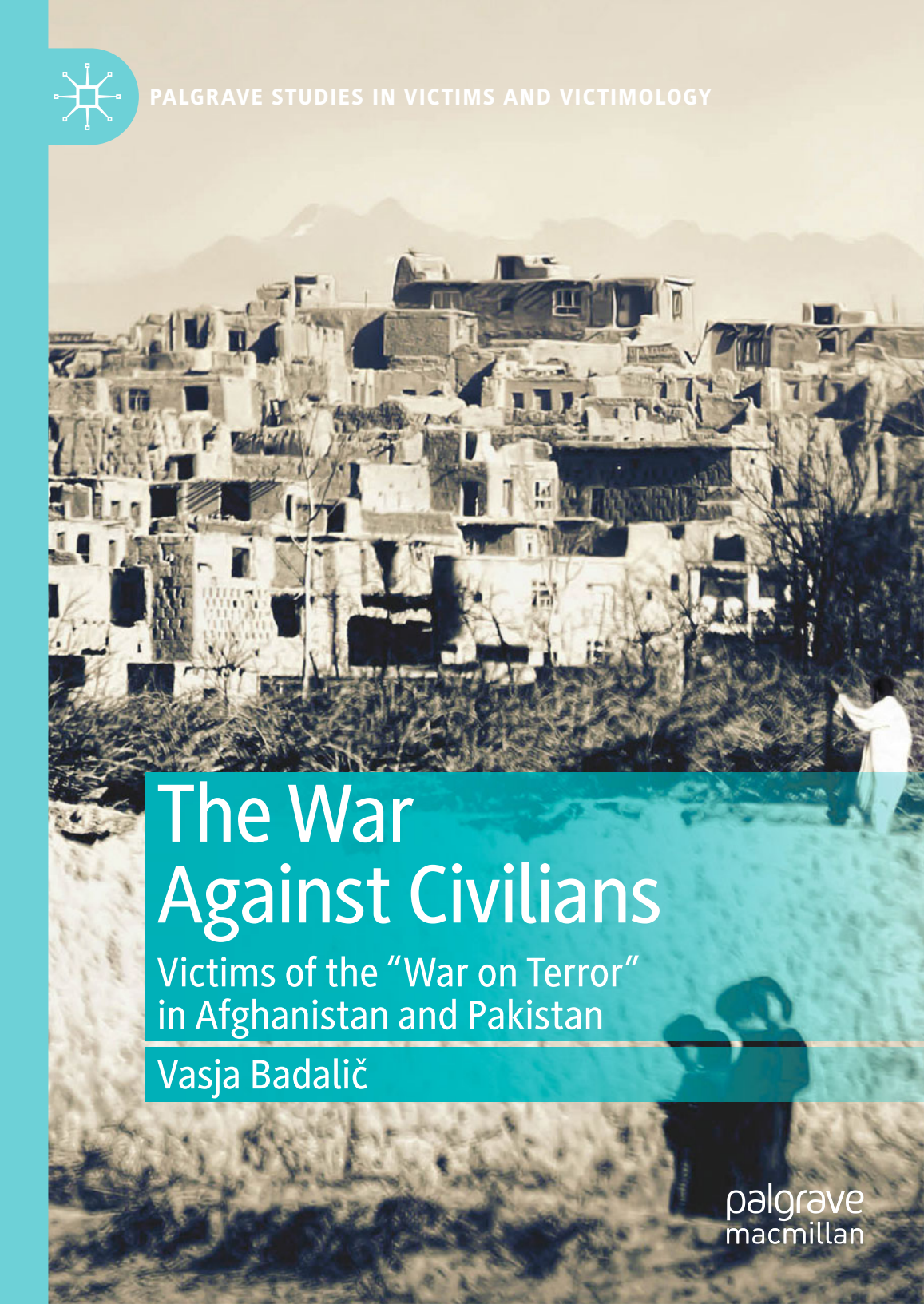
PALGRAVE STUDIES IN VICTIMS AND VICTIMOLOGY
The War Against Civilians
Victims of the "War on Terror" in Afghanistan and Pakistan
Vasja Badalič
palgrave
macmillan

Palgrave Studies in Victims and Victimology

Series Editors
Matthew Hall
University of Lincoln
Lincoln, UK

Pamela Davies
Department of Social Sciences
Northumbria University
Newcastle upon Tyne, UK

In recent decades, a growing emphasis on meeting the needs and rights of victims of crime in criminal justice policy and practice has fuelled the development of research, theory, policy and practice outcomes stretching across the globe. This growth of interest in the victim of crime has seen victimology move from being a distinct subset of criminology in academia to a specialist area of study and research in its own right.
Palgrave Studies in Victims and Victimology showcases the work of contemporary scholars of victimological research and publishes some of the highest-quality research in the field. The series reflects the range and depth of research and scholarship in this burgeoning area, combining contributions from both established scholars who have helped to shape the field and more recent entrants. It also reflects both the global nature of many of the issues surrounding justice for victims of crime and social harm and the international span of scholarship researching and writing about them.

More information about this series at
http://www.palgrave.com/gp/series/14571

Vasja Badalič

The War Against Civilians

Victims of the "War on Terror" in Afghanistan and Pakistan

palgrave
macmillan

Vasja Badalič
Institute of Criminology at the Faculty
of Law
Ljubljana, Slovenia

Palgrave Studies in Victims and Victimology
ISBN 978-3-030-12405-2 ISBN 978-3-030-12406-9 (eBook)
https://doi.org/10.1007/978-3-030-12406-9

Library of Congress Control Number: 2019930709

Cover credit: © 991940530@getty

This Palgrave Macmillan imprint is published by the registered company Springer Nature Switzerland AG
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

For Alojzij, Marija, Stanislav and Vida.
I miss you all.
A lot.

Acknowledgements

I am deeply grateful to all my Afghan and Pakistani friends and colleagues for their assistance and guidance. Without their kind and graceful support, it would be impossible for me to overcome the countless difficulties that emerged during my work, as well as in everyday life, in Afghanistan and Pakistan. On the Pakistani side of the Durand line, I would like to express my gratitude to Rahimullah Yusufzai, the editor-in-chief of *The News* in Peshawar, for his invaluable insights that helped me grasp the complexity of the conflict in Pakistan's tribal areas. I am also grateful for the assistance provided by Kamran Yusufzai and Zia ul-Islam. On the Afghan side of the Durand line, I would like to thank all representatives of the media and non-governmental organizations who helped me to understand the new Afghan reality. In particular, tremendous thanks are owed to Farid Jan, a good friend and colleague who guided me on frequent trips in Afghanistan.

I am sincerely grateful to all my colleagues at the Institute of Criminology at the Faculty of Law in Ljubljana. The support provided by the Institute over the past years, and the countless inspiring debates and strong coffees that we had together, were crucial in the process of conducting the research needed for writing this book.

I would like to thank Ali Žerdin, editor at the Slovenian daily newspaper *Delo*, for giving me the opportunity to reach with my articles the public at large.

I would also like to thank Josephine Taylor and Liam Inscoe-Jones, editors at *Palgrave*, for their support, guidance, and patience through the entire process of writing and producing the book. Thanks also to Majda Peklaj, editor at *Krtina*, for giving the permission to re-use a few excerpts from my previous book "Teror 'trajne svobode': vojna v Afganistanu in Pakistanu".

A special thanks to my comrades at Crvena, *the* association for culture and art in Sarajevo, for providing the perfect working conditions in the final months of writing the book. Without them, all this would never be possible.

Finally, I am immensely grateful to my parents, family members, relatives and friends for supporting me despite my not-so-rational decision to work in places that are not always as safe as we would want them to be.

***

It would not be possible to conduct the research needed for this book without public funding. I acknowledge receiving financial support from the Slovenian Research Agency (research core funding No. P5-0221 B). I also acknowledge the project (Shifting boundaries in criminology and crime policy, J5-8242 B) was financially supported by the Slovenian Research Agency. The results of the research carried out in that project were included in Chapters 2, 3, and 6. I also acknowledge the project (Crimmigration between human rights and surveillance, ID: J5-7121 B) was financially supported by the Slovenian Research Agency. The results of the research carried out in that project were included in Chapter 10. The project also received funding from the European Union's Horizon 2020 research and innovation program under the Marie Skłodowska-Curie grant agreement no. 734855. The results of the research conducted in that project were included in Chapters 2 and 3.

Contents

Abbreviations

AACPR	Actions (in Aid of Civil Power) Regulations
AHRO	Afghanistan Human Rights Organization
AIHRC	Afghanistan Independent Human Rights Commission
ALP	Afghan Local Police
ANA	Afghan National Army
ANP	Afghan National Police
CIA	U.S. Central Intelligence Agency
FATA	Federally Administered Tribal Areas
FRC	Frontier Crimes Regulations
HIG	Hizb-i-Islami-Gulbuddin
HRCP	Human Rights Commission of Pakistan
ICCPR	International Covenant on Civil and Political Rights
ICPPED	International Convention for the Protection of all Persons from Enforced Disappearance
ICRC	International Committee of the Red Cross
ILF—A	International Legal Foundation—Afghanistan
ISAF	International Security Assistance Force
ISI	Inter-Services Intelligence
ISPR	Inter-Services Public Relations
LAOA	Legal Aid Organization of Afghanistan
MOI	Afghan Ministry of Interior

MOJ	Afghan Ministry of Justice
NATO	North Atlantic Treaty Organization
NDS	National Directorate of Security
PATA	Provincially Administered Tribal Areas
TLO	The Liaison Office
TNSM	Tehrik-e-Nifaz-e-Shariat-e-Mohammadi
TTP	Tehrik-e-Taliban Pakistan
UDHR	Universal Declaration of Human Rights
UNAMA	United Nations Assistance Mission in Afghanistan
UNHCR	United Nations High Commissioner for Refugees

1

Introduction: Creating a Reign of Terror

1 The Durand Frontline

From the beginning of the "war on terror," the U.S. treated Afghanistan and Pakistan as a single theater of war. After toppling the Taliban regime in Afghanistan, the Bush administration soon started providing aid to the Pakistani government in return for conducting military operations against insurgent groups, including Al Qaeda, that used Pakistan's tribal areas as a safe haven (Wright 2003). In the same period of time, the Bush administration also green-lighted covert U.S. military operations against insurgents hiding on Pakistani soil. The first U.S. drone strike in Pakistan, for example, was carried out in South Waziristan in June 2004, when a Hellfire missile killed Nek Mohammed, a local Taliban commander, and several unidentified individuals (Plaw et al. 2016, 45).

During the Obama administration, the "war on terror" continued to be fought on both sides of the Durand Line, the border between Afghanistan and Pakistan. Based on the assessment that the same "cancer"—that is, the insurgency—had taken root in both countries, Obama argued that a common military strategy was needed to defeat

V. Badalič, *The War Against Civilians*, Palgrave Studies in Victims and Victimology,
https://doi.org/10.1007/978-3-030-12406-9_1

insurgents on both sides of the Durand Line (Transcript 2009). The new strategy devised by Obama government officials led to a significant escalation of fighting. In Afghanistan, tens of thousands of U.S. troops, who poured into the country during the military "surge," tried to break the momentum of the Afghan Taliban insurgency, while in Pakistan, the Pakistani armed forces, supported with U.S. drone strikes, conducted extensive military operations against insurgents holed up in the areas along the border with Afghanistan (Badalič 2013).

The Trump administration also adopted the view that Afghanistan and Pakistan constituted a single theater of the "war on terror." While promising additional military support for the Afghan regime, the Trump administration made it clear it expected Pakistan to step up its military operations against insurgents. Although Trump government officials reduced the number of drone attacks against targets in Pakistan and slashed the military aid provided to Pakistan, they continued to demand from the Pakistani authorities to do more to defeat insurgent groups operating on Pakistani soil (Barker 2018; Pence Tells Abbasi 2018).

A key element of the U.S. common strategy for defeating insurgent groups in Afghanistan and Pakistan was to rely, to a large extent, on local proxy armies and paramilitary groups. In Afghanistan, the U.S. and its allies equipped, trained and many times led in battle members of the new Afghan security forces. From 2002 to mid-2018, the U.S. appropriated about $126.30 billion to fund the new Afghan state, and most of those funds—about $72.8 billion—were spent to finance the Afghan security forces (SIGAR 2018, 47). In Pakistan, the U.S. chose a similar approach. From 2002 to 2018, the U.S. provided roughly $34 billion in military and humanitarian aid to Pakistan (CRS 2019). Most of those funds—about $23 billion—were spent on security, which included reimbursements for counterterrorism operations carried out by Pakistan's security forces (ibid.). In addition to dismantling insurgent networks operating in the tribal areas, Pakistan had to provide safe passage through its territory for trucks and tankers supplying the U.S.-led military coalition in Afghanistan.

Although the Bush administration unleashed the "war on terror" to kill or capture those responsible for nearly 3000 civilian deaths in

the terrorist attack on September 11, 2001, the vast majority of people, both civilians and combatants, who were killed or injured in the war in Afghanistan and Pakistan never represented a threat for the U.S. and its allies. As the fighting and chaos spread through most of Afghanistan and the north-western part of Pakistan, all belligerent parties—the U.S. and its allies, the Afghan government, Afghan paramilitary groups, the Pakistani government, Afghan Taliban, Pakistani Taliban and many other insurgent groups—conducted military operations that continuously caused civilian fatalities. From 2001 to 2018, about 212,000 people in total, both civilians and combatants, died in the war on both sides of the Durand Line—about 147,000 people were killed in Afghanistan, while nearly 65,000 people lost their lives in Pakistan (Crawford 2018). The large number of civilians killed or injured in operations carried out by all belligerent parties indicated that the "war on terror" became, to a significant extent, a war against civilians. In Afghanistan, roughly 38,400 civilians were killed between 2001 and 2018, while in Pakistan about 23,300 civilians lost their lives in the same period of time (Crawford 2018).

In addition to the tens of thousands of civilians killed or injured in the war, hundreds of thousands of civilians were displaced from their villages due to the fighting, with many of them left with no choice but to flee their country (Badalič 2013).

2 From Fighting a "War on Terror" to Creating a Reign of Terror

From 2008 to 2017, I frequently visited Afghanistan and Pakistan to conduct research on how the "war on terror" affected the local civilian population. A fragmented picture of the consequences of the conflict slowly emerged as I carried out interviews with civilians injured during military operations, civilians arbitrarily detained and tortured in detention centers, civilians whose family members "disappeared" while being held in detention, civilians kidnapped by insurgent groups, and civilians who had to flee their homes to escape from the violence.

By using the data gathered during fieldwork, combined with the data available in the relevant literature, this book aims to provide an analysis of the impact of the "war on terror" on civilians living on both sides of the Durand Line. Firstly, the book focuses on specific methods of combat—for example, drone strikes, kill-or-capture operations, assassinations—in order to show which were the factors that led to civilians getting killed or injured in such operations. Secondly, the book examines detention practices used by the belligerent parties—for example, arbitrary detention and enforced disappearance—in order to provide an analysis of the factors that led to civilians being unlawfully detained. And thirdly, the book focuses on other unlawful practices—for example, torture in detention centers, forced repatriation of refugees—in order to show how they affected the civilian population in both countries.

One of the main themes running throughout the book is how all belligerent parties deliberately ignored key norms of international humanitarian law and international human rights law in order to establish their own rules about what was lawful and what was unlawful in the armed conflict. The belligerent parties used a number of approaches that revealed their contempt for international law. One of the approaches—used by the U.S. military, Afghan paramilitary groups, and the Afghan Taliban—was to introduce too-broad criteria for determining military targets. The new criteria ignored the definitions of legitimate military targets in international humanitarian law, and, consequently, led to violations of the principle of distinction between combatants and civilians, a fundamental principle of international humanitarian law. The second approach, used by Pakistan, was to suspend some of the fundamental human rights by creating a parallel legal framework devoid of those rights, for example, the right to life and the right to a fair trial. The third approach—used by the U.S. military, Pakistani security forces and Afghan security forces—was to continuously rely on practices that violated some of the key rights of international human rights law. The U.S. and Pakistan, for example, used practices that led to violations of the prohibition of arbitrary detention, while the Afghan security forces used practices that violated the norm prohibiting torture and ill-treatment. All those approaches blurred the line between civilians and combatants,

and thus led to military operations resulting in thousands of civilians being killed, injured or unlawfully detained.

The book is divided into three major parts. Each part focuses on one of the belligerent parties. The first part examines the unlawful practices used by the U.S. military and their local allies, that is, the Afghan security forces and Afghan paramilitary groups. The second part examines the unlawful practices used by Pakistan's security forces, while the third part focuses on the Afghan Taliban.

The first part of the book starts with an examination—in Chapter 2—of the factors that led to imprecise U.S. drone strikes that killed and maimed civilians in both Afghanistan and Pakistan. The chapter shows that the key factor behind imprecise drone strikes was the use of three too-broad criteria for determining what the U.S. military believed were legitimate military targets. The first criterion, which was used to find targets for "crowd kills," was that all adult males standing in the vicinity of a known insurgent were legitimate military targets. The second criterion, which was used to find targets for "double tap" strikes, was that first responders who rushed to the site of a drone strike to help the victims of the strike were legitimate targets in follow-up strikes. The third criterion presupposed that surveilled individuals were legitimate targets if they regularly communicated, via mobile phones, with known insurgents. By introducing those target selection criteria, the U.S. military abandoned the two definitions of legitimate military targets in international humanitarian law. Under international humanitarian law, a state party at war with a non-state armed group can lawfully target only individuals actively participating in hostilities, that is, members of non-state armed groups who continuously participate in hostilities and civilians who temporarily participate in hostilities. The above-mentioned target selection criteria were, therefore, inconsistent with international humanitarian law because they ignored the concept of "directly participating in hostilities" and instead targeted individuals based on their location, gender, age and communication patterns.

In addition to an unlawful target selection process, there were other factors that sporadically influenced the precision of the strikes, for example, faulty intelligence provided by local informers, low quality of video footage that prevented drone operators from clearly seeing their

targets, limited field of view that prevented drone operators from seeing what was going on in the vicinity of their targets, and tendentious interpretations of unclear images.

The chapter argues that the too-broad target selection criteria constantly influenced the precision of the strikes, and, consequently, necessarily led to indiscriminate strikes, that is, strikes that targeted military objectives and civilians without distinction (Melzer 2009, 355). Drone attacks were indiscriminate because they relied on a method of combat that could not always be directed at specific military objectives. To put it differently, drone strikes used a method of combat the effects of which could not be limited as required by international humanitarian law, for example, as required by the principle of distinction between civilians and combatants.

Another method of combat that resulted in indiscriminate attacks were kill-or-capture missions, or night raids, carried out by the U.S. military in Afghanistan. Chapter 3, which explores the factors that led to civilians getting killed and injured in such missions, shows that the key factor behind civilian casualties was the use of too-broad target selection criteria that blurred the line between combatants and civilians. One of the criteria, which was also used in drone strikes, was that individuals were recognized as legitimate military targets if they frequently communicated, via mobile phones, with known insurgents. The second criterion was based on the idea that individuals were legitimate targets if they provided—either willingly or unwillingly—food and shelter to insurgents. The third criterion presupposed that individuals—for example, family members of insurgents, civilians who briefly met insurgents, and civilians how lived in areas where insurgents operated—were legitimate targets if they were suspected of possessing incidental information on the insurgency.

In addition to the broad target selection criteria, there were two other factors that led to civilian casualties in night raids. On the one hand, when members of U.S. assault forces mistakenly attacked civilian houses, they sometimes interpreted actions of civilians who wanted to protect their homes as "hostile acts," and then opened fire on them. On the other hand, U.S. troops sometimes made excessively subjective interpretations of "hostile intent" and used them as a pretext

to open fire on civilians. That became possible after the introduction of a new, too-broad definition of "hostile intent." The Bush administration redefined "hostile intent"—a demonstrated threat of imminent use of force (Chairman of the Joint Chiefs of Staff 2005, 89)—by changing the meaning of the term imminent. The U.S. abandoned, in part, the common meaning of the term imminent by stating that "[i]mminent does not necessarily mean immediate or instantaneous" (Chairman of the Joint Chiefs of Staff 2005, 89). With the new definition of "hostile intent," the U.S. assault forces did not have to focus anymore on whether the targets posed an instantaneous threat because they were allowed to shoot at a target even when they believed the threat might emerge at an unspecified time in the future (IHRC 2016, 20–21). As a result, the U.S. forces more easily pulled the trigger during kill-or-capture missions, and thus caused more civilian casualties (ibid.).

Both the too-broad target selection criteria and the vague definition of "hostile intent" led to indiscriminate kill-or-capture missions that targeted military objectives and civilians without distinction. Kill-or-capture missions were inherently indiscriminate because they relied on a target selection process that could not be directed at specific military objectives, or, in other words, they used a method of combat the effects of which could not be limited as required by international humanitarian law, for example, as required by the principle of distinction between civilians and combatants.

Shifting from military combat operations to detention practices, Chapter 4 explores the factors that led to civilians being unlawfully detained in U.S. detention centers in Afghanistan. The chapter focuses on administrative detention, that is, a deprivation of liberty that has been ordered by the executive branch, as opposed to the judiciary, without criminal charges being brought against the detained individuals (Pejic 2005, 375). Based on the gathered data, it became evident that the main factor that led to civilians being detained by the U.S. military was a flawed system for selecting targets for detention. When carrying out operations to capture people, the U.S. military used to too-broad criteria for determining who was detainable (e.g., individuals providing shelter and food to insurgents, individuals suspected of possessing information on insurgents), made mistakes in verifying the identity of

detainees, relied on weak evidence to justify detentions, and relied on faulty intelligence provided by local informers.

Another key factor behind unlawful detention of civilians was the lack of adequate procedural safeguards during the review of cases of detention. The U.S. military, for example, denied detainees access to information about the reasons of detention, access to a defense lawyer, the right to challenge the lawfulness of detention, the right to confront witnesses, and the right to appear in front of an independent body with the authority to order the release of detainees.

By using the practices examined above, the U.S. violated the prohibition of arbitrary detention, a norm of customary international law applicable in non-international armed conflicts (Henckaerts and Doswald-Beck 2005, 344). Both international humanitarian law and human rights law insist that two basic standards have to be met in order to avoid arbitrary detention in a non-international armed conflict: first, the grounds for detention must be based on security needs, and, second, the detaining power has to adopt the procedural safeguards needed to prevent arbitrary detentions (Henckaerts and Doswald-Beck 2005, 344). Both the Bush and Obama administration failed to meet those standards. On the one hand, both administrations formulated too-broad detention criteria that enabled U.S. troops to detain civilians who did not represent a threat, while, on the other hand, they also failed to meet key procedural requirements needed to prevent arbitrary detentions.

Chapter 5 sheds light on the use of torture in Afghan detention facilities, in particular the use of torture against civilians accused of being members of insurgent groups. In order to have free rein in torturing and mistreating detainees, the Afghan security forces routinely ignored a key due process guarantee, that is, the right of detainees to have access to a defense lawyer. While holding suspects in incommunicado detention, the Afghan security forces used the following torture techniques. Probably the most frequently used technique were beatings, carried out with various instruments such as electric cables, water hoses, wooden sticks, and iron rods. Another technique was to hang up detainees to a ceiling or a wall, usually leaving them, with their arms shackled, suspended for hours. In some cases, members of the Afghan security forces tortured

detainees with electric shocks, or forced them to stand for hours, both during the day and night, thus depriving them of sleep.

The main reason for using torture during interrogations in pre-trial detention was to extract confessions from suspects in conflict-related cases (UNAMA and OHCHR 2017, 48). Although the use of torture blurred the line between insurgents and civilians trying to avoid severe physical pain, the confessions obtained through torture were regularly presented in Afghan courts as evidence—in many cases as the only evidence—against alleged insurgents (UNAMA and OHCHR 2011, 45; 2015, 20). By relying on torture, the Afghan security forces constantly violated the norm prohibiting torture and other forms of cruel treatment, which is recognized as a non-derogable prohibition that must be respected, without exception, at all times, including during criminal investigations and judicial proceedings (Henckaerts and Doswald-Beck 2005, 315–319).

Chapter 6 explores the factors that led to targeted killings of civilians by Afghan paramilitary groups. The main factor behind deliberate attacks against civilians was the use of very broad criteria for determining targets. On the one hand, Afghan pro-government militias regularly targeted civilians perceived to be linked to the insurgency, for example, family members and relatives of alleged insurgents, civilians suspected of aiding alleged insurgents, and civilians living in areas from where insurgent attacks were launched. On the other hand, militia members also targeted civilians who, despite not being linked to the insurgency, refused to submit themselves to the authority of the militias. This category of targets included political and religious figures objecting the militias' activities, civilians refusing to pay illegal taxation imposed by the militias, and civilians involved in personal feuds with militia members.

From an international humanitarian law perspective, the above-mentioned targeted individuals were not legitimate military targets. The targeted individuals were neither members of insurgent groups nor individuals who temporarily joined an insurgent group to directly participate in hostilities. By using target selection criteria that were clearly inconsistent with international humanitarian law, the Afghan paramilitary groups blurred the line dividing legitimate military targets and civilians, and, as a result, created circumstances for indiscriminate

attacks against civilians. The killings were indiscriminate because they relied on a method of combat that necessarily led to attacks that could not be directed at specific military objectives. Put differently, the killings were indiscriminate because they used a method of combat the effects of which could not be limited as required by international humanitarian law. For example, the effects of the method of combat used by the paramilitary groups could not be limited as required by the principle of distinction between civilians and combatants.

The second part of the book sheds light on the unlawful practices used by Pakistan's security forces. Chapter 7 explores arbitrary detentions of civilians during the "war on terror." The chapter shows that one of the main factors that led to arbitrary detentions of civilians was the use of vaguely defined grounds for detention. The Pakistani authorities, for example, passed a law that provided the following too-broad grounds for detention: any person "who may obstruct actions in aid of civil power in any manner whatsoever," any person who "by any action or attempt may cause a threat to the solidarity, integrity or security of Pakistan," and anyone "linked with any private army and an armed group or an insurrectional movement" (AACPR 2011). By including in the legislation vague phrases such as "to obstruct in any manner whatsoever," "any attempt that may cause a threat to the solidarity of Pakistan," and "linked with an armed group," the Pakistani authorities failed to formulate precisely the grounds for detention, and thus provided to the security forces ample room for maneuver on detention decisions. As a result, many times civilians became targets of detentions.

In addition, the Pakistani authorities failed to provide detainees the procedural safeguards that would meet the requirements of international human rights law. The Pakistani authorities, for example, denied detainees the right to challenge the lawfulness of detention, they denied them access to information about the reasons of detention, they refused to give them access to legal assistance, and gave them no opportunity to confront the evidence and witnesses used against them.

The new legal framework established by the Pakistani authorities during the "war on terror" paved the way for the creation of an arbitrary detention program. In order to prevent arbitrary deprivation of liberty,

States have—first—to ensure that the grounds for detention are based solely on security needs, and—second—specify the procedures to be used during detention to supervise the need for detention (Henckaerts and Doswald-Beck 2005, 344). The Pakistani authorities failed to meet those two standards. On the one hand, the Pakistani government formulated too-broad detention criteria, with vague definitions of insurgents and those linked to them, which led to detentions of civilians who did not represent a security risk for the Pakistani state. On the other hand, successive Pakistani governments failed to create a legal framework that would meet the procedural requirements needed to avoid arbitrary detentions.

Chapter 8 explores enforced disappearances of civilians in Pakistan. Drawing on the International Convention for the Protection of all Persons from Enforced Disappearance (ICPPED), the chapter adopts the definition of enforced disappearance as any form of deprivation of liberty by the State, "followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law" (U.N. General Assembly 2007). The chapter focuses on two elements of enforced disappearances, that is, the concealment of the fate or whereabouts of the "disappeared" and their exclusion from the protection of the law. On the one hand, Pakistan's security forces tried to conceal the fate or whereabouts of the "disappeared" by using a range of measures, for example, not registering detainees, locking them up in secret detention facilities, and frequently transferring them between detention facilities. On the other hand, the Pakistani security forces excluded the "disappeared" from the protection of the law by depriving them of some fundamental rights, including the right to freedom and personal safety, the right not to be arbitrarily detained or arrested, and the right to a just and fair trial.

The chapter also shows that many of the "disappeared" who died while being held in detention were deprived of the right to life. Throughout the "war on terror," dead bodies of young men, many of them marked with signs of torture and ill-treatment, appeared months or years after the arrests took place (AI 2006, 33–34; 2015, 282–283; AHRC 2014). Based on the examination of the deaths that occurred

during detention and of how the detaining authorities consistently refused to investigate them, the chapter argues that such deaths must be regarded as prima facie arbitrary executions.

Chapter 9 sheds light on trials of civilians at Pakistan's secret military courts. The first section of the chapter examines how the military courts failed to meet the standards required for independent tribunals. On the one hand, the Pakistani authorities refused to provide institutional independence to military courts (e.g., by keeping the courts within the executive branch of power), while, on the other hand, they also refused to secure the individual independence of judges (e.g., judges were military officers who had no legal training and no security of tenure). The second section of the chapter proceeds to show how the military courts also failed to meet some other key requirements for a fair trial. For example, defendants had no right to a public hearing, no right to be represented by a defense lawyer of their own choice, no right to a written judgment, and no right to have their conviction reviewed by a civilian court.

By allowing military courts to impose the death penalty on individuals convicted on terrorism-related charges, Pakistan also failed to meet its obligation to protect the right to life. The death penalty may only be imposed on the basis of a reasoned judgment made by an independent and impartial court after a legal process that provides all safeguards to ensure a fair trial, in particular the safeguards set out in Article 14 of the ICCPR (U.N. Human Rights Committee 1982; U.N. Human Rights Council 2017, 3). If a death penalty is imposed upon the conclusion of a trial that does not meet the requirements of fairness, the right to life guaranteed under Article 6 of the ICCPR is violated (U.N. Human Rights Committee 1987). During the "war on terror," it became evident that Pakistan's secret military courts were not independent and failed to provide some key safeguards needed to ensure a fair trial, and, therefore, the imposition of a death penalty by those courts violated the defendants' right to life.

Chapter 10 focuses on the plight of Afghan refugees in Pakistan. It examines the measures implemented by the Pakistani authorities to force hundreds of thousands of Afghan refugees to return to their war-torn country of origin. The chapter begins with a brief overview of

how successive Pakistani governments encouraged anti-refugee sentiment among the local population in order to create circumstances for the forced repatriation program. The central part of the chapter shows how the anti-refugee measures introduced by the Pakistani authorities compromised the physical, legal and material safety of Afghan refugees before and during the repatriation process. In order to compromise the physical safety of Afghan refugees, the Pakistani security forces regularly resorted to violence (e.g., beatings) and intimidation. In order to compromise the legal safety of refugees, the Pakistani authorities continuously threatened to strip refugees of their protection status and denied them equal protection of the law. And finally, in order to undermine the material safety of refugees, the Pakistani authorities restricted the freedom of movement of refugees to prevent them from going to work, extorted money from refugees, denied them access to education, and limited access to humanitarian assistance.

By implementing those anti-refugee measures, Pakistan prevented Afghan refugees from exercising free choice when deciding whether or not to return to their country of origin. By using measures that created circumstances for involuntary returns, the Pakistani authorities, with UNHCR's complicity, violated the principle of *non-refoulement*, a norm of customary international law. Under the principle of *non-refoulement*, Pakistan was bound not to coerce any individual to repatriate to a territory where he/she would face a threat to life, physical integrity or liberty (Lauterpacht and Bethlehem 2001, 71). Although the security situation in Afghanistan continued to deteriorate in the post-Taliban era, Pakistan insisted on carrying out the repatriation process, thus forcing refugees to return to a war zone where they were likely to come into harm's way.

The third and last part of the book, which explores abuses of power by the Afghan Taliban, starts with an examination—in Chapter 11—of the factors that led to civilians getting killed or injured in the Afghan Taliban's targeted killing program. The main factor that caused civilian casualties was the use of too-broad criteria for determining what the Taliban believed were legitimate military targets. The Taliban broadly defined their targets as "the enemies of Islam and their helpers and supporters" (Clark 2011, 2), but they also issued more detailed descriptions

of the targets. The civilian targets, for example, included contractors working for U.S./ISAF forces and the Afghan regime, pro-government religious leaders, judicial officials, teachers in government-run schools, as well as employees of local and international aid organizations. By using such broad target selection criteria, the Taliban completely ignored the definitions of legitimate military targets in international humanitarian law. Under international humanitarian law, the Taliban we allowed to lawfully target only members of the Afghan armed forces and the U.S.-led occupying forces, members of Afghan paramilitary groups, and civilians who joined Afghan pro-government forces to directly participate in hostilities.

By relying on target selection criteria that were inconsistent with international humanitarian law, the Taliban erased, to a significant extent, the dividing line between combatants and civilians, and thus created the circumstances for indiscriminate attacks against civilians, that is, attacks targeting military objectives and civilians without distinction. The Taliban targeted killings were indiscriminate because they relied on a target selection process that necessarily led to attacks that could not be directed at specific military objectives. In other words, the killings were indiscriminate because they used a method of combat the effects of which could not be limited as required by international humanitarian law, for example, the effects of the method of combat used by the Taliban could not be limited as required by the principle of distinction between civilians and combatants.

Chapter 12 examines how the Afghan Taliban's parallel justice system affected the civilian population in Afghanistan. The first section of the chapter provides an overview of both conflict-related offenses (e.g., spying for the Afghan regime and the U.S.-led occupying forces, working for the Afghan regime and their foreign backers, being a relative of a member of the Afghan security forces) and non-conflict-related criminal offenses (e.g., murder, kidnapping, crimes against property, and "moral crimes") as defined by the Afghan Taliban. In addition, that section provides an insight into the harsh punishments meted out by Taliban courts (e.g., public executions by stoning, beheading, hanging or shooting, amputations of limbs, and lashings).

The second section of the chapter explores how the Sharia-based courts failed to provide some of the essential judicial guarantees needed to ensure a fair trial. Based on available data, it was possible to determine that the Afghan Taliban did not include into their judicial system the following guarantees: the right to a hearing by an independent tribunal, the right to be represented by a defense lawyer, the right to have sufficient time to prepare a defense, and the right to appeal.

The lack of essential judicial guarantees and safeguards, as well as the harsh punishments meted out by the Taliban "justice system," led to systemic human rights violations against civilians convicted and sentenced by Taliban courts. First, by not providing the judicial guarantees needed to ensure a fair trial, the Taliban violated the defendants' right to life. As we have already seen above, if a death penalty is pronounced after a trial that fails to meet the standard of fairness, the right to life is violated (U.N. Human Rights Committee 1987). Second, by imposing harsh sentences (e.g., lashings and amputations of limbs), the Taliban violated the right not to be subjected to torture or any other form of similar cruel treatment, a non-derogable right that has to be observed at all times and all places (Henckaerts and Doswald-Beck 2005, 317).

The last chapter—Chapter 13—explores the impact of Taliban abductions on the civilian population in Afghanistan. The first section of the chapter examines the criteria used by the Taliban for selecting targets for abduction. The Taliban regularly targeted two categories of individuals, that is, members of the Afghan security forces and civilians (e.g., people working for the Afghan regime and their foreign backers, employees of non-governmental organizations, journalists, tourists). The second section of the chapter analyzes the main objectives the Taliban wanted to achieve with the abductions (e.g., prisoners exchange, ransom, withdrawal of foreign troops, forced displacement of people perceived to be supporters of the Afghan government).

By regularly taking as hostages both civilians and non-civilians, the Afghan Taliban systemically violated the norm prohibiting hostage taking, recognized as a norm of customary international law applicable in both international and non-international armed conflicts (Henckaerts and Doswald-Beck 2005, 334). In addition to breaching the prohibition of hostage taking, the Afghan Taliban violated three other norms

of customary international law. First, by killing some of the abductees, the Taliban violated the norm prohibiting murder. Second, by torturing abductees to force them to confess they were working for the Afghan regime or their foreign backers (Abdul-Ahad 2010; Giustozzi et al. 2012, 21), the Afghan Taliban violated the norm prohibiting torture and any other form of cruel treatment. Third, when the Taliban used an abduction of civilians to compel family members, relatives and neighbors of the abductees to flee their villages, they violated the norm prohibiting forced displacements.

3 The War Against Human Rights

Due to the difficulties encountered while doing research in the war zones of Afghanistan and Pakistan, it was not always possible to get a detailed insight into the unlawful practices being used by the belligerent parties. The gathered data, however, indicated that the facts on the ground significantly differed from the "alternative truth" disseminated by the belligerent parties. On the Afghan side of the Durand Line, the systemic and deliberate use of unlawful practices by the U.S. military, the Afghan security forces and paramilitary groups revealed how misleading was the propaganda about the establishment of a democratic, human rights-based system in the country. Instead of establishing a system of governance that would protect human rights, the new rulers of Afghanistan created a dysfunctional and corrupt system controlled by powerful warlords regularly involved in human rights violations. The Afghan Taliban and other insurgent groups operating across the country showed a similar contempt for human rights. By consistently carrying out military operations in which thousands of civilians died, they showed that they chose to ignore the most fundamental principles of international humanitarian law and human rights law.

On the Pakistani side of the Durand Line, the "war on terror" also resulted in systemic human rights violations. Both the Pakistani security forces and the Pakistani Taliban consistently resorted to practices that were unlawful under domestic and international law, and, consequently, created a reign of terror in areas under their control.

The unlawful practices used by the U.S.-led military coalition on the battlefields of Afghanistan and Pakistan revealed that we, the West, cannot continue pretending that we respect some of the key norms of international humanitarian law and human rights law. By embracing those unlawful practices as the new normal, many leaders of the "free world" showed that they were willing to create a reign of terror devoid of some of the basic principles and rights that supposedly constituted the legal foundations of Western countries. And while it was terrifying to observe how we entered into a new era of imperial terror, it was perhaps even more terrifying to see how civil societies in Western countries remained too weak and marginalized to prevent the use of those unlawful practices. Although the anti-terrorism measures introduced during the "war on terror" severely undermined the foundations upon which Western countries had supposedly been built, we were unable to respond strongly enough to prevent those measures from being implemented.

References

Abdul-Ahad, Ghaith. 2010. "Five Days Inside a Taliban Jail." *The Guardian*, November 25. https://www.theguardian.com/world/2010/nov/25/taliban-afghanistan-prison-special-report. Accessed on 30 September 2018.

Actions (in Aid of Civil Power) Regulations 2011 (AACPR). 2011. http://www.isj.org.pk/the-actions-in-aid-of-civil-power-regulation-2011/. Accessed on 7 June 2018.

AHRC (Asian Human Rights Commission). 2014. "Pakistan: Balochistan—160 Persons Extra-Judicially Killed, 510 Disappeared and 50 Decomposed Bodies Were Found During 2013." *AHRC*, January 7. http://www.humanrights.asia/news/ahrc-news/AHRC-STM-007-2014. Accessed on 18 July 2018.

AI (Amnesty International). 2006. *Pakistan: Human Rights Ignored in the "War on Terror."* London: AI Publications. https://www.amnesty.org/en/documents/ASA33/036/2006/en/. Accessed on 30 May 2018.

———. 2015. *Amnesty International Report 2014/15: The State of the World's Human Rights*. London: AI Publications. https://www.amnestyusa.org/pdfs/AIR15_English.PDF. Accessed on 18 July 2018.

Badalič, Vasja. 2013. *Teror "trajne svobode": vojna v Afganistanu in Pakistanu*. Ljubljana: Krtina.

Barker, Memphis. 2018. "U.S. Military Confirms $300m Cut in Aid to Pakistan." *The Guardian*, September 2. https://www.theguardian.com/world/2018/sep/02/us-military-confirms-300m-cut-in-aid-to-pakistan. Accessed on 28 October 2018.

Chairman of the Joint Chiefs of Staff. 2005. Standing Rules of Engagement/ Standing Rules for the Use of Force for US Forces. http://www.jag.navy.mil/distrib/instructions/CJCSI%203121.01B13Jun05.pdf. Accessed on 28 August 2017.

Clark, Kate. 2011. *The Layha: Calling the Taleban to Account. Appendix 1. The Taleban Codes of Conduct in English*. Kabul: Afghanistan Analyst Network. http://www.afghanistan-analysts.org/wp-content/uploads/downloads/2012/10/Appendix_1_Code_in_English.pdf. Accessed on 1 October 2017.

Crawford, Neta C. 2018. "Human Cost of the Post-9/11 Wars: Lethality and the Need for Transparency." *Costs of War*. https://watson.brown.edu/costsofwar/files/cow/imce/papers/2018/Human%20Costs%2C%20Nov%208%202018%20CoW.pdf. Accessed on 9 November 2018.

CRS (Congressional Research Service). 2019. "Direct Overt U.S. Aid Appropriations for and Military Reimbursements to Pakistan, FY2002–FY2020." https://fas.org/sgp/crs/row/pakaid.pdf. Accessed on 24 March 2019.

Giustozzi, Antonio, Franco Claudio, and Adam Baczko. 2012. *Shadow Justice: How the Taliban Run Their Judiciary?* Kabul: Integrity Watch Afghanistan. https://www.baag.org.uk/sites/www.baag.org.uk/files/resources/attachments/Integrity%20Watch%20Shadow%20Justice%20Dec.%202012.pdf. Accessed on 3 September 2018.

Henckaerts, Jean-Marie, and Louise Doswald-Beck. 2005. *Customary International Humanitarian Law. Volume 1: Rules*. Cambridge: Cambridge University Press.

IHRC (International Human Rights Clinic Harvard Law School). 2016. *Tackling Tough Calls: Lessons from Recent Conflicts on Hostile Intent and Civilian Protection*. Boston: Harvard Law School. https://www.justsecurity.org/wp-content/uploads/2016/03/Tackling-Tough-Choices-Hostile-Intent-HLSIHRC-2016.pdf. Accessed on 21 September 2017.

Lauterpacht, Elihu, and Daniel Bethlehem. 2001. "The Scope and Content of the Principle of *Non-refoulement*: Opinion." Geneva: UNHCR. http://www.unhcr.org/protect/PROTECTION/3b33574d1.pdf. Accessed on 31 March 2017.

Melzer, Nils. 2009. *Targeted Killing and International Law*. Oxford: Oxford University Press.

Pejic, Jelena. 2005. "Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence." *International Review of Human Rights Law* 87 (858): 375–391.

"Pence Tells Abbasi That Pakistan Must Do More to Defeat Militants." 2018. *Radio Free Europe/Radio Liberty*, March 18. https://www.rferl.org/a/pence-united-states-pakistan-abbasi-taliban-extremists/29106452.html. Accessed on 28 October 2018.

Plaw, Avery, Matthew S. Fricker, and Carlos R. Colon. 2016. *The Drone Debate: A Primer on the U.S. Use of Unmanned Aircraft Outside Conventional Battlefields*. Lanham: Rowman & Littlefield.

SIGAR (Special Inspector General for Afghanistan Reconstruction). 2018. Quarterly Report to the United States Congress. https://www.sigar.mil/pdf/quarterlyreports/2018-07-30qr.pdf. Accessed on 28 October 2018.

"Transcript of Obama Speech on Afghanistan." 2009. *CNN*, December 2. http://edition.cnn.com/2009/POLITICS/12/01/obama.afghanistan.speech.transcript/index.html. Accessed on 29 October 2018.

U.N. Assistance Mission in Afghanistan (UNAMA) and U.N. Office of the High Commissioner for Human Rights (OHCHR). 2011. *Treatment of Conflict-Related Detainees in Afghan Custody*. Kabul: UNAMA and OHCHR. http://unama.unmissions.org/Portals/UNAMA/Documents/October10_%202011_UNAMA_Detention_Full-Report_ENG.pdf. Accessed on 6 August 2018.

———. 2015. *Update on the Treatment of Conflict-Related Detainees in Afghan Custody: Accountability and Implementation of Presidential Decree 129*. Kabul: UNAMA and OHCHR. https://unama.unmissions.org/sites/default/files/unama_detention_report_2015_revised.pdf. Accessed on 6 August 2018.

———. 2017. *Treatment of Conflict-Related Detainees: Implementation of Afghanistan's National Plan on the Elimination of Torture*. Kabul: UNAMA and OHCHR. https://unama.unmissions.org/sites/default/files/treatment_of_conflict-related_detainees_24_april_2017.pdf. Accessed on 6 August 2018.

U.N. General Assembly. 2007. International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED). https://treaties.un.org/doc/Publication/CTC/Ch_IV_16.pdf. Accessed on 3 July 2018.

U.N. Human Rights Committee. 1982. CCPR General Comment No. 6: Article 6 (Right to Life). http://www.refworld.org/docid/45388400a.html. Accessed on 2 August 2018.

———. 1987. *Carlton Reid v. Jamaica*, Communication No. 250/1987, U.N. Doc. CCPR/C/39/D/250/1987. http://hrlibrary.umn.edu/undocs/session39/250-1987.html. Accessed on 5 September 2018.

U.N. Human Rights Council. 2017. Capital Punishment and the Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty: Yearly Supplement of the Secretary-General to His Quinquennial Report on Capital Punishment, A/HRC/36/26. https://www.ohchr.org/en/hrbodies/hrc/regularsessions/session36/pages/listreports.aspx. Accessed on 25 July 2017.

Wright, George. 2003. "Bush Pledges $3bn Aid to Pakistan." *The Guardian*, November 9. https://www.theguardian.com/world/2003/jun/25/usa.pakistan. Accessed on 9 November 2018.

Part I

The U.S. Military, the Afghan Security Forces, and Afghan Paramilitary Groups

2

Inherently Imprecise Killings: Civilian Victims in U.S. Drone Strikes in Afghanistan and Pakistan

1 Introduction

"He was my relative, my cousin, the son of my father's sister. His name was Nasrullah. He was not a Taliban fighter. He was a religious man. He was a businessman. All the villagers knew him," said Samiullah Dawar (pers. comm.), a journalist from North Waziristan, who lost his cousin in a U.S. drone strike. When Dawar reconstructed the events that led to the killing of Nasrullah, he first described a prior drone strike that demolished a madrasa in Dandai Darpakhel village in North Waziristan on 23 October 2008. "That madrasa belonged to [Jalaluddin] Haqqani. It was built with funds from Saudi Arabia. They used the madrasa only for providing education. When the drone bombed it, eight people died. All of them were students. There were no members of the Taliban or Al Qaeda among them. Some of the students were from Miran Shah [the main city of North Waziristan, a tribal area in western Pakistan], while others were from South Waziristan," said Dawar. Although the targeted madrasa belonged to Jalaluddin Haqqani, the leader of the Haqqani group, one of the most powerful factions within the Afghan Taliban movement, Dawar insisted that all of the victims were civilians.

V. Badalič, *The War Against Civilians*, Palgrave Studies in Victims and Victimology,
https://doi.org/10.1007/978-3-030-12406-9_2

His statement was backed by other villagers who witnessed the attack. According to news reports on the strike, collected by the Bureau of Investigative Journalism (TBIJ), the drone's missiles killed seven to ten students, mostly children aged between twelve to eighteen (TBIJ 2011a).

After the drone attack on Haqqani's madrasa, Nasrullah, who had many friends studying at the madrasa, helped transfer some of the victims' bodies to South Waziristan. The remains of the victims were handed over to their families for burial. On their way back to North Waziristan, Nasrullah and the other men traveling with him briefly stopped in the Shakai area. "They went to see a friend. They stopped at his house for about an hour. It was then that a drone bombed the house. It happened on 26 October 2008. The attack killed seventeen people. All of them were innocent. All of them were civilians," said Dawar. According to news reports on the attack, seventeen to twenty people were killed in the strike, and four of them, including Nasrullah, were identified as civilians (TBIJ 2011a). The identities of the other victims remained unclear—the local authorities claimed they were all civilians, while some news media reported they were insurgents from Maulana Nazir's group, a militant group from North Waziristan (ibid.). Some early reports also claimed that Haji Omar aka Mohammed Omar, a local Taliban commander, was among those killed, but those reports proved to be false (ibid.). As the vast majority of U.S. drone strikes in Pakistan, the strike that killed Nasrullah remained without a thorough investigation. No independent monitoring organization was allowed to visit the site of the strike to determine the status of the victims.

In the post-9/11 era, the drone program became one of the cornerstones of the U.S. "counter-terrorism" strategy in both Afghanistan and Pakistan. In Afghanistan, a declared war zone, drone strikes were carried out by U.S. Special Operations Forces under the command of the U.S. Joint Special Operations Command (JSOC) (Scahill 2013). On 7 October 2001, on the very first day of the U.S.-led invasion of Afghanistan, the U.S. targeted killing program was born with the first ever drone strike carried out in the southern province of Kandahar (Plaw et al. 2016, 21–22). The attack, believed to be green-lighted by General Tommy Franks, allegedly killed several members of Taliban

leader Mullah Omar's security detail (ibid.). Over the following years, drones gradually replaced conventional manned aircraft in the Afghan skies. In 2015, drones released more weapons than manned aircraft for the first time since the start of the occupation of Afghanistan (Smith 2016). In that year, drones accounted for about 56% of all weapons released by the U.S. Air Force (ibid.). That ratio continued to rise (ibid.). In Pakistan, a non-declared war zone, the CIA took over the drone campaign, with most of the attacks targeting locations in South and North Waziristan, the two main hubs for insurgents fighting against the U.S.-led forces in Afghanistan. The first drone strike on Pakistani soil was conducted in South Waziristan on 18 June 2004 when a Hellfire missile killed Nek Mohammed, a local Taliban commander, and several unidentified individuals (Plaw et al. 2016, 45). After a slow start under the Bush administration, the number of strikes in Pakistan's tribal areas dramatically increased during President Obama's first term. In 2010, when the number of drone attacks on Pakistani soil peaked, the CIA carried out 128 attacks, killing at least 89 civilians (TBIJ 2018). In the following years, the number of strikes fell significantly, with just three strikes conducted in 2016 (ibid.).

Although the Bush and Obama administrations insisted that drone strikes killed, with "surgical precision," almost exclusively "terrorists" who posed an imminent threat to the U.S., numerous news reports on strikes that caused civilian casualties indicated that many times drones bombed the wrong targets. Due to the secrecy of the drone program and the inaccessibility of sites where strikes had been carried out, it was impossible to verify the precise number and nature of all drone victims (Boyle 2013, 5). It was, however, possible to examine many well-documented cases that revealed how drones frequently hit public spaces (e.g., a school, mosque, bazar, cemetery, farmland, road) where, at the time of the strike, mostly or exclusively civilians were carrying out their daily activities (e.g., studying, praying, shopping, attending a funeral, cultivating the land, attending a tribal assembly, driving a car or motorcycle) (Badalič 2016, 164–165).

The numerous civilian victims of drone strikes indicated that the portrayal of drones as precise killing machines was deeply flawed. Apologists of the drone program usually promoted the use of drones by

claiming that the cutting-edge technology permitted "surgically precise" strikes with few, if any, civilian casualties (Strawser 2010, 351–352). But, as research evidence suggested, the fact that drone operators relied on modern technology that enabled them to annihilate targets with "surgical precision" did not mean they were more capable to distinguish between civilians and legitimate military targets (Chamayou 2015, 142–143). The precision of the weapons systems and the target selection process were two separate issues, and it was primarily the target selection process, with its inherent flaws, that caused imprecise strikes with civilian casualties.[1]

The main objective of this chapter is to analyze the factors that led to imprecise drone strikes that killed and maimed civilians in Afghanistan and Pakistan. The central part of the chapter is divided into four sections. The first section examines how three too-broad criteria for determining targets of drone strikes blurred the line between combatants and civilians, thus causing drone strikes to be inherently imprecise. The first criterion stated that all adult males standing in the vicinity of known combatants were legitimate targets; the second criterion was that first responders who rushed to the site of a drone strike were legitimate targets; and the third criterion presupposed that surveilled individuals were legitimate targets if they regularly communicated, via mobile phones, with combatants. The second section of the chapter focuses on two technical factors influencing the precision of the strikes. The section shows how the low quality of video footage and the limited field of view provided by the drones' cameras caused imprecise strikes. The third section examines how malicious human behavior in the target selection procedure undermined the precision of the strikes. The section shows how local informers working for the U.S. military provided faulty intelligence on targets, and how tendentious interpretations of unclear video footage by drone operators led to strikes with tragic results for civilians.

[1]For a more rudimentary analysis of the factors causing imprecise strikes see Badalič (2016, 166–170).

The last, fourth section of the chapter examines how the too-broad criteria for determining targets necessarily led to indiscriminate attacks against civilians.

2 Too-Broad Criteria for Determining Targets

The first category of factors causing imprecise drone strikes consisted of three too-broad criteria for determining targets of strikes. In order to see how the new criteria blurred the line between combatants and civilians, we first need to take a look at how international humanitarian law defines legitimate military targets in an armed conflict between a state party and a non-state armed group. By comparing the criteria used in international humanitarian law with the new criteria adopted by successive U.S. administrations, we will see how the new criteria expanded the notion of combatant by including in it individuals identified as civilians under international humanitarian law.

The principle of distinction, a key principle in international humanitarian law, states that all belligerent parties involved in an armed conflict have to distinguish, at all times, between the civilian population and combatants, and that only military objectives are legitimate military targets (ICRC 2010, 36). Under international humanitarian law, a state party at war with a non-state armed group is permitted to target only two categories of individuals, that is, permanent members of a non-state armed group who continuously participate in hostilities and civilians who temporarily directly participate in hostilities as supporters of the non-state armed group (Heller 2013, 92–93). Regular members of a non-state armed group who continuously take part in the planning and execution of military operations can be lawfully targeted at any time during an armed conflict (Melzer 2009a, 31–36), while civilians who temporarily participate in hostilities are legitimate targets only for such time as they take part in the hostilities (Melzer 2009a, 65).

Both criteria for determining legitimate targets in a non-international armed conflict are based on the premise that an individual can be lawfully targeted only if he participates in hostilities, either on a regular basis (as a permanent member of a non-state armed group) or

temporarily (as a civilian who occasionally participates in hostilities). The boundary between lawful and unlawful targets is thus based on the distinction between individuals who continuously or temporarily participate in hostilities and individuals who are not involved in the fighting. On the basis of this distinction, individuals who cooperate with a non-state armed group without taking part in hostilities are not legitimate targets (e.g., individuals supplying food and/or shelter to members of non-state armed groups, individuals providing economic support and political advocacy, individuals conducting propaganda campaigns for non-state armed groups) (Alston 2010, 19).

In drone warfare, the U.S. abandoned the two standard definitions of legitimate military targets and introduced three new criteria for determining targets that dangerously blurred the line between combatants and civilians. The new criteria, embraced by the Bush and Obama administrations, were based on the idea that it was possible to determine the combatant status of an individual solely by analyzing his pattern of life (IHRCRC and GJC 2012, 12–13). The pattern of life of surveilled individuals was gradually constructed with data gathered by drones (e.g., video footage, phone records). By monitoring the movements of surveilled individuals, by verifying the locations they frequently visited, by identifying their social circles, U.S. intelligence analysts gained the raw data they needed to figure out whether the surveilled individuals had a pattern of life that was consistent with the pattern of life of combatants (Abbot 2012; Shaw and Akhter 2014, 227).

The key problem with using a pattern-of-life analysis to select targets was that U.S. military officials introduced lax criteria for determining combatant-like behavior. First, one of the new criteria stated that surveilled individuals were legitimate targets if they consorted with known militants (Filkins 2011). A more detailed version of this criterion stated that all military-aged men standing in proximity of known combatants during a drone strike were legitimate military targets. The logic that treated physical proximity as evidence of combatant status presupposed that adult males, aged twenty to forty, were combatants if they were located in an area of known "terrorist" activities, or in the company of known "terrorists" (Becker and Shane 2012, A1; McKelvey 2012). As one U.S. Special Operation Officer in Afghanistan explained:

"If we decide he's [a surveilled individual] a bad person, the people with him are also bad" (Clark 2011, 30). This kind of logic assumed that the Taliban, Al Qaeda, and other non-state armed groups were extremely insular organizations whose fighters spent time only with other fighters, without having any links to the civilian population.

This new criterion for determining targets paved the way for the introduction of "signature strikes," in military parlance also termed "crowd killings," which targeted groups of unidentified individuals consorting with known combatants. "Signature strikes" killed unidentified individuals with characteristics, or "signatures," believed by U.S. military officials to indicate combatant-like behavior (HRC and Civic 2012, 8–9). The main problem with this kind of strikes was that the too-broad criterion for determining targets inevitably led to strikes that killed innocent civilians, including children. Here are some examples. On 30 October 2006, a "signature strike" targeted a madrasa in Chenagai village in Bajaur, a Pashtun tribal area in north-western Pakistan (Gall and Khan 2006). The madrasa, led by Maulana Liaqat Ullah Hussain, a prominent figure in the militant group Tehrik Nifaz-i-Shariat Muhammadi (TNSM), was believed to be sheltering Al Qaeda fighters, including Ayman al Zawahiri, Al Qaeda's second-in-command (ibid.). It turned out, however, that Zawahiri was not present at the madrasa during the strike that killed up to 83 people (ibid.). The majority of the victims were young students, some of them as young as nine years old, who never participated in "terrorist" activities (Ali 2006; Gall and Khan 2006). On 17 March 2011, the CIA carried out a "signature strike" in Datta Khel village in North Waziristan (IHRCRC and GJC 2012, 57–62). The missiles fired by a drone hit a *jirga*, a tribal conflict-resolution assembly, organized by local pro-government tribal elders at the Nomada bus depot. "I saw the attack on the *jirga* organized by Malik Daud. He was my friend. Many government employees attended the *jirga*," said Samiullah Dawar (pers. comm.). The assembly was attended by pro-government tribal elders, government officials and members of *khasadar*, a pro-government tribal paramilitary force. According to some reports, four mid-level insurgents attended the jirga because they were needed to resolve a dispute over a local chrome mine (IHRCRC and GJC 2012, 57–62). In the aftermath of the strike, U.S. officials claimed

only insurgents were killed, but an investigation into the strike revealed that the vast majority of those killed and maimed were civilians who supported the Pakistani government (ibid.). The strike killed at least forty-two people, including thirty-eight civilians, while fourteen were injured (ibid.). On 8 January 2016, the U.S. military launched a "signature strike" in Achin district in eastern Afghanistan. "Daesh [Islamic State – Khorasan] militants carried out a public execution on the main square in Pekha. They brought with them a few Taliban fighters that they wanted to kill. They invited locals to come see the execution. Many locals went to see the execution. A drone hit those people. There were many civilians among the victims," said Khan (pers. comm.), a local tribal elder. News reports on the strike offered contradictory interpretations of whether the victims were civilians (TBIJ 2016). Some witnesses claimed there were civilians among the victims, while others claimed the strike killed only members of the Islamic state—Khorasan (ibid.). On 25 August 2016, a drone strike targeted a Taliban prison in Helmand province in south-eastern Afghanistan, killing thirty-two people in total (Stanikzai 2016). Local authorities first claimed that those killed in the strike were Taliban, but it soon emerged that the majority of the victims were members of the Afghan security forces and civilians imprisoned by the Taliban (ibid.). One of the survivors of the attack, Mohammed Nabi, an Afghan soldier, said that at the moment of the strike there were seven Afghan soldiers, eleven Afghan policemen and eight civilians held in detention by the Taliban (ibid.). The prison was supervised by eight Taliban guards. The only survivors of the strike were one Taliban guard, one civilian and Mohammed Nabi (ibid.).

The above-mentioned examples of "signature strikes" showed how drones targeting unidentified individuals standing in proximity of known combatants caused civilian casualties. Strikes with such tragic results revealed how the new criterion for determining targets abandoned international humanitarian law's principle of distinction and its strict criteria for determining who can be lawfully targeted by a state party in a non-international armed conflict. Under international humanitarian law, as we have seen above, a state party involved in a non-international armed conflict is permitted to target only regular members of non-state armed groups who continuously participate

in hostilities and civilians who temporarily take part in hostilities. By adopting the new, too-broad criterion for determining targets of drone strikes, the U.S. military chose to ignore the two widely accepted definitions of military targets, and, consequently, created the circumstances for violations of the principle of distinction. As other authors pointed out, the assumption that the status of a combatant can be inferred from the mere fact that a surveilled individual is an adult male in the vicinity of a known combatant is inconsistent with the principle of distinction (Heller 2013, 97–98). It is not possible to determine combatant status solely on the basis of an individual's age, gender and location. If an adult male is standing—willingly or unwillingly—in the proximity of a combatant, he may still be a civilian. Civilian targets may include family members and relatives of combatants; civilians who may find themselves near insurgents against their will (e.g., prisoners of war, kidnapped persons); and civilians who may come across insurgents while carrying out their everyday tasks (e.g. local tribal elders negotiating with insurgents, shopkeepers selling products to insurgents, journalists interviewing insurgents). Under international humanitarian law, those individuals are identified as civilians because they are neither regular members of non-state armed groups nor civilians participating in hostilities.

The second criterion for determining targets of drone strikes was that surveilled individuals were legitimate targets if they rushed to the site of a drone strike to help injured combatants. This criterion was a somewhat expanded version of the first criterion examined above. While the first criterion implied that individuals standing in proximity of combatants were legitimate targets, the second criterion assumed that even individuals standing in proximity of killed or injured combatants were legitimate targets. The logic behind the second criterion, which also treated physical proximity as evidence of "terrorist" behavior, paved the way for the introduction of "double tap" strikes. This kind of attacks consisted of a sequence of two strikes in which the second strike hit, after a short period of time, the site of the first strike, thus killing or maiming rescuers who reached the site of the first strike to help the victims (Woods and Lamb 2012). Apologists of "double tap" strikes—for example, Williams (2013, 81)—argued that those helping injured

combatants were usually combatants who came to the rescue of their comrades. This argument was, in part, confirmed by Samiullah Dawar. "When militants are killed in the first strike, the Taliban usually cordon off the site of the strike because they don't want anyone else to get close. In such cases, Taliban fighters get killed in the second strike. If civilians get killed in the first strike, then villagers go to the site of the strike. In such cases, civilians get killed in the second strike," said Dawar (pers. comm.), referring to the situation in North Waziristan.

Although combatants were targeted in follow-up strikes, research evidence revealed that was not always the case. Samiullah Dawar once witnessed a "double tap" attack in which both combatants and civilians were killed after they reached the site of the first strike to help the victims. The first strike of that "double tap" attack, carried out in Danda Darpa Khel village in North Waziristan on 15 September 2010, hit two housing compounds harboring members of the Haqqani group. At the time of the strike, Samiullah Dawar was in the village interviewing a Taliban commander. "We heard a loud explosion. It was really close, perhaps four or five houses away from us. I walked there [to the site of the strike]. I saw it was a drone strike. I saw many injured people. They suffered severe burns. I drove some of them to the hospital in Miran Shah," recalled Dawar. When first responders were providing medical treatment to the victims of the first strike, a drone again bombed that area. The follow-up strike, conducted about fifteen minutes after the first strike, killed eight people who were helping the victims of the first strike (TBIJ 2011b). Five of them were civilians, villagers identified as Yahya, Samin, Niamatullah, Shahzad, and Ilyas, while the other three were militants who rushed to the site of the strike from the house where Dawar was interviewing the Taliban commander (ibid.). In both strikes, up to fifteen people were killed (ibid.).

A major issue in "double tap" strikes was that the short period of time between the two consecutive strikes—sometimes just a few minutes—indicated that prior to the follow-up strike drone operators were not able to identify the targets in order to confirm they were not civilians. As a result, "double tap" strikes considerably increased the possibility of hitting civilian targets. There were many examples of civilians killed in follow-up strikes while they were assisting those injured in the first

strike (Woods and Yusufzai 2013; Woods and Lamb 2012). On 16 May 2009, the first confirmed drone strike on rescuers took place in the village of Khaisor in North Waziristan (Woods and Lamb 2012). The strike targeted a local mosque where Taliban fighters gathered for prayers before heading across the border into Afghanistan (ibid.). Following the first drone strike, which hit the Taliban group and killed at least a dozen people, villagers joined the surviving Taliban to retrieve the dead bodies from the rubble and help the injured (ibid.). During the rescue operation, a drone again bombed that area with two missiles, killing many more people, including civilians—in total, at least twenty-nine people died (ibid.). Between May 2009 and June 2011, at least fifteen attacks on rescuers were reported by the news media (ibid.).

The tragic consequences of "double tap" strikes indicated that targeting unidentified individuals standing in proximity of killed or maimed combatants inevitably led to civilian casualties. The main reason for civilian casualties was that the too-broad criterion for determining targets ignored the two standard definitions of legitimate military targets and the principle of distinction. The assumption that the status of a combatant can be inferred from the fact that the surveilled individual rushed to the site of a drone strike in order to help the victims was inconsistent with the two definitions of legitimate military targets. It was not possible to determine combatant status solely on the basis of the individual's location. If an individual came to the rescue of known combatants, he was not necessarily a member of a non-state armed group or a civilian taking part in hostilities.

The third criterion for determining drone targets was based on the premise that surveilled individuals were legitimate military targets if they frequently communicated, via mobile phones, with known combatants. In order to locate targets based on phone records, the U.S. military relied on "social network analysis," also termed "link analysis," to comb through the large quantities of raw metadata obtained from tracking mobile phones, or SIM cards, and convert the metadata into actionable intelligence (Porter 2011). This kind of analysis, which focused only on the metadata and not the content of phone calls, aimed at identifying networks of combatants on the basis of the number of phone calls between the surveilled individuals (Porter 2011; Clark 2011).

The analysis was expected to identify militant commanders, individuals at the center of the network, and their subordinates (Dryer 2006). If a phone record of a surveilled individual revealed that the individual made frequent calls to a mobile phone of a known combatant, the individual was likely to become a legitimate target for the U.S. military (Porter 2011).

According to a former drone operator who conducted missions in Afghanistan, the vast majority—about 90%—of "high-value target" operations, which included drone strikes and night raids, relied on signals intelligence (Scahill 2016, 99). The problem of over-relying on such intelligence was that many times it was not backed by traditional human intelligence in order to cross-check the information provided by signals intelligence. When the U.S. military did not have local informers on the ground to verify the identities of individuals carrying the surveilled mobile phones, they relied exclusively on signals intelligence. In such cases, the U.S. military did not target people with known identities, but only mobile phones that they believed belonged to combatants (Porter 2011; Scahill 2016, 97–98). This tactic led to killings of innocent civilians. The drone strike carried out in the Afghan province of Takhar on 2 September 2010 was one of the most well-documented strikes that killed the wrong person due to mistakes made in the analysis of signals intelligence (Clark 2011). The network analysis carried out before the strike mixed the identities of two persons, Zabet Amanullah, a former Taliban fighter who laid down his arms in 2001, and Mohammed Amin, the Taliban deputy shadow governor of Takhar (Clark 2011, 25–26). The U.S. military did not cross-check the metadata gathered through signals intelligence neither with Afghan officials nor local informers (ibid.). The failure to verify the identity of the individual carrying the targeted mobile phone led to the killing of the wrong target, Zabet Amanullah, and nine other civilians traveling with him in a car convoy (Clark 2011, 20–24).

When drone operators used exclusively signals intelligence to target mobile phones, without knowing who exactly was in possession of the mobile phones at the time of the strike, there was always a possibility of hitting civilians. The too-broad criterion for determining targets ignored the two widely accepted definitions of legitimate military targets, and,

consequently, created circumstances for violations of the principle of distinction. By analyzing communication patterns to locate targets, it was not possible for U.S. intelligence analysts to ascertain that the targets were either regular members of non-state armed groups or civilians directly participating in hostilities. Intelligence analysts could only determine that the surveilled individuals made frequent phone calls to known combatants, which did not necessarily mean that they were legitimate military targets. Even if individuals made frequent phone calls to known combatants, they were perhaps civilians with family links to combatants or civilians who were in contact with combatants for pragmatic reasons (e.g., civilians seeking help from rebel commanders to resolve local disputes). In southern Afghanistan, for example, the majority of local residents had a few phone numbers of Taliban commanders saved to their mobile phones in case they needed them for help (Porter 2011). The problem was that U.S. intelligence analysts, who relied only on metadata obtained from mobile phone tracking, could not distinguish between such pragmatic contacts with combatants and active membership in the insurgency (ibid.).

3 Technical Factors Causing Civilian Victims

There were two technical factors causing indiscriminate strikes. First, drone strikes were imprecise because drone surveillance technology provided images of low quality (Wheeler 2012). Even in good weather conditions, the quality of the pixelated imagery was so limited that drone crews were unable to clearly identify the nature of the individuals under surveillance (e.g., they were not able to tell whether the target was a man or a woman, an adult or a child) and discern possibly incriminating objects that they saw on the screens (e.g., they were unable to tell whether an object was a weapon or a farming tool) (Linebaugh 2013; Wheeler 2012). The poor quality of the video images, and the drone operators' guesses about what the blurry images on the screens depicted, led to mistakes in the target selection process. On 6 April 2011, for example, the failure to identify targets even resulted in a drone "friendly fire" strike on two U.S. Marines in Afghanistan (Wheeler 2012).

During a clash between the Marines and the Taliban, drone operators failed to distinguish the Marines, fully equipped and dressed in military fatigues, from the Taliban (ibid.). Mistaking them for the enemy, drone operators released the missiles on the two Marines, killing them on the spot (ibid.).

Second, drone strikes were imprecise because drone technology provided limited situational awareness of the area around the target. When drone operators zoomed in on the target, their view of the surveilled area became very limited—it was like looking at the targeted area through a soda straw. It was this "soda straw effect" that increased the risk of drone operators not noticing civilians moving into proximity of the target (Shah 2013, 2–3). According to Lewis (2014, 42), reduced situational awareness led to civilian casualties in follow-up strikes of "double tap" attacks. While carrying out the second strike, drone operators lacked a wide field of view and, consequently, failed to see civilians who rushed to the scene of the first strike to help the victims. In addition, limited situational awareness also caused civilian casualties in drone attacks with only one weapon released. A drone "pilot" once described how they killed innocent civilians when targeting a truck carrying alleged combatants in Afghanistan (HRC and Civic 2012, 37). While analyzing the video footage collected by the drone's camera, the drone operators concluded that the surveilled truck was located far enough away from civilian houses to avoid harm to civilians. On the basis of the video footage, a U.S. military officer, who was deployed on the ground, gave the permission to hit the target. After the missile had been fired, two young boys on bicycles suddenly appeared on the drone operators' screen. The drone "pilot" could do nothing as he watched how the missile killed the two boys and the alleged combatants on the targeted truck. If the "pilot" had a wider field of view of the targeted area, he could perhaps have noted the two children.[2]

[2]The entire description of this drone strike is based on the report prepared by HRC and Civic (2012, 37).

4 Faulty Intelligence and Tendentious Interpretations of Video Footage

On the basis of available data, it was possible to identify two kinds of malicious human behavior that led to strikes with civilian victims. First, botched strikes were the result of faulty intelligence provided by local informants working for the U.S. forces. In both Afghanistan and Pakistan, U.S. military officials identified two main reasons why local informants deliberately provided false information in the target selection process. The first reason was that local tribal elders and warlords who collaborated with the U.S. military falsely identified their local rivals (e.g., their rivals in tribal feuds) as members of the insurgency because they wanted to use the U.S. military to eliminate those rivals (Gusterson 2016, 102–103; Shah 2013, 3; Mayer 2009). Another reason for imprecise strikes was that local informants sometimes provided false information because they wanted to earn some money. They wanted to convince the U.S. forces that they possessed valuable information on targets in order to get paid (Mayer 2009). In Pakistan's tribal areas, for example, one informant working for the CIA claimed he received on average $200 a month, which was a significant amount of money in those areas (Kazim 2013). Another informant claimed he got $350 per target (Farooq and Kakakhel 2014).

Second, strikes were imprecise because drone operators provided tendentious interpretations of the video footage collected by drones. When drone operators analyzed large quantities of video material, they were tempted to tendentiously link the unclear pixelated images they saw on their screens to their pre-established broad definitions of legitimate targets (Wall and Monahan 2011, 240). There was always a risk that drone operators "creatively" interpreted unclear images in order to confirm their biased assumption that they had legitimate military targets under surveillance. There was one well-documented case of a drone strike in which it became clear that tendentious interpretations of drone imagery led to civilian casualties. The strike, carried out in Oruzgan province on 21 February 2010, hit a convoy of three vehicles, and an investigation into the strike revealed that all of the victims were civilians

(Cloud 2011). The U.S. military admitted killing 15 or 16 civilians, while local tribal elders insisted 23 civilians were killed, including two children (ibid.).

The publicly released transcript of cockpit and radio conversations prior to the strike provided a unique insight into the process of identifying "terrorist" targets by showing how drone operators tendentiously interpreted the blurry images on their screens (Radio Transmissions 2010).[3] A close reading of the transcript revealed three things. First, in the process of identifying the nature of surveilled individuals, drone operators consistently dismissed every image indicating that those individuals were non-combatants (i.e., images indicating the presence of children in the surveilled vehicles). Members of the drone crew used various arguments to dismiss the images indicating the presence of children. One of the crew members simply denied the possibility that there were children in the convoy by arguing it was too early in the morning for the locals to bring their children out. "I don't think they have kids out at this [early morning] hour," he said (ibid.). Another crew member tried to relativize the presence of children by claiming that what he saw on the screen was "something more toward adolescents or teens" (ibid.). In his view, adolescents were legitimate military targets because 12- and 13-year-old children with rifles were just as dangerous as adults (ibid.). The sensor operator denied the young age of a surveilled individual by saying that maybe he was a teenager, "but I haven't seen anything that looked that short" (ibid.). Throughout the target identification process, the drone operators knew what they wanted. They wanted to identify all the surveilled individuals as military-aged men in order to have "evidence" that all of them were combatants. As the sensor operator said: "I want this pickup truck full of dudes" (ibid.).

Second, the drone operators took a completely different approach when interpreting images indicating the possibility that the surveilled individuals were combatants (e.g., images showing that the surveilled individuals perhaps had weapons with them). Although the images were of poor quality, members of the drone crew tried to confirm they saw

[3]For a short description of this drone strike see also Badalič (2015, 212–214; 2016, 167–168).

weapons on their screens. This eagerness to positively identify weapons was perhaps most clearly shown by the drone "pilot" who said that he hoped they would be able to make a rifle out while analyzing the video footage (ibid.). Throughout the conversation between the drone operators, it was possible to notice a keen interest to confirm there were weapons in the convoy. At one moment, for example, a member of the drone crew said he thought that "that dude had a rifle," which was confirmed by the drone "pilot" (ibid.). Prior to the strike, drone operators claimed they positively identified at a minimum three rifles, which was one of the reasons for launching the attack. After the attack, however, an investigation revealed that the killed civilians, including women and children, had no weapons with them (Radio Transmissions 2010; Cloud 2011).

Third, the transcript revealed that drone operators consistently interpreted even the most innocuous movements of the blurry figures on their screens as dangerous "terrorist" behavior. There are three examples of such interpretations. When a third vehicle joined the first two surveilled vehicles in the convoy, the sensor operator commented that that "looks like a, uh, grouping of forces," implying that a new group of combatants joined the first group (Radio Transmissions 2010). When a scuffle erupted among the surveilled individuals, drone operators thought that combatants were pushing innocent civilians into their vehicles to use them later as "human shields" in the fighting (ibid.). When the surveilled vehicles took a road leading away from a U.S. military unit on the ground, drone operators still believed the surveilled individuals were combatants who wanted to drive around the U.S. military unit in order to attack it from another location (ibid.). In all three instances, drone operators provided interpretations that fit into their assumption that they had legitimate military targets under surveillance.

It was truly disturbing to see how drone operators, on the one hand, consistently refused to accept the images undermining their unfounded assumption that the figures on the screens were combatants, while, on the other hand, they uncritically embraced all images they believed were evidence confirming the "terrorist" nature of the surveilled individuals. Prior to releasing their deadly weapons, drone operators selectively used the unclear images, the blurry mass of pixels, to tendentiously interpret

them as legitimate military targets. Drone operators believed the unclear figures on the screens represented combatants because they wanted them to represent combatants, and they believed the movements of surveilled individuals were hostile "terrorist" maneuvers because they wanted to see those movements as hostile maneuvers.

It was also disturbing to see how members of the drone crew refused to admit that it was not possible to correctly determine the meaning of the blurred images on the screens. Although they were aware of the fact that the low-quality images prevented them from making critically important decisions in the identification of targets, they insisted in providing tendentious interpretations to confirm that what they saw in the video footage were legitimate targets. It was, therefore, not an unintended mistake that caused the tragedy, but a deliberate insistence to provide false interpretations. It was not possible to tell with certainty what prompted drone operators to produce their "creative" interpretations of the unclear images. It was, however, possible to indicate the direction in which to look for the main reason behind such behavior. The main reason was probably the drone operators' eagerness to take action against "terrorists." The transcript consists of many statements indicating a strong interest to launch the attack. For example, as the drone crew prepared for the attack, the drone "pilot" said: "Can't wait till this actually happens, with all this coordination and *expletive* (agreement noises from crew)" (Radio Transmissions 2010). In addition, the drone "pilot" also said: "As long as you keep somebody that we can shoot in the field of view I'm happy" (ibid.). It was that eagerness to bomb people that probably drove the drone operators to identify the unclear images on their screens as combatants. In order to get permission to launch the strike, they needed positively identified combatants and weapons.

5 Inherently Indiscriminate Drone Strikes

Although the above-mentioned factors causing imprecise drone strikes significantly differ from each other, we can nevertheless put them into two categories. The first category, the category of factors that

constantly influenced the precision of the strikes, consisted of the three too-broad criteria for determining what the U.S. military believed were legitimate military targets. The new criteria for selecting targets continuously influenced the target selection process and the execution of strikes in a way that caused civilian casualties. The second category of factors, the category of factors that sporadically influenced the precision of strikes, consisted of limited situational awareness, low-quality images, faulty intelligence, and tendentious interpretations of unclear images.

It was the first category of factors that necessarily led to indiscriminate drone attacks, that is, attacks that targeted military objectives and civilians without distinction (Melzer 2009b, 355). Indiscriminate attacks are defined as attacks (a) which are not directed at a specific military target; (b) which use a method or means of combat that cannot be directed at a specific military target; and (c) which use a method or means of combat the effects of which cannot be limited as required by international humanitarian law (Henckaerts and Doswald-Beck 2005a, 40; 2005b, 247–291). To put it differently, indiscriminate attacks lack the capability of means (i.e., the weapons being used) or methods (i.e., the way weapons are being used in combat) to respect the principle of distinction while conducting military operations (Melzer 2009b, 355–356). In drone warfare, it was the fact that the method of combat relied on a flawed target selection process that led to indiscriminate attacks. Drone attacks were inherently indiscriminate because, first, they were not always directed at specific military objectives; second, they used a method of combat that could not be directed at specific military objectives; and third, they used a method of combat the effects of which could not be limited as required by international humanitarian law (e.g., the effects of drone strikes could not be limited as required by the principle of distinction between civilians and combatants).

By violating the prohibition of indiscriminate attacks, recognized as part of customary international law and applicable in non-international armed conflicts (Henckaerts and Doswald-Beck 2005a, 38–39), the U.S. military carried out acts that constituted violations of the laws of war.

References

Abbot, Sebastian. 2012. "New Light on Drone War's Death Toll." *Associated Press*, February 26. http://news.yahoo.com/ap-impact-light-drone-wars-death-toll-150321926.html. Accessed on 28 February 2017.

Ali, Yousaf. 2006. "Most Bajaur Victims Were Under 20." *The News*, November 5. https://www.thenews.com.pk/archive/print/646502-most-bajaur-victims-were-under-20. Accessed on 12 February 2017.

Alston, Philip. 2010. *Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions: Study on Targeted Killings.* Geneva: UN Human Rights Council. http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf. Accessed on 12 March 2016.

Badalič, Vasja. 2015. "Kdo je terorist?" [Who Is a Terrorist?]. *Problemi* 5–6: 193–224.

———. 2016. "The Predators' Rule of Terror." In *Drones and Unmanned Aerial Systems: Legal and Social Implications for Security and Surveillance*, edited by Aleš Završnik, 157–181. Cham: Springer.

Becker, Jo, and Scott Shane. 2012. "Secret 'Kill List' Proves a Test of Obama's Principles and Will." *The New York Times*, May 29, A1.

Boyle, Michael J. 2013. "The Costs and Consequences of Drone Warfare." *International Affairs* 89 (1): 1–29. https://doi.org/10.1111/1468-2346.12002.

Chamayou, Grégoire. 2015. *Drone Theory*. London: Penguin Random House.

Clark, Kate. 2011. *The Takhar Attack: Targeted Killings and the Parallel Worlds of US Intelligence in Afghanistan*. Kabul: Afghanistan Analyst Network. http://www.afghanistan-analysts.org/wp-content/uploads/downloads/2012/10/20110511KClark_Takhar-attack_final.pdf. Accessed on 20 April 2017.

Cloud, David S. 2011. "Anatomy of an Afghan War Tragedy." *Los Angeles Times*, April 10. http://articles.latimes.com/print/2011/apr/10/world/la-fg-afghanistan-drone-20110410. Accessed on 16 April 2017.

Dryer, Alexandre. 2006. "How the NSA Does 'Social Network Analysis'." *Slate*, May 15. http://www.slate.com/articles/news_and_politics/explainer/2006/05/how_the_nsa_does_social_network_analysis.html. Accessed on 12 February 2017.

Farooq, Umar, and Syed Fakhar Kakakhel. 2014. "Obama's Deadly Informants: The Drone Spotters of Pakistan." *The Daily Beast*, November 14. http://www.thedailybeast.com/articles/2014/11/12/obama-s-deadly-informants-the-drone-spotters-of-pakistan.html. Accessed on 20 April 2017.

Filkins, Dexter. 2011. "The Journalist and the Spies." *The New Yorker*, September 19. http://www.newyorker.com/magazine/2011/09/19/the-journalist-and-the-spies. Accessed on 28 April 2017.

Gall, Carlotta, and Ismail Khan. 2006. "American Strike in January Missed Al Qaeda's No. 2 by a Few Hours." *The New York Times*, November 10. http://www.nytimes.com/2006/11/10/world/asia/10pakistan.html?pagewanted=all. Accessed on 25 April 2017.

Gusterson, Hugh. 2016. *Drone: Remote Control Warfare*. Cambridge: The MIT Press.

Heller, Kevin Jon. 2013. "'One Hell of a Killing Machine': Signature Strikes in International Law." *Journal of International Criminal Justice* 11 (1): 89–119. https://doi.org/10.1093/jicj/mqs093.

Henckaerts, Jean-Marie, and Louise Doswald-Beck. 2005a. *Customary International Humanitarian Law*. *Volume 1: Rules*. Cambridge: Cambridge University Press.

———. 2005b. *Customary International Humanitarian Law*. *Volume 2: Practice—Part I*. Cambridge: Cambridge University Press.

HRC (Human Rights Clinic) and Civic (Center for Civilians in Conflict). 2012. *The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions*. New York: Colombia Law School and Civic. http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/The%20Civilian%20Impact%20of%20Drones.pdf. Accessed on 20 April 2017.

ICRC (International Committee of Red Cross). 2010. *Additional Protocols to the Geneva Conventions of 12 August 1949*. Geneva: International Committee of the Red Cross. https://www.icrc.org/eng/assets/files/other/icrc_002_0321.pdf. Accessed on 14 April 2017.

IHRCRC (International Human Rights and Conflict Resolution Clinic), and GJC (Global Justice Clinic). 2012. *Living Under Drones: Death, Injury, and Trauma to Civilians from US Drone Practices in Pakistan*. New York: Stanford Law School, NYU School of Law. http://chrgj.org/wp-content/uploads/2012/10/Living-Under-Drones.pdf. Accessed on 8 May 2017.

Kazim, Hasnain. 2013. "Drone Attacks are the Right Thing to Do." *Spiegel Online*, December 14. http://www.spiegel.de/international/zeitgeist/interview-pakistani-cia-informant-on-drone-warfare-and-taliban-a-937045.html. Accessed on 30 April 2017.

Lewis, Larry. 2014. Improving Lethal Action: Learning and Adapting in US Counterterrorism Operations. *CNA Analysis & Solutions*. https://www.cna.org/CNA_files/PDF/COP-2014-U-008746-Final.pdf. Accessed on 5 April 2017.

Linebaugh, Heather. 2013. "I Worked on the US Drone Program. The Public Should Know What Really Goes on." *The Guardian*, December 29. http://www.theguardian.com/commentisfree/2013/dec/29/drones-us-military Accessed on 11 April 2016.

Mayer, Jane. 2009. "The Predator War: What Are the Risks of the CIA's Covert Drone Program?" *The New Yorker*, October 26. http://www.newyorker.com/reporting/2009/10/26/091026fa_fact_mayer. Accessed on 6 June 2016.

McKelvey, Tara. 2012. A Former Ambassador to Pakistan Speaks Out. *The Daily Beast*, November 20. http://www.thedailybeast.com/articles/2012/11/20/a-former-ambassador-to-pakistan-speaks-out.html. Accessed on 5 April 2017.

Melzer, Nils. 2009a. *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*. Geneva: International Committee of the Red Cross.

———. 2009b. *Targeted Killing and International Law*. Oxford: Oxford University Press.

Plaw, Avery, Matthew S. Fricker, and Carlos R. Colon. 2016. *The Drone Debate: A Primer on the U.S. Use of Unmanned Aircraft Outside Conventional Battlefields*. Lanham: Rowman & Littlefield.

Porter, Gareth. 2011. "How McChrystal and Petraeus Built an Indiscriminate 'Killing Machine'." *Truthout*, September 11. http://www.truth-out.org/news/item/3588:how-mcchrystal-and-petraeus-built-an-indiscriminate-killing-machine. Accessed on 4 April 2016.

Radio Transmissions and Intercom. 2010. http://www.scribd.com/doc/52825019/Transcripts-of-Drone-Attack. Accessed on 4 April 2017.

Scahill, Jeremy. 2013. *Dirty Wars: The World Is a Battlefield*. New York: Nation Books.

———. 2016. *The Assassination Complex: Inside the Government's Secret Drone Warfare Program*. New York: Simon & Schuster.

Shah, Naureen. 2013. *Civilian Harm from Drone Strikes Assessing Limitations & Responding to Harm*. New York: Colombia Law School. https://cpc-grijalva.house.gov/uploads/Naureen%20Shah%20DronesHearingWrittenTestimony1.pdf. Accessed on 11 April 2016.

Shaw, Ian, and Majed Akhter. 2014. "The Dronification of State Violence." *Critical Asian Studies* 46 (2): 211–234. https://doi.org/10.1080/14672715.2014.898452.

Smith, Josh. 2016. "Afghan Drone War: Data Show Unmanned Flights Dominate Air Campaign." *Reuters*, April 20. http://www.reuters.com/article/us-afghanistan-drones-exclusive-idUSKCN0XH2UZ. Accessed on 11 April 2016.

Stanikzai, Zainullah. 2016. "17 Security Personnel Among 32 Killed in Helmand Raids." *Pajhwok*, August 27. http://www.pajhwok.com/en/2016/08/27/17-security-personnel-among-32-killed-helmand-raids. Accessed on 26 April 2017.

Strawser, Bradley Jay. 2010. "Moral Predators: The Duty to Employ Uninhabited Aerial Vehicles." *Journal of Military Ethics* 9 (4): 342–368.

TBIJ (The Bureau of Investigative Journalism). 2011a. "The Bush Years: Pakistan Strikes 2004–2009." London: TBIJ. https://www.thebureauinvestigates.com/2011/08/10/the-bush-years-2004-2009/. Accessed on 16 February 2017.

———. 2011b. "Pakistan: Reported US Strikes in 2010." London: TBIJ. https://www.thebureauinvestigates.com/drone-war/data/obama-2010-pakistan-strikes. Accessed on 12 February 2017.

———. 2016. "Afghanistan: Reported US Air and Drone Strikes 2016." London: TBIJ. https://www.thebureauinvestigates.com/drone-war/data/get-the-data-a-list-of-us-air-and-drone-strikes-afghanistan-2016. Accessed on 12 February 2017.

———. 2018. "CIA and US Military Drone Strikes in Pakistan, 2004 to Present." London: TBIJ. https://docs.google.com/spreadsheets/d/1NAfj-FonM-Tn7fziqiv33HlGt09wgLZDSCP-BQaux51w/edit#gid=694046452. Accessed on 24 March 2019.

Wall, Tyler, and Torin Monahan. 2011. "Surveillance and Violence from Afar: The Politics of Drones and Liminal Security-Scapes." *Theoretical Criminology* 15 (3): 239–254.

Wheeler, Winslow. 2012. "Finding the Right Targets." *Time*, February 29. http://nation.time.com/2012/02/29/3-finding-the-right-targets/. Accessed on 16 April 2017.

Williams, Brian Glyn. 2013. "New Light on CIA 'Double Tap' Drone Strike on Taliban 'First Responders' in Pakistan's Tribal Areas." *Perspectives on Terrorism* 7 (3). http://www.terrorismanalysts.com/pt/index.php/pot/article/view/269/html. Accessed on 5 May 2017.

Woods, Chris, and Christina Lamb. 2012. "CIA Tactics in Pakistan Include Targeting Rescuers and Funerals." *The Bureau of Investigative Journalism*, February 4. http://www.thebureauinvestigates.com/2012/02/04/obama-terror-drones-cia-tactics-in-pakistan-include-targeting-rescuers-and-funerals/ Accessed on 6 June 2016.

Woods, Chris, and Mushtaq Yusufzai. 2013. "Bureau Investigation Finds Fresh Evidence of CIA Drone Strikes on Rescuers." *The Bureau of Investigative Journalism*, August 1. http://www.thebureauinvestigates.com/2013/08/01/bureau-investigation-finds-fresh-evidence-of-cia-drone-strikes-on-rescuers/. Accessed on 6 June 2016.

3

Death Comes at Night: Civilian Victims in U.S. Kill-or-Capture Missions in Afghanistan

1 Introduction

On 1 September 2008, the first day of the holy month of Ramadan, a joint force of foreign and Afghan troops conducted a night raid in Hodkhel neighborhood on the eastern outskirts of Kabul. The raid targeted a compound located in the vicinity of Dogan military base where the Turkish contingent was stationed. "It happened in the middle of the night. We were asleep when they broke into the house. Gunshots woke me up. There were perhaps five or six shots," said 75-year-old Said Mohammed (pers. comm.), the owner of the compound. "We asked them why they had entered into our house without permission. They said insurgents were living with us. They searched all of our rooms. They forcibly opened everything. They took everything they wanted. They took our money and gold. They never returned what they stole from us."

Said Mohammed told me that he was not able to see who fired the fatal shots that killed four members of his family. The assailants blindfolded him, thus preventing him from identifying the men who killed his son, 30-year-old Nurullah, and two of Nurullah's sons, aged 2

V. Badalič, *The War Against Civilians*, Palgrave Studies in Victims and Victimology,
https://doi.org/10.1007/978-3-030-12406-9_3

and 3. Nurullah's pregnant wife, who had been severely injured in the raid, died later at the hospital. "Nurullah was innocent. He was not a Taliban fighter. But even if he were a Taliban fighter… how could they shot a 3-year-old and 2-year-old child? Were they Taliban fighters? Was Nurullah's pregnant wife a Taliban fighter?" rhetorically asked Said Mohammed. About three years after the raid, in early October 2011, he was still convinced that they were attacked because the foreign troops received faulty intelligence from their local informers, falsely accusing them of being insurgents. The only surviving member of Nurullah's family was Nurullah's oldest son Zarkawi. When I met him, he was six years old. His grandfather and grandmother were taking care of him.

While night raids were used for years during the Bush administration (Meyerle et al. 2012, 95–116), it was during Obama's presidency that they became one of the cornerstones of the U.S. military tactic in the war against the Afghan insurgency (Shanker et al. 2010). During Obama's first term, when Afghanistan again became the main battlefield of the "war on terror," the number of night raids, usually carried out by U.S. Special Operations Forces and their Afghan counterparts, increased exponentially. In early 2009, at the beginning of Obama's first term, the U.S. military was conducting roughly 20 night raids a month (Porter 2011a). After Obama appointed General Stanley A. McChrystal as the commander of ISAF/U.S. forces in Afghanistan in June 2009, the number of raids started to go up (ibid.). By November 2009, McChrystal scaled up the number of raids to about 90 a month (ibid.). In spring 2010, the number of raids increased to about 250 a month, while in summer 2010 nearly 600 raids a month were being carried out (ibid.). Until early 2011, the frequency of raids remained roughly the same (Porter 2011b). From December 2010 to February 2011, for example, U.S. troops conducted about 600 night raids a month (Graham-Harrison 2011a). It was after the U.S. started to withdraw its troops in 2012 that the number of raids gradually decreased. In 2013, during the transition of the responsibility for providing security from ISAF to Afghan forces, Afghan President Hamid Karzai even decided to ban night raids (Nordland and Shah 2014). In late 2014, however, the new Afghan President, Ashraf Ghani, quietly lifted the ban, thus allowing

Afghan Special Operations Forces to resume, with their U.S. counterparts in an "advisory role," carrying out raids (ibid.).

The Obama administration believed that night raids, also termed kill-or-capture missions in military parlance, were one of the most effective tactics in fighting the Taliban and other insurgent groups (Shanker et al. 2010; Van Linschoten and Kuehn 2011, 1). Obama administration officials provided four reasons for conducting such missions. First, they argued that raids disrupted the operations of insurgent groups by dismantling their leadership structure and limiting the freedom of movement of rank-and-file insurgents (Graham-Harrison 2011b; Gall 2011). Second, they insisted that raids improved the safety of U.S. troops. By providing the advantage of surprising insurgents at their homes in the middle of the night, kill-or-capture missions reduced the risk of U.S. troops getting killed or injured during military operations. Third, night raids, Obama officials argued, reduced the risk of causing civilian harm. The risk of killing or injuring innocent civilians was much lower in targeted raids than in large-scale military offensives. Fourth, night raids were cheaper and needed fewer troops than large-scale military operations. This fact became particularly important after the U.S. withdrew most of its troops from the country (OSF and TLO 2011, 7).

The large majority of night raids conducted during the Obama administration ended with the surrender of the wanted individuals and not with their killing. According to ISAF, shots were fired in only about 20% of raids, albeit no statistics had been released to support that claim (Graham-Harrison 2011b). In some provinces, the percentage of raids with shots fired was even lower. According to Khalid Pashtun, a member of parliament from Kandahar, U.S. forces carried out roughly 2300 night raids in Kandahar city in 2010. "Out of the 2.300 night raids […], shots were fired in only 24 raids," claimed Pashtun (pers. comm.), relying on data provided to him by ISAF.

Although only a small percentage of night raids ended with shots fired, the number of people killed was high. The U.S. military confirmed that a minimum of 3873 individuals were killed in raids conducted from 1 December 2009 to 30 September 2011 (Van Linschoten and Kuehn 2011, 1). That figure, which included insurgent leaders, rank-and-file insurgents, "facilitators" and civilians, was not complete

because many raids remained unreported (Van Linschoten and Kuehn 2011, 7). Due to the unstable security situation that prevented independent researchers from reaching areas were raids had been carried out, it was also not possible to determine exactly how many of those killed were civilians. Only partial data, based on a limited number of investigated cases, was available. From 2009 to 2013, UNAMA and AIHRC documented 391 civilian deaths in kill-or-capture operations (UNAMA and AIHRC 2011, 29; UNAMA 2012, 25; 2014, 49). The victims included children, women, and men of various professions, for example, farmers, government employees, students, and even members of Afghan security forces (Kelly and Pearson 2010; AIHRC 2008, 21–30; Starkey 2010a).

It is worth noting that the 2010 figure—102 civilian deaths (UNAMA and AIHRC 2011, 29)—represented only a fraction of the number of civilians killed because UNAMA and AIHRC officials were not able to visit all the locations from where they received complaints about civilian fatalities. In 2010, UNAMA and AIHRC received 60 complaints from locals about civilian deaths, but they managed to investigate only 13 incidents before publishing their annual report (Porter and Noori 2011a). In October 2011, Ahmad Nader Nadery, an AIHRC commissioner, revealed that, based on data collected by AIHRC, 462 civilians had been killed in night raids carried out in 2010 (Porter and Noori 2011b).

The objective of this chapter is to shed light on the impact of U.S. kill-or-capture missions on the civilian population in Afghanistan. The central part of the chapter, which primarily focuses on raids that ended with civilian casualties, is divided into four sections. By exploring, in the next two sections, the target selection process of night raids, and, in the third section, the execution of raids, the chapter aims at identifying the factors that led to botched raids with civilian casualties. The first section examines how the too-broad criteria used by the U.S. military for determining targets of raids blurred the line between combatants and civilians, thus creating circumstances for raids targeting innocent civilians' homes. The first criterion introduced by the U.S. military was that individuals were legitimate targets if they frequently communicated through mobile phones with combatants, the second criterion was

based on the idea that individuals were legitimate targets if they provided food and shelter to combatants, while the third criterion presupposed that individuals were legitimate targets if they were suspected of possessing incidental information on the insurgency. The second section of the chapter briefly examines two other reasons for night raids causing civilian casualties, that is, reliance on faulty intelligence and mistakes in locating the targeted houses. The third section of the chapter, which focuses on what happened during raids, examines two factors causing civilian fatalities. The section analyzes how excessively subjective interpretations of "hostile acts" and "hostile intent" led to the killings of innocent civilians. The last, fourth section shows how the too-broad criteria for determining targets and the vague definition of "hostile intent" led to indiscriminate attacks against civilians.

2 Too-Broad Criteria for Determining Targets

The U.S. considered kill-or-capture missions to be military operations and not law enforcement actions, which meant that such missions were subjected to international humanitarian law (OSF and TLO 2011, 14). The U.S. was therefore bound to comply with the principle of distinction between combatants and civilians, a key principle in international humanitarian law, in order to avoid targeting civilians in night raids (Barber 2010, 474–475). As a state party involved in a non-international armed conflict against non-state armed groups, the U.S. was permitted to target in raids only two categories of targets: combatants of non-state armed groups who continuously participated in military operations and civilians who sporadically directly participated in hostilities as supporters of non-state armed groups (Melzer 2009, 312–314). A civilian directly participating in hostilities is defined as an individual who temporarily joins an armed group and, while in battle, directly causes adverse military affects such as death, injury, and property destruction (Melzer 2009, 328–334).

While conducting night raids, the U.S. military adopted three too-broad criteria for determining targets that ignored the two standard definitions of legitimate military targets and, consequently, led to

violations of the principle of distinction. The first criterion for determining targets was that individuals were legitimate military targets if they regularly communicated, via mobile phones, with known combatants.[1] Like in the drone campaign, the U.S. military heavily relied on signals intelligence (i.e., monitoring and interpretation of metadata from mobile phones tracking) to locate what they believed were legitimate targets. In Afghanistan, roughly 90% of "high-value target" operations, which included kill-or-capture missions and drone strikes, relied on signals intelligence (Scahill 2016, 99). In order to examine the large quantities of metadata obtained from mobile phones tracking, the U.S. military used "social network analysis" (Porter 2011a). The starting point of this kind of analysis were mobile phones of known combatants, preferably insurgent commanders, from where it was possible to identify other combatants linked to them (ibid.). By analyzing phone records of the surveilled individuals, the U.S. military hoped to identify the leaders and rank-and-file combatants of specific insurgent networks (Porter 2011a; Clark 2011; Dryer 2006).

The assumption that it was possible to deduce the status of a combatant from the fact that a surveilled individual made frequent phone calls to a known combatant ignored the two widely accepted definitions of legitimate military targets and, consequently, helped create circumstances for violations of the principle of distinction. By using solely phone communication patterns to determine links between surveilled individuals, it was not possible to discern whether those individuals were really legitimate military targets (i.e., members of non-state armed groups or civilians directly participating in hostilities) or innocent civilians who frequently communicated with known combatants (i.e., family members of combatants, relatives and friends of combatants, villagers who needed insurgent commanders to solve local disputes). A quantitative analysis of huge amounts of metadata could only identify the links between individuals within specific social networks, but

[1]For a detailed analysis of this criterion see also Chapter 2.

it could not provide a clear picture of the nature of the surveilled individuals, that is, a clear picture of who exactly those individuals were. Without knowing who the surveilled individuals actually were, such analysis failed to distinguish between civilians and combatants. As a result, over-relying on signals intelligence, without backing it with traditional human intelligence to determine who the individuals within the surveilled social networks were, necessarily led to attacks targeting civilians (Scahill 2016, 96–99).

The second criterion for determining targets of night raids was that individuals were legitimate military targets if they provided food and shelter to combatants. Many civilians who became victims of raids complained they were targeted only because they had given—willingly or unwillingly—food and shelter to either the Taliban or any other insurgent group (OSF and TLO 2011, 10–11). By adopting the interpretation that people providing food and shelter to combatants were legitimate targets, the U.S. military again deliberately ignored the two standard definitions of legitimate military targets. Under international humanitarian law, individuals who give—willingly or under duress—food and shelter to combatants are not legitimate military targets because they are neither regular combatants nor civilians directly participating in hostilities. Individuals cooperating with a non-state armed group without taking part in hostilities, including individuals supplying food and providing shelter to members of a non-state armed group, are protected persons and not military objectives (Alston 2010, 19; Melzer 2009, 322). Therefore, by targeting protected persons under international humanitarian law, the U.S. military deliberately violated the principle of distinction between civilians and combatants.

One of the most troubling consequences of using this target selection criterion was that the U.S. military targeted even those civilians who did not support insurgents but were forced to provide them assistance because they lived in areas under control of insurgent groups. As research evidence suggested, by widening the net in the target selection process, the U.S. military started to conduct raids against civilians who many times had no choice but to provide food and shelter to the Taliban and other insurgent groups. In Kunduz province, for example,

a local resident argued that the vast majority of the population had to provide assistance to the Taliban given their power in the province (OSF and TLO 2011, 11). The man, who was detained in a night raid, claimed that 95% of local residents gave food to the Taliban (ibid.). The Taliban used to come to ask for food at different people's houses, sometimes they informed villagers before they came, while sometimes they just showed up (ibid.).

The third criterion for determining targets of night raids was that individuals were legitimate military targets if they were suspected of having incidental information about the insurgency. According to the U.S. military, suspects who might have had information on insurgent activities included individuals with extended family or tribal links to members of insurgent groups, individuals who—willingly or unwillingly—briefly met with insurgents, and individuals who lived in an area suspected of insurgent activity (OSF and TLO 2011, 9–12; Foschini 2011, 5). By embracing such lax descriptions of targets, the U.S. military again deliberately ignored the two standard definitions of legitimate military targets. All of the above-mentioned targets (i.e., family members and relatives of combatants, individuals who met combatants, and individuals who lived in areas where combatants operated) were people who at some point in their lives came in contact with combatants, which did not mean that they were regular members of non-state armed groups or civilians taking part in hostilities. Therefore, those descriptions of targets led to attacks against protected persons under international humanitarian law, and, consequently, created circumstances for breaches of the principle of distinction.

Like the criteria used for locating targets of drone strikes, the criteria for determining targets of night raids were based on the premise that it was possible to identify combatants solely by analyzing their pattern of life. The U.S. military believed it was possible to recognize the pattern of life of combatants by gathering and analyzing metadata of their phone calls, by finding out whether they provided food and shelter to other combatants, and by identifying their family members, relatives, and other people in their social circles. This target selection process was based on the guilt-by-association logic that treated as legitimate military

targets all individuals who were—willingly or unwillingly—somehow linked to known combatants. The key problem of this target selection process was that it treated even the most incidental contacts between civilians and combatants as evidence indicating that the surveilled civilians were legitimate military targets. As a result, civilians were being targeted based on mere associations with members of non-state armed groups, and not because they were regular members of such groups or civilians directly participating in hostilities.

3 Relying on Faulty Intelligence and Locating the Wrong Houses

In addition to the too-broad criteria for determining targets, there were two other factors within the target selection process that led to night raids attacking civilians. The first factor was faulty intelligence (Mazzetti et al. 2015). The U.S. forces were many times too naïve in interpreting information on insurgent activities provided to them by local informers (Alston 2009, 10–12). "Sometimes informers deliberately provide faulty intelligence. If someone has links with the Americans, if he cooperates with them, he can denounce a civilian as an insurgent in order to get rid of him. In many cases informers denounced civilians as Taliban commanders because they had a feud with them and wanted to take revenge against them," explained Abdul Rahim Khurram (pers. comm.), director of The Liaison Office (TLO), an Afghan non-governmental organization that conducted research on night raids in the eastern provinces of Paktika, Paktya, and Khost in 2011.

The second factor behind botched raids was the inability of assault forces to correctly locate the houses and compounds that they wanted to attack. In large, labyrinthine urban areas that consisted of narrow lanes and unmarked houses, assault forces sometimes made mistakes when they were trying to locate the targeted buildings, and, as a result, they raided the wrong buildings with civilians inside (Abdul Rahim Khurram, pers. comm.).

4 Interpreting "Hostile Acts" and "Hostile Intent"

When I was doing research on night raids, I met in Kabul the mother of Afzal Maskin, a two-month-old child who had been injured in a raid carried out in the village of Qala-i-Zal in Tagab district, Kapisa province, on 5 October 2011. "The Americans broke into our house in the middle of the night. They threw a grenade towards us. My husband got scared. He tried to run away, and they shot him dead. They also killed my daughter. She was only seven years old," said Afzal's mother (pers. comm.), who had six children. After being injured, Afzal was transferred to a hospital in Kabul where an X-ray photograph revealed a tiny piece of shrapnel near his left knee. His doctor said that the injury would not cause permanent damage to his leg. Afzal was expected to recover fully.

Due to the unstable security situation in Kapisa, it was not possible to independently investigate the raid in Qala-i-Zal to determine whether Afzal's father was a legitimate military target. It was, however, possible to collect statements from both involved sides. Afzal's mother claimed that her husband was innocent, while the Afghan authorities insisted that ISAF forces targeted a local Taliban commander (Safi 2011). The administrative head of Tagab district, Abdul Hakim Akhunzada, said that Afzal's father, known as Commander Maskin, was responsible for conducting attacks on Afghan forces and making suicide vests, albeit no evidence was provided to substantiate those charges (ibid.). Despite the obstacles that prevented an independent investigation into the raid, it was clear that the two young victims of the raid—Afzal and his sister—were not members of the insurgency.

The Qala-i-Zal night raid was one of the numerous examples showing how easily night raids ended up with civilian casualties. On the one hand, even when U.S. Special Operations Forces targeted a legitimate military objective, civilians frequently found themselves in harm's way. The risk of civilian casualties was always significant because insurgents lived in family compounds that usually housed large extended families, which included parents, siblings, and children of the insurgents

(AI 2014, 20; OSI and TLO 2010, 2). On the other hand, when U.S. assault forces attacked a compound that housed only civilians, the likelihood of killing or injuring civilians was even higher. In the dark of the night, it was many times difficult for U.S. forces to see that the targeted individuals were civilians. If civilians made movements interpreted as suspicious by the assault force, they were always in danger of getting killed or injured.

In order to examine the factors that during the execution of raids led to civilian fatalities, we have to focus on how the U.S. forces interpreted the behavior of targeted individuals and how they made the decisions to release lethal force against them. According to the U.S. Rules of Engagement, the directives defining the circumstances and limitations of the use of lethal force, the U.S. forces were allowed to use lethal force in military operations only against individuals who carried out hostile acts (i.e., individuals who attacked or used other force against U.S. troops or other designated persons or property) and individuals who displayed hostile intent (i.e., individuals who made movements that indicated the threat of imminent use of force against U.S. troops or other designated persons and property) (Chairman of the Joint Chiefs of Staff 2005, 88–89; IHRC 2016, 8). In Afghanistan, a number of botched night raids that ended with civilian fatalities revealed there were two major factors that led to the use of lethal force against civilians.

The first factor was that U.S. forces interpreted actions of civilians who wanted to protect their homes as "hostile acts." While conducting night raids, members of the assault forces were many times unable to tell the difference between insurgents who wanted to fight against them and scared civilians who wanted to defend their families and friends by opening fire at the unknown assailants attacking them in the middle of the night. Despite not being able to distinguish civilians from combatants, U.S. forces many times unleashed lethal force against civilians who protected their family members and property. In early 2010, General Stanley A. McChrystal issued a tactical directive on night raids in which he recognized Afghan men who tried to protect their homes as one of the major factors causing civilian fatalities during raids (Graff 2010). In the tactical directive, parts of which had been issued to the public

by ISAF, McChrystal observed that Afghan men had been "conditioned to respond aggressively" whenever they perceived that their homes and families were under attack (ibid.). McChrystal admitted that many times U.S. assault forces interpreted Afghan men's instinctive reactions to defend their homes "as insurgent acts," and, consequently, responded by releasing lethal force against them, thus causing deaths and injuries among civilians (ibid.). As many Afghans kept guns at home to assure their self-protection, there was always a high likelihood that they would shoot at any unknown assailants, including U.S. Special Operations Forces and their Afghan counterparts, who tried to break into their houses during the night (Alston 2009, 9). For example, one of the raids in which U.S. forces responded with fire against civilians defending their homes occurred in the vicinity of Jalalabad, the capital city of Nangarhar Province, on 14 May 2010 (AI 2014, 31–35).[2] The raid targeted a compound that belonged to three brothers of the Kashkaki family. The three Kashkaki brothers, who worked as drivers and car dealers, lived at the compound with their family members and relatives, as well as some farmers and guards. The compound was home to 13 families, over 100 people, including small children. When U.S. troops attacked the compound, one of the Kashkaki brothers, Rafiuddin Kashkaki, responded by firing a few shots in the air with his Kalashnikov. Not knowing that his family was under attack by U.S. forces, he wanted to warn the attackers not to enter the compound. Those warning shots sealed his fate. The assault force, which interpreted the gunshots as a hostile act from insurgents, killed nine men and boys, aged from 16 to 70. The victims included two members of the Kashkaki family, a guard, and one farmer and his four sons. In the aftermath of the raid, ISAF, which continued to insist the victims were insurgents, issued a statement claiming that when members of "the joint force approached the compound they received automatic gunfire. During the firefight the security force attempted several callouts without success" (ibid.).

[2]The description of the attack on the compound of the Kashkaki family is based on the report by AI (2014, 31–35).

The second factor that led to night raids causing civilian harm was a new, vague definition of hostile intent that enabled U.S. troops to make excessively subjective interpretations of hostile intent and use them as a pretext to open fire on civilian targets (IHRC 2016, 18). It was under the Bush administration that the U.S. military redefined the concept of hostile intent—i.e., a demonstrated threat of imminent use of force (Chairman of the Joint Chiefs of Staff 2005, 89)—by altering the meaning of the term imminent. The U.S. military abandoned, in part, the common meaning of the term imminent—e.g., "ready to take place" (Oxford Dictionary), "coming or likely to happen very soon" (Cambridge Dictionary), "almost certain to happen very soon" (Collins Dictionary)—by stating that "[i]mminent does not necessarily mean immediate or instantaneous" (Chairman of the Joint Chiefs of Staff 2005, 89; IHRC 2016, 20). The new term imminent, therefore, still retained its old meaning, but also gained a new meaning that was the exact opposite of the old meaning. In other words, the term imminent meant both instantaneous and, at the same time, not necessarily instantaneous.

By defining the term imminent in the negative, and without providing precise directions on how to interpret the term, the U.S. Rules of Engagement failed to impose limits on interpretations of imminent threat, a key component of the concept of hostile intent. With the new, contradictory meaning of the term imminent, the phrase "imminent threat" became unclear because it included both instantaneous and non-instantaneous threats. Consequently, the concept of hostile intent became unclear because it encompassed both immediate threats and threats that may happen at some unspecified time in the future. This vagueness enabled U.S. troops to make excessively subjective determinations of hostile intent that led to civilian victims. It is true that hostile intent determinations were always, to a significant extent, inherently subjective, but, as even U.S. military officers admitted, the failure to provide an exact meaning of imminent threat allowed excessive subjectivity that undermined civilian protection (IHRC 2016, 18–21). According to Major Eric Montalvo, a U.S. Marine judge advocate, the difficulties in assessing hostile intent, which was the result of the unclear meaning of imminent threat, became a primary contributor to civilian casualties (ibid.). With the new definition of hostile intent,

U.S. troops did not have to focus on whether targets posed an instantaneous threat because the new meaning of imminent enabled them to shoot at a target even when they believed the threat might emerge at an unspecified time in the future (IHRC 2016, 20–21). The result of such targeting process was that U.S. forces more easily pulled the trigger in "self-defense" engagements, thus putting civilians more often in danger of getting killed or injured (ibid.).

Based on a number of botched raids, it was possible to identify three examples of excessively subjective interpretations of "hostile intent." The first example were interpretations that recognized "hostile intent" in the fact that a targeted individual possessed a weapon. If assault troops identified a weapon, they were allowed to eliminate the target based on the perception that the target might pose a threat in the future. The mere presence of a weapon, without being used, was reason enough to shoot the target (Mazzetti et al. 2015; Porter 2011b; Sahak and Rubin 2011). Such practice was extremely dangerous for civilians because many of them kept weapons at home. As we have already seen above, many Afghans have guns at home in order to protect themselves and their homes from criminals. It is common for Afghans to sleep with guns due to fear of intruders (Alston 2009, 9). Therefore, the fact that U.S. assault forces recognized "hostile intent" in people who possessed guns necessarily led to civilian fatalities. One of the night raids that killed an armed civilian and a civilian that the assault force believed was armed occurred in the district of Surkhrod in Nangarhar province on 12 May 2011 (Rubin 2011).[3] In that raid, the assault force killed 25-year-old police officer Shukrullah, father of two daughters, and his 12-year-old niece, Nelofar. The raid targeted the compound of Neik Mohammed, Nelofar's father and Shukrullah's brother-in-law. When ISAF troops entered the compound, mistakenly identifying it as the home of a Taliban commander, they first fired at Shukrullah because he had a pistol that the troops thought represented an imminent threat. Although Shukrullah did not open fire, he was shot twice, once in the head and once in the chest. The assault troops also hurled a grenade at Nelofar when she tried to escape from the compound.

[3]The entire description of the night raid in Surkhrod is based on the report by Rubin (2011).

A piece of shrapnel hit her head, killing her instantly. After the raid, ISAF issued a statement explaining that an "individual ran out the back of the compound toward the outer security perimeter and was killed when the security force mistakenly identified what they suspected was a weapon on the individual. Later, the force discovered the individual was an unarmed Afghan female adolescent" (ibid.). A scared 12-year-old girl running for her life was identified by members of the assault force as a threat that had to be eliminated because they thought she had a weapon.

The second example of excessively subjective interpretations of "hostile intent" were interpretations that recognized "hostile intent" in the fact that targeted individuals stepped out of their houses during raids. This happened in a night raid carried out in the village of Khataba, Paktya province, on 12 February 2010 (UNAMA 2010, 18–19).[4] The raid, conducted by a joint force of U.S. Special Operations forces and Afghan forces, targeted the compound of Commander Daud, 43, a former police officer who had been promoted to head of intelligence in one of the districts in Paktya. Despite being a supporter of the occupying powers, Commander Daud fell under shots fired by U.S. forces when he celebrated, with about 25 guests, the naming of a newborn baby. In total, the assault force killed five civilians, two men, and three women. The two men killed were Commander Daud and his brother Saranwal Zahir, a prosecutor in the district of Ahmadabad. Two of the women killed were pregnant. Bibi Shirin, a 22-year-old mother of four children, was four months pregnant, while 37-year-old Bibi Saleha, mother of 11, was five months pregnant. The fifth fatality of the attack was 18-year-old girl Gulalai who just got engaged (Starkey 2010b; Cavendish 2010; UNAMA 2010, 18–19). In the aftermath of the raid, Greg Smith, director of communication at ISAF, explained that the assault force opened fire on the civilians because they stepped out of their compound. "If you have got an individual stepping out of a compound, and if your assault force is there, that is often the trigger to neutralize the individual. You don't have to be fired upon to fire back," explained Smith (Starkey 2010b). According to ISAF, individuals who merely stepped out of their

[4]The description of the night raid in Khataba is based on reports by Starkey (2010b), Cavendish (2010), and UNAMA (2010, 18–19).

compounds during raids displayed "hostile intent," and, consequently, they became legitimate military targets that the troops were authorized to shoot at, or—in ISAF-speak—to "neutralize."

The third example of excessively subjective interpretations of "hostile intent" were interpretations that recognized "hostile intent" in the fact that the targeted individuals tried to escape from the assault forces. In a night raid carried out in eastern Afghanistan, U.S. forces killed five civilians after they mistakenly interpreted as "hostile intent" the fact that the targeted civilians sought safety on the rooftop of their house. This happened on 9 April 2009, when an assault force attacked the home of Awal Khan, a military officer in the Afghan army, in Ali Daya village in Khost province (Kelly and Pearson 2010).[5] At the time of the raid, Awal Khan was away from home and only his family members—all of them civilians—were present at the house. When the assault force burst into their home, members of the family, believing that criminals entered the house to rob them, ran for safety on the rooftop of the house. When they reached the rooftop, U.S. forces positioned on the roof opposite Awal Khan's house, started shooting at them, killing five—Awal Khan's wife, his brother, his 17-year-old daughter Nadia, his 15-year-old son Aimal, and his infant son, born just a week earlier. Two other women were wounded. Following the raid, ISAF officials initially issued a statement claiming that those killed were "armed militants," but later they admitted that all of them were civilians.

5 Inherently Indiscriminate Night Raids

Although the above-mentioned factors causing civilian casualties in night raids considerably differ from each other, we can divide them, like the factors causing civilian casualties in drone strikes, into two categories. On the one hand, the first category, the category of factors that constantly influenced the execution of night raids, consisted of the three too-broad criteria for determining targets and the vague definition of

[5]The entire description of the night raid in Ali Daya is based on the report by Kelly and Pearson (2010).

"hostile intent." This category of factors continuously influenced the target selection process and the execution of night raids in a way that caused civilian harm. On the other hand, the second category, the category of factors that sporadically influenced the execution of night raids, consisted of mistakes in locating the targeted houses, reliance on faulty intelligence, and mistaken interpretations of "hostile acts."

The first category of factors necessarily led to indiscriminate night raids, that is, attacks that targeted military objectives and civilians without distinction (Melzer 2009, 355; Henckaerts and Doswald-Beck 2005a, 40; 2005b, 247–291). Because the U.S. military used too-broad criteria for determining targets of raids and a vague definition of "hostile intent," it was unavoidable that such missions caused harm to civilians. Night raids were inherently indiscriminate because, first, they were not always directed at specific military objectives; second, they were a method of combat that relied on a target selection process that could not be directed at specific military objectives; and third, they were a method of combat the effects of which could not be limited as required by international humanitarian law (e.g., the effects of night raids could not be limited as required by the principle of distinction between civilians and combatants).

By deliberately violating the prohibition of indiscriminate attacks, recognized as part of customary international law (Henckaerts and Doswald-Beck 2005a, 38–39), the U.S. military carried out acts that constituted a grave breach of the laws of war.

References

AI (Amnesty International). 2014. *Left in the Dark: Failures of Accountability for Civilian Casualties Caused by International Military Operations in Afghanistan*. https://www.amnesty.org/en/documents/ASA11/006/2014/en/. Accessed on 21 August 2017.

AIHRC (Afghanistan Independent Human Rights Commission). 2008. *From Hope to Fear: An Afghan Perspective on Operations of Pro-government Forces in Afghanistan*. Kabul: AIHRC. http://www.aihrc.org.af/media/files/Research%20Reports/english/Eng_Pro_G_2.pdf. Accessed on 21 August 2017.

Alston, Philip. 2009. *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Mission to Afghanistan*. Geneva: UN Human Rights Council. https://documents-dds-ny.un.org/doc/UNDOC/GEN/G09/131/17/PDF/G0913117.pdf?OpenElement. Accessed on 20 September 2017.

———. 2010. *Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions: Study on Targeted Killings*. Geneva: UN Human Rights Council. http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf. Accessed on 12 September 2017.

Barber, Rebecca J. 2010. "The Proportionality Equation: Balancing Military Objectives with Civilian Lives in the Armed Conflict in Afghanistan." *Journal of Conflict & Security Law* 15 (3): 467–500.

Cavendish, Julius. 2010. "US Special Forces Apologise for Botched Night Raid." *The Independent*, April 8. http://www.independent.co.uk/news/world/asia/us-special-forces-apologise-for-botched-night-raid-1939880.html. Accessed on 22 September 2017.

Chairman of the Joint Chiefs of Staff. 2005. *Standing Rules of Engagement/Standing Rules for the Use of Force for US Forces*. http://www.jag.navy.mil/distrib/instructions/CJCSI%203121.01B13Jun05.pdf. Accessed on 28 August 2017.

Clark, Kate. 2011. *The Takhar Attack: Targeted Killings and the Parallel Worlds of US Intelligence in Afghanistan*. Kabul: Afghanistan Analyst Network. http://www.afghanistan-analysts.org/wp-content/uploads/downloads/2012/10/20110511KClark_Takhar-attack_final.pdf. Accessed on 20 April 2017.

Dryer, Alexandre. 2006. "How the NSA Does 'Social Network Analysis.'" *Slate*, May 15. http://www.slate.com/articles/news_and_politics/explainer/2006/05/how_the_nsa_does_social_network_analysis.html. Accessed on 12 February 2017.

Foschini, Fabrizio. 2011. "Because the Night Belongs to Raiders: Special Ops in Nangarhar." *Afghanistan Analyst Network*, January 10. https://www.afghanistan-analysts.org/because-the-night-belongs-to-raiders-special-ops-in-nangrahar/. Accessed on 28 August 2017.

Gall, Carlotta. 2011. "Night Raids Curbing Taliban, but Afghans Cite Civilian Toll." *The New York Times*, July 8. http://www.nytimes.com/2011/07/09/world/asia/09nightraids.html?mcubz=3. Accessed on 28 August 2017.

Graff, Peter. 2010. "McChrystal Bans Night Raids Without Afghan Troops." *Reuters*, March 5. http://www.reuters.com/article/us-afghanistan-raids/mcchrystal-bans-night-raids-without-afghan-troops-idUSTRE6241Y420100305. Accessed on 28 August 2017.

Graham-Harrison, Emma. 2011a. "NATO's Afghan Night Raids Come with High Civilian Cost." *Reuters*, February 24. http://www.reuters.com/article/us-afghanistan-raids-idUSTRE71N15U20110224. Accessed on 28 August 2017.

———. 2011b. "Fact Box: Night-Time Raids in Afghanistan." *Reuters*. February 24. http://www.reuters.com/article/us-afghanistan-raids-fact-box-idUSTRE71N17320110224. Accessed on 29 August 2017.

Henckaerts, Jean-Marie, and Louise Doswald-Beck. 2005a. *Customary International Humanitarian Law. Volume 1: Rules*. Cambridge: Cambridge University Press.

———. 2005b. *Customary International Humanitarian Law. Volume 2: Practice—Part I*. Cambridge: Cambridge University Press.

IHRC (International Human Rights Clinic Harvard Law School). 2016. *Tackling Tough Calls: Lessons from Recent Conflicts on Hostile Intent and Civilian Protection*. Boston: Harvard Law School. https://www.justsecurity.org/wp-content/uploads/2016/03/Tackling-Tough-Choices-Hostile-Intent-HLSIHRC-2016.pdf. Accessed on 21 September 2017.

Kelly, Kathy, and Dan Pearson. 2010. "Atrocities Against Civilians in Afghanistan: A Troubling Timetable." *The Huffington Post*, April 29. http://www.huffingtonpost.com/kathy-kelly/atrocities-against-civili_b_562363.html. Accessed on 21 September 2017.

Mazzetti, Mark, Nicholas Kulish, Christopher Drew, Serge F. Kovaleski, Sean D. Naylor, John Ismay. 2015. "SEAL Team 6: A Secret History of Quiet Killings and Blurred Lines." *The New York Times*, June 6. https://www.nytimes.com/2015/06/07/world/asia/the-secret-history-of-seal-team-6.html?mcubz=3. Accessed on 29 September 2017.

Melzer, Nils. 2009. *Targeted Killing and International Law*. Oxford: Oxford University Press.

Meyerle, Jerry, Megan Katt, and Jim Gavrilis. 2012. *On the Ground in Afghanistan: Counterinsurgency in Practice*. Quantico: Marine Corps University Press.

Nordland, Rod, and Taimoor Shah. 2014. "Afghanistan Quietly Lifts Ban on Nighttime Raids." *The New York Times*, November 23. https://www.nytimes.com/2014/11/24/world/asia/afghanistan-quietly-lifts-ban-on-night-raids.html?mcubz=3. Accessed on 28 September 2017.

OSF (Open Society Foundations), and TLO (The Liaison Office). 2011. *The Cost of Kill/Capture: Impact of the Night Raid Surge on Afghan Civilians*. Kabul: OSF & TLO. https://www.opensocietyfoundations.org/sites/default/files/Night-Raids-Report-FINAL-092011.pdf. Accessed on 21 August 2017.

OSI (Open Society Institute), and TLO (The Liaison Office). 2010. *Strangers at the Door: Night Raids by International Forces Lose Hearts and Minds of Afghans*. Kabul: OSI & TLO. https://www.opensocietyfoundations.org/sites/default/files/a-afghan-night-raids-20100222_0.pdf. Accessed on 21 August 2017.

Porter, Gareth. 2011a. "How McChrystal and Petraeus Built an Indiscriminate 'Killing Machine.'" *Truthout*, September 11. http://www.truth-out.org/news/item/3588:how-mcchrystal-and-petraeus-built-an-indiscriminate-killing-machine. Accessed on 4 April 2017.

———. 2011b. "ISAF Data Show Night Raids Killed Over 1,500 Afghan Civilians." *Inter Press Service*, November 2. http://www.ipsnews.net/2011/11/isaf-data-show-night-raids-killed-over-1500-afghan-civilians/. Accessed on 4 April 2017.

Porter, Gareth, and Shah Noori. 2011a. "U.N. Reported Only a Fraction of Civilian Deaths from U.S. Raids." *IPS*, March 17. http://www.ipsnews.net/2011/03/un-reported-only-a-fraction-of-civilian-deaths-from-us-raids/. Accessed on 4 April 2017.

———. 2011b. "U.N. Tally Excluded Most Afghan Civilian Deaths in Night Raids." *IPS*, October 25. http://www.ipsnews.net/2011/10/un-tally-excluded-most-afghan-civilian-deaths-in-night-raids/. Accessed on 1 September 2017.

Rubin, Alissa J. 2011. "Raid on Wrong Afghan House Kills Afghan Girl, 12." *The New York Times*, May 13, p. A12.

Safi, Bakhtar. 2011. "Rebel Commander Killed Along with His Daughter." *Pajhwok*, 6 October 2011. https://www.pajhwok.com/en/2011/10/06/rebel-commander-killed-along-daughter. Accessed on 4 April 2017.

Sahak, Sharifullah, and Alissa J. Rubin. 2011. "For Second Time in 3 Days, NATO Raid Kills Afghan Child." *The New York Times*, May 14. http://www.nytimes.com/2011/05/15/world/asia/15afghan.html?mcubz=3. Accessed on 30 September 2017.

Scahill, Jeremy. 2016. *The Assassination Complex: Inside the Government's Secret Drone Warfare Program*. New York: Simon & Schuster.

Shanker, Thom, Elizabeth Bumiller, and Rod Nordland. 2010. "Despite Gains, Night Raids Split U.S. and Karzai." *The New York Times*, November 15. http://www.nytimes.com/2010/11/16/world/asia/16night.html. Accessed on 28 August 2017.

Starkey, Jerome. 2010a. "Nato Admits That Deaths of 8 Boys Were a Mistake." *The Times*, February 25. https://www.thetimes.co.uk/article/nato-admits-that-deaths-of-8-boys-were-a-mistake-6hbmv3ljmj6.

———. 2010b. "Nato 'Covered Up' Botched Night Raid in Afghanistan That Killed Five." *The Times*, March 13. http://www.thetimes.co.uk/tto/news/world/asia/afghanistan/article2464783.ece. Accessed on 31 August 2017.

UNAMA (United Nations Assistance Mission in Afghanistan). 2010. *Afghanistan Mid-Year Report 2010: Protection of Civilians in Armed Conflict*. Kabul: UNAMA. https://unama.unmissions.org/sites/default/files/august102010_mid-year_report_2010_protectionofciviliansinarmed_conflict.pdf. Accessed on 31 August 2017.

———. 2012. *Afghanistan Annual Report 2011: Protection of Civilians in Armed Conflict*. Kabul: UNAMA. https://unama.unmissions.org/sites/default/files/unama_poc_report_final_feb_2012.pdf. Accessed on 6 September 2017.

———. 2014. *Afghanistan Annual Report 2013: Protection of Civilians in Armed Conflict*. Kabul: UNAMA. https://unama.unmissions.org/sites/default/files/feb_8_2014_poc-report_2013-full-report-eng.pdf. Accessed on 28 September 2017.

UNAMA (United Nations Assistance Mission in Afghanistan), and (AIHRC) Afghanistan Independent Human Rights Commission. 2011. *Afghanistan Annual Report 2010: Protection of Civilians in Armed Conflict*. Kabul: UNAMA. https://unama.unmissions.org/sites/default/files/engi_version_of_poc_annual_report_2011.pdf. Accessed on 6 September 2017.

Van Linschoten, Alex Strick, and Felix Kuehn. 2011. *A Knock at the Door: 22 Months of ISAF Press Releases*. Kabul: Afghanistan Analyst Network. http://www.afghanistan-analysts.org/wp-content/uploads/downloads/2012/10/AAN_2011_ISAFPressReleases.pdf. Accessed on 28 August 2017.

4

The War on Due Process: Civilian Victims of the U.S. Arbitrary Detention Program in Afghanistan

1 Introduction

"The Americans came between 11 and 12 p.m. They put explosive on the front door and blew it apart. When I heard the explosion, I came out of my room to see what was going on. The Americans pointed their guns into my face," said a young bearded man (pers. comm.), describing the first moments of a night raid that targeted his home in Kunar province in October 2007. The young man, who requested to speak on condition of anonymity for fear of reprisals from the U.S. military and the Afghan regime, said that at the time of the raid he was on holiday, celebrating with his family and relatives Eid ul-Fitr, the festive days that mark the end of the holy month of Ramadan. He still had two days left before going back to work. He was a soldier of the Afghan National Army (ANA), stationed at a military base in Gardez city, the capital of Paktia province.

After breaking into his house, the U.S. assault force detained him and his uncle. "They drove us both to a nearby military base from where they flew us with a helicopter to Bagram." Did the U.S. military inform them why they deprived them of liberty? Did they provide them the reasons

V. Badalič, *The War Against Civilians*, Palgrave Studies in Victims and Victimology,
https://doi.org/10.1007/978-3-030-12406-9_4

for the detention? "The Americans told us nothing. They only asked me some questions about my job. I showed them my Afghan National Army card." After landing at Bagram, the largest U.S. military base in Afghanistan, he was separated from his uncle. He did not see him again.

"They locked me in a very small cell. There was barely enough room for a bed," he recalled. Another problem was the lack of food. "They didn't give us enough food. We are used to eating three times a day, but we received only two rations a day, one in the morning and one in the evening. During the first days of detention, I was hungry, but then I got used to it." When U.S. military officers interrogated him, they mostly raised questions about his job, for example, they asked him which battalion did he belong to and who was his commander. "They didn't torture me," he said. "The only unusual thing was that they handcuffed me and blindfolded me each time they took me to the toilet."

While being held in detention, he was denied access to information about the reasons for detention. He was denied the right to challenge, with the assistance of a defense lawyer, the lawfulness of his detention before an impartial and independent judicial body. He was also denied the right to get in contact with his family. He was, however, released soon. Unlike his uncle, who remained in US military custody almost a year after being detained, he was set free after only 20 days in detention. Before releasing him, the U.S. military flew him to Kandahar airbase. "They didn't apologize to me. They only gave me 1000 Afghanis [about $20] for a bus ticket from Kandahar [province] to Kunar [province]," he said.

From late 2001, when the first detention center was set up by the U.S. military at Kandahar air base, to December 2014, when the Obama administration shut the Bagram detention center, the last detention center it ran on Afghan soil, the U.S. military operated a detention program under which thousands of individuals had been deprived of liberty (AI 2009, 5–6; Graham-Harrison 2014). In that period of time, the U.S. military operated at least three types of detention facilities in Afghanistan. The first type included Field Detention Sites where suspects were usually first transferred after being captured in night raids and "clearance operations." In early 2010, the U.S. military operated 9 Field Detention Sites where they kept suspects for interrogation for a maximum of 14 days (Gopal 2010). The second type of detention centers

were large centers used for long-term detentions. After a short period of time at the end of 2001, when most of the long-term detainees were held at the Kandahar air base, the U.S. military set up its largest detention facility at Bagram airbase, located north of Kabul. Throughout the conflict, the Bagram detention facility remained the largest U.S. detention facility in Afghanistan (AI 2009, 5–6). The third type of detention facilities consisted of facilities operated by the U.S. Central Intelligence Agency (CIA). During the Bush administration, the CIA established at least four "black sites," that is, secret detention centers for extrajudicial detention and interrogation. One of the "black sites," codenamed Cobalt, was set up in an abandoned factory on the outskirts of Kabul, while the locations of the other three sites, codenamed Grey, Orange, and Brown, remained unknown (AI 2015, 49; Priest 2005).

Due to the secrecy surrounding the U.S. detention program in Afghanistan, it was not clear exactly how many individuals had been detained, either for a short or long period of time, between 2001 and 2014. Available data, for example, revealed how many individuals were being held at Bagram detention facility. During the Bush presidency, for example, the number of individuals held at Bagram gradually increased from about 100 detainees in 2004 to about 600 detainees in 2008 (HRF 2011, 6). During Obama's first term, when the U.S. military was ordered to significantly scale up its operations across Afghanistan, the number of detainees held at Bagram almost tripled—from about 600 individuals in 2008 to more than 1700 individuals in 2011 (HRF 2011, 6).

The objective of this chapter is to explore how the detention program operated by the U.S. military in Afghanistan impacted on the local civilian population. The chapter focuses exclusively on internment or administrative detention, also referred to as "security detention" and "preventive detention", defined as a deprivation of liberty that has been ordered by the executive branch, as opposed to the judiciary, without criminal charges being brought against the detained individuals (Pejic 2005, 375; Deeks 2009, 404; Webber 2012, 167). The chapter, therefore, excludes detentions for the purposes of criminal proceedings, that is, criminal proceedings carried out by Afghan courts against alleged insurgents handed over by the U.S. military (HRF 2008, 1–14; HRF 2009a, 21–24).

The central part of the chapter is divided into three sections. The first section analyzes the factors that influenced the selection of targets for detention (e.g., too-broad criteria for determining who was detainable, reliance on weak evidence to justify detentions, mistakes in verifying the identity of detainees, and reliance on faulty intelligence). The second section examines the lack of adequate procedural safeguards during detention (e.g., denial of the right to challenge the lawfulness of detention, denial of access to information about the reasons of detention, denial of access to a defense lawyer, denial of right to confront witnesses, denial of the right to appear in front of an independent body with the authority to order the release of detainees). The third section of the chapter shows how both the vaguely defined grounds for detention and the inadequate procedural safeguards in U.S. internment centers led to arbitrary detention of hundreds of innocent civilians.

Given that international humanitarian law does not provide clarity on the grounds of detention and the procedural safeguards for individuals held in administrative detention in non-international armed conflicts, this analysis primarily relies on human rights law of both binding and non-binding nature in order to determine which fundamental principles and procedural safeguards should govern administrative detention in this kind of armed conflicts (Pejic 2005, 377–378; Sassòli 2015, 55). Drawing primarily on Pejic (2005), this analysis adopts the grounds for detention and procedural standards listed by the ICRC in order to compare them with the standards used by the U.S. military under both Bush and Obama administrations.

2 Too-Broad Detention Criteria

2.1 Defining Detainable Individuals

Although international humanitarian law applicable in non-international armed conflicts does not specify the grounds for deprivation of liberty, this chapter argues, based on the guidelines provided by the ICRC, that the detaining power has to adopt the concept of "imperative reasons of security" as the minimum legal standard for making detention decisions

in a non-international armed conflict, including a non-international conflict in which foreign forces operate detention programs on the territory of a host state (Dörmann 2012, 356; Debuf 2009, 864). This minimum standard, formulated in Article 78 of the Fourth Geneva Convention (1949), is applicable in international armed conflicts, but it can also be used in non-international conflicts (Pejic 2005, 383; Dörmann 2012, 356). In addition, Article 42 of the Fourth Geneva Convention stipulates that an individual may be detained or placed in assigned residence only if "the security of the detaining power makes it absolutely necessary" (Pejic 2005, 383; Sassòli and Olsen 2008, 617).

Although there is no consensus about what the standard of "imperative reasons of security" exactly means (Debuf 2009, 865), this chapter adopts the view—drawing on Dörmann (2012, 356)—that direct participation in hostilities is an activity that meets that standard. The concept of direct participation in hostilities defines the circumstances under which civilians lose their protection from military attacks, and, therefore, it is reasonable to argue that individuals taking an active part in hostilities may also be subject to administrative detention (Dörmann 2012, 356). By adopting this view, this chapter argues that only members of insurgent groups continuously engaged in hostilities and civilians directly participating in hostilities may be subject to detention. To put it differently, individuals may be detained only if their present belligerent activities indicate that it is "highly likely" or "certain" they will carry out in the near future hostile acts against the detaining power and/or against those whom the detaining power is mandated to protect, for example, the civilian population (Debuf 2009, 865).

In order to see whether the U.S. adopted the concept of direct participation in hostilities as a standard for making detention decisions in Afghanistan, we first need to examine two new terms introduced by the Bush and Obama administrations to define who was legally detainable. The Bush administration invented the term "unlawful enemy combatants," defined as individuals who engaged "in acts against the United States or its coalition partners in violation of the laws and customs of war during an armed conflict" (HRF 2009a, 7). The term "unlawful enemy combatant" also included, but was not limited to, "an individual who is or was part of or supporting Taliban or al Qaeda

forces or associated forces that are engaged in hostilities against the United States or its coalition partners" (HRF 2009a, 7). The Obama administration adopted a similar approach by introducing the term of "unprivileged enemy belligerents," defined as "[p]ersons who planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks" (Elsea and Garcia 2011, 6). In addition, "unprivileged enemy belligerents" also included "[p]ersons who were part of, or substantially supported, Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces" (Elsea and Garcia 2011, 6).

Both new terms were only partially based on the premise that those individuals who directly participate in hostilities may be subject to detention. On the one hand, the Bush and Obama administrations adopted the concept of direct participation in hostilities by identifying as detainable all members of insurgent groups (e.g., the Taliban, Al Qaeda) engaged in hostile acts against the U.S. and its allies. Membership in such insurgent groups fell within the parameters of the concept of direct participation in hostilities. On the other hand, both Bush and Obama administrations ignored the concept of direct participation in hostilities when they defined as detainable individuals who supported insurgents without taking part in hostilities. Both administrations believed that non-military support for insurgent groups was a valid ground for detention. The only difference between the definition of "unlawful enemy combatants" introduced by the Bush administration and "unprivileged enemy belligerents" used by the Obama administration was that the latter required a demonstration of "substantial support" for insurgent groups engaged in hostilities against the U.S. and its allies, while the former definition required only "support" of those groups (HRF 2009b, 4).

There were two key problems with the "support"/"substantial support" concept. First, there was no authority in U.S. domestic law and international humanitarian law to justify that concept as a valid reason for detaining individuals. When asked by Judge John D. Bates to

provide a justification for the "substantial support" concept in the laws of war, Obama administration officials provided none (*Hamlily v. Obama* 2009). Drawing on *Hamlily v. Obama*, other judges also embraced the position that the "support" concept has no justification in the laws of war (*Mattan v. Obama* 2009; *Awad v. Obama* 2009). The second problem was that both Bush and Obama administrations failed to provide an exact meaning of "support"/"substantial support." In *Hamlily v. Obama* (2009), the Obama administration vaguely explained that "substantial support" covered individuals who were "not technically part of al-Qaeda," but had some sort of connection to the group by, for example, providing financing. In 2009, Obama administration officials also wrote a brief in which they refused to clarify the meaning of "substantial support" by stating that it "is neither possible nor advisable […] to attempt to identify, in the abstract, the precise nature and degree of 'substantial support'" (Elsea and Garcia 2011, 6).

By introducing the vaguely defined concept of "support" in the two definitions of detainable individuals, the Bush and Obama administrations abandoned the concept of direct participation in hostilities as a key standard in detention decisions, and thus paved the way for the creation of a detention program in Afghanistan that targeted not only active members of insurgent groups but also civilians with no or very limited connection to insurgents. Based on cases of detention in Afghanistan, it was evident that the U.S. military embraced the broad detention criteria and regularly detained two categories of civilians who did not directly participate in hostilities. The first category consisted of civilians who, either willingly or under duress, provided food and/or accommodation to insurgents. Although civilians living in areas under control of insurgent groups many times had no choice but to provide food and/shelter to insurgents, U.S. troops detained them because they perceived them as "supporters" of the insurgency (OSF and TLO 2011, 13–14). The second category consisted of civilians suspected of having incidental information on members of the insurgency. This category of detainees included civilians perceived as being close to insurgents, for example, family members and relatives of insurgents, tribal elders linked to insurgents, clerics suspected of being politically involved with insurgents, and villagers living in areas where insurgents operated (OSF

and TLO 2011, 11–12; HRW 2004, 24). The logic behind this kind of detentions was perhaps best explained by a U.S. military officer who said that if "you can't get the guy you want, you get the guy who knows him" (OSF and TLO 2011, 11). This detention criterion was clearly inconsistent with the laws of war because administrative detention may not be used for the sole purpose of intelligence gathering (Pejic 2005, 380; Debuf 2009, 865; Dörmann 2012, 357).

2.2 Relying on Thin "Evidence"

Besides using broad detention criteria, the U.S. military many times relied on very weak "evidence" when detaining individuals suspected of being members or supporters of insurgent groups. First, the U.S. military detained people on the basis of their gender, age and location of their residence (HRW 2004, 24). According to a study by The Open Society Foundation and The Liaison Office (OSF and TLO 2011, 12–13), that happened during "clearance operations," that is, military operations that, due to a lack of specific enough intelligence to target a specific house, targeted entire villages in order to find individuals suspected of being members or supporters of the insurgency.[1] When U.S. troops believed insurgents frequented a particular village or area, or used a village as a base for hostile activities, they launched "clearance operations" to conduct house-to-house searches of the targeted village or area. While conducting such operations, U.S. forces first cordoned off the targeted village to close all entry/exit points and then searched the houses in the village. On the basis of the assumption that all military-aged men in a targeted village were suspects, they temporarily detained and interrogated all of them in order to determine which one of them had to be transferred to military bases for further questioning. This kind of operations could last from a number of hours to a number of days, and could take place in the daytime or at night.

[1]The description of clearance operations is based on the report prepared by OSF and TLO (2011, 12–13).

Detaining large numbers of individuals in "clearance operations" was inconsistent with two key principles of international law. On the one hand, "clearance operations" violated the principle of non-discrimination, a tenet of both international humanitarian and human rights law (Pejic 2005, 382). As Henckaerts and Doswald-Beck pointed out (2005, 308), adverse distinction in the application of international humanitarian law based on race, color, sex, political opinion, or on any other similar criteria is prohibited. This rule, which is part of customary international law, is recognized as a fundamental guarantee by common Article 3 of the Geneva Conventions and Additional Protocol II (ibid.). In addition, both the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) stipulate that all individuals are entitled to human rights, including the right to liberty, without distinction of any kind, such as race, color, sex, language, political opinion or other status (U.N. General Assembly 1948, 1966). By detaining people solely on the basis of their gender, age and location, the U.S. military breached the principle of non-discrimination, a fundamental principle that has to be applied even during states of emergency when measures derogating from the right to liberty are put in place (U.N. General Assembly 1966). On the other hand, "clearance operations" also violated the prohibition of *en bloc* detentions. The detaining power has to take the initial decision on administrative detention, and any subsequent decisions to maintain it, on an individual basis (Pejic 2005, 381–382; Debuf 2009, 865–866). The case-by-case approach is needed in order to avoid making detentions a measure that results in collective punishment (Pejic 2005, 381–382). By collectively detaining individuals on the basis of their gender and place of residence, the U.S. military failed to take its initial decisions on detentions on an individual basis and, consequently, violated the prohibition of collective punishment.

Second, the U.S. military detained individuals on the basis of their physical appearance. According to research by OSF and TLO (2011, 12–13), that happened in a military operation carried out by U.S. Special Forces and Afghan troops in the village of Otmanzey, Kunduz

province, in October 2010.[2] In that operation, U.S. and Afghan troops detained between 80 and 100 villagers. After handcuffing them, they rounded them up in a local mosque where they interrogated them from about 8 p.m. until 3 a.m. the next day. A masked informer working for U.S. forces picked out 15 villagers who were then taken to a U.S. military base for further questioning. According to eyewitnesses, the joint force used the following criteria to select suspects taken for further questioning. If, for example, an individual had worn shoulders, which supposedly indicated he wore a weapon, he was detained. If an individual had non-callous hands, which supposedly indicated he was not a farmer but an insurgent, he was detained. All those detained in that operation were later released.

Third, the U.S. military sometimes detained individuals for simply being at the wrong place at the wrong time. This category of detainees included civilians spotted near the site of an insurgent attack (HRW 2004, 24) and civilians found in the vicinity of weapons (HRF 2011, 14–15). In one case, for example, a man named Gul Alai was detained for owning a compound where the bomb-making material was found (HRF 2011, 14). The U.S. military admitted that there were no bomb-making materials found on Gul Alai or in his house, and that Gul Alai did not test positive for explosive residue, but they nevertheless detained him because the bomb-making material was found in the house next door to his (ibid.).

Fourth, the U.S. military detained individuals who possessed weapons. In some cases, the fact that an individual was found, during a search operation, with a weapon at home was the reason for detention (HRF 2009a, 12). This detention criterion led to captures of civilians because many Afghans who were neither members nor supporters of insurgent groups had weapons at home for protecting their families and property (HRF 2009a, 12; Graff 2010). The fact that someone had a weapon at home did not necessarily mean that he was a member or supporter of insurgent groups.

[2]The entire description of the operation in Otmanzey is based on the report prepared by OSF and TLO (2011, 12–13).

2.3 Making Mistakes: Mistaken Identities and Faulty Intelligence

In addition to the use of too-broad detention criteria and reliance on slim "evidence," there were to other factors that led to detentions of innocent civilians. First, sometimes U.S. forces made mistakes in verifying the identity of individuals they wanted to detain (HRF 2009a, 14; Oppel 2009). According to Lieutenant colonel Steven Weir, Deputy Staff Judge Advocate for U.S. Forces-Afghanistan, the capture of the wrong individuals occurred because many Afghans only had one name and there was no national system for registering to verify their identity (HRF 2009a, 14).

Second, sometimes U.S. forces failed to properly verify the human intelligence they relied on when detaining people. The U.S. military acknowledged that their local informers sometimes deliberately provided false information on insurgent activities. Lieutenant Colonel David B. Womack, a battalion commander in Afghanistan, admitted that villagers often deliberately provided them faulty intelligence, naming enemies from rival tribes as Taliban collaborators in order to convince the U.S. military to target them (HRF 2011, 18; Rivera 2011).

3 Denial of Adequate Procedural Standards

3.1 Denial of the Right to Challenge the Lawfulness of Detention

Under international human rights law, the authorities responsible for detentions in situations of non-international armed conflicts must guarantee to detainees the right to challenge the lawfulness of the detention in a court of law (Henckaerts and Doswald-Beck 2005, 350–351). Article 9(4) of the ICCPR stipulates that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful" (U.N. General Assembly 1966). Although the ICCPR does not list the right to liberty among non-derogable rights, the jurisprudence

of both universal and regional human rights bodies has confirmed that the right to challenge the lawfulness of detention must be considered non-derogable (Pejic 2005, 383).

Although they determined that the conflict in Afghanistan was a non-international armed conflict, both Bush and Obama governments refused to transfer the vast majority of detainees to the Afghan authorities for prosecution. By April 2008, for example, only a minority of detainees, about 160, were handed over to the Afghan authorities and referred for prosecution (HRF 2008, 7). Instead of putting detainees on trial, both Bush and Obama administrations decided to establish military review boards for revising the initial decisions on detentions and any subsequent decisions to maintain them. The Bush administration, for example, set up various review boards, alternately called Detainee Review Boards, Unlawful Enemy Combatant Review Boards and Enemy Combatant Review Boards (HRF 2011, 7). These review boards, however, did not provide detainees the right to challenge the lawfulness of detention (ibid.). Without the possibility to challenge the lawfulness of detention in a court of law, some family members of detainees tried to secure the release of their beloved ones by pleading with the Afghan authorities. When I met him in 2008, Mohammed Gul from Paktika province said he had spent more than a year trying to secure the release of his brother, Abdullah Khan, a 36-year-old policeman, who was captured during a Taliban ambush on U.S. troops. "The Americans and a group of Afghan policemen, with my brother among them, came into our village. The Taliban ambushed them. My brother was wounded. The Americans said they were taking him to the hospital, but later they detained him. They said he organized the ambush. The local police chief accused him of doing that," said Gul (pers. comm.). Because his brother was not allowed to challenge the lawfulness of detention, Gul tried to help him by preparing a number of petitions calling for his release. Gul sent the petitions to the local authorities in Paktika, the Afghan government, the International Security Assistance Force (ISAF), and the National Directorate of Security (NDS), the Afghan intelligence agency. None of those organizations answered him. "My brother is innocent," insisted Gul. He showed me "guarantee letters" from tribal elders in Paktika, including from the provincial governor of Paktika, attesting to the innocence of his brother.

In a petition, written in broken English, apparently prepared for the U.S. military, Gul claimed that his efforts to secure his brother's release had cost him 400,000 Afghanis, about $8000.

The Obama administration introduced changes in the detention program that enabled detainees to challenge the lawfulness of their detention before the Detainee Review Board, a military body responsible for reviewing detainees' cases (Bovarnick 2010, 22–23). There were, however, serious flaws within the review process that prevented detainees from effectively challenging the lawfulness of their detention.[3] One of the major flaws was that the review board was not an independent and impartial body. In particular, the review board did not have the power to order the release of unlawfully detained individuals, which is a key element of the required independence (HRF 2011, 19; Pejic 2005, 387). Article 9(4) of the ICCPR stipulates that anyone should have the right to proceedings before a court of law that has the power to order the release of those unlawfully detained (U.N. General Assembly 1966). If a court establishes that a detention is unlawful, it must have the authority to order the release of unlawfully detained individuals. The Detainee Review Board set up by the Obama administration did not have that authority (HRF 2011, 19). That authority lied, in part, with the Commander of the Joint Task Force 435, the military command responsible for detainee affairs. It was him or his designee that made the final decision on the release of Afghans held at the U.S. detention facility in Bagram. In addition, the U.S. Deputy Secretary of Defense or his designee had the authority to make the final decision on the release of non-Afghan detainees (ibid.). As a result, even if the Detainee Review Board recommended the release of a detained individual who did not pose, or ceased to pose, a threat to the U.S. military and its allies, it was possible that the detainee continued to be held in detention, without explanation (ibid.). If the Commander of the Joint Task Force 435, or the Deputy Secretary of State, refused to order the release of an unlawfully detained individual, the individual continued to stay in

[3]This section examines only the fact that the review board lacked the power to order the release of unlawfully detained individuals. The other deficiencies are examined below.

detention. Due to a lack of information, it was unclear how many times the Commander of the Joint Task Force 435 or the Deputy Secretary of State overruled the recommendations made by the Detainee Review Board, and what where the standards guiding their final decisions (ibid.).

3.2 Denial of Access to Information About the Reasons for Detention

International human rights law establishes that the detaining power has to inform all detainees, including those held in administrative detention, of the reasons for their detention in order to enable them to challenge the lawfulness of detention (Henckaerts and Doswald-Beck 2005, 349–350; Pejic 2005, 384). The ICCPR establishes—in Article 9(2)—that "[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him" (U.N. General Assembly 1966). In addition to promptly provide a detainee the information about the reasons for his detention, the detaining power must also provide that information in sufficient detail, in a language the detained individual understands (Pejic 2005, 384).

During the Bush administration, the U.S. military in Afghanistan did not inform detainees about the reasons for their detention. Between early 2002, when the U.S. military started bringing detainees to Bagram detention facility, and early 2009, when Bush finished his second term, the U.S. military established various review boards for determining a detainee's status, but none of these boards informed detainees why they were being deprived of their liberty (HRF 2009b, 5; 2011, 7). Detainees were not provided with any official, and sometimes not even an informal, statement about the grounds for detention (HRF 2009a, 9).

During President Obama's first term, a new detention review policy was introduced with the objective to correct some of the past deficiencies in detainee operations (Bovarnick 2010, 20). One of the changes included in the new detention review policy was that detainees had to be informed about the grounds of their detention. Within thirty days of their transfer to Bagram detention facility, every detainee had to be informed, during a meeting with his "personal representative," of the facts supporting the initial detention (Bovarnick 2010, 22).

3.3 Denial of Access to a Defense Lawyer

Although neither humanitarian nor human rights treaty law provide for the right to have access to a defense lawyer for individuals held in administrative detention, human rights soft law and the jurisprudence of human rights bodies provide the grounds to fill that gap (Pejic 2005, 388). For example, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states—in principle 17—that "a detained person shall be entitled to have the assistance of a legal counsel" (U.N. General Assembly 1988).

The Bush administration consistently denied detainees held at U.S. detention facilities access to defense lawyers (Bovarnick 2010, 18; HRF 2009b, 5). The Obama administration, on the other hand, opted for a different approach and included in its detention program the right for detainees to have "personal representatives" assigned to them in order to assist them in hearings before the Detainee Review Board (HRF 2011, 9). "Personal representatives," however, were not lawyers but military officers and, as a result, did not represent an adequate substitute for defense lawyers (Bovarnick 2010, 30). The key problem with "personal representatives" was their lack of training in law. Before taking on the responsibility to assist detainees in hearings, "personal representatives" went through only a 5-day training course—35 hours of training in total (HRF 2011, 9–13). While serving as "personal representatives," they also received a weekly "refresher training" to hone their advocacy skills, but they did not have any language or cultural training in order to gain at least rudimentary knowledge about the local culture (Bovarnick 2010, 30; HRF 2011, 9). Based on observations made while attending hearings before the review board, researchers from HRF (2011, 14–16) came to a conclusion that "personal representatives" lacked the training needed to effectively defend detainees in a meaningful way. For example, "personal representatives" did not appear to understand the principles of the fact-finding process and, consequently, they were unable to provide—by introducing new evidence or calling witnesses—all of the relevant facts necessary for the review board to reach an informed decision (ibid.).

3.4 Denial of Right to Confront Witnesses

The ICCPR states that any individual facing criminal charges should be allowed to "examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as the witnesses against him" (U.N. General Assembly 1966). Although the right to obtain the attendance of witnesses requested by the accused is not unlimited, it is clear that not allowing the attendance of a witness requested by the accused may result in a violation of the right to a fair trial (U.N. Human Rights Committee 1992; CTITF 2014, 33).

During the Bush administration, detainees had no opportunity to examine any information that supported the reasons for detention and they were not allowed to bring in witnesses, for example, tribal elders or individuals from their village, to rebut the U.S. military's claims (HRF 2009a, 14; 2009b, 5). Although the Obama administration introduced a new detention policy that envisaged the right to challenge the evidence and witnesses, it was very difficult, if not impossible, for detainees to fully exercise their right. The main problem was that detainees were not allowed to have access to classified evidence presented during classified sessions, and, consequently, they could not effectively challenge the evidence presented against them (HRF 2011, 16–18). The de-classification of evidence rarely occurred because it was a complicated process that depended on whether the military officer who initially classified the evidence was willing to authorize its de-classification (HRF 2011, 18).

4 The Normalization of Arbitrary Detentions

Due to the secrecy surrounding the U.S. detention program, it was not possible to determine the exact number of civilians who had been locked up in U.S. detention facilities in Afghanistan. Various statements made by U.S. military officials, and independent research carried out by non-governmental organizations, indicated that hundreds of detained individuals, who had little or no connection to insurgent groups, did not represent a threat for the U.S. military and its allies. Between early

2002 and early 2004, for example, at least 1000 persons were detained in the course of U.S.-led military operations in Afghanistan (HRW 2004, 30). Most of the detainees were released within days or weeks of their capture, which indicated they did not represent a security risk (ibid.). In 2009, Major General Doug Stone, who prepared a classified report on detention for the U.S. military, estimated that as many as 400 of the 600 individuals held in Bagram detention facility could be released because they had little connection to the insurgency (Bowman et al. 2009; Horowitz 2009). Between January 2010 and November 2010, approximately 5500 individuals had been detained by the U.S. military, said Admiral Robert Harward, commander of the Joint Task Force 435 (Porter 2011). According to Harward, only about 1100 detainees were transferred to the detention facility in Parwan [Bagram] (ibid.). Given that about 80% of those detained were soon released, usually within days after being captured, it was apparent that the vast majority of them did not pose a threat to the U.S. military (ibid.).

Many unlawfully detained individuals were not lucky enough to be released after only a few days in detention. "Some of them have been in prison for two, three or four years, but all they got after being released was a letter in which it was confirmed [by the U.S. military] they were innocent," said, in 2008, Ahmad Nader Nadery from the Afghanistan Independent Human Rights Commission (AIHRC) (pers. comm.).

By using the practices examined above, both Bush and Obama administrations violated the prohibition of arbitrary detention, recognized as a norm of customary international law applicable in both international and non-international armed conflicts (Henckaerts and Doswald-Beck 2005, 344). Despite the differences between international humanitarian law and human rights law, both these branches of law aim at preventing arbitrary deprivation of liberty by—first—insisting that the grounds for detention must be based on security needs, and—second—by specifying the procedures that have to be used during detention in order to supervise the need for detention (Henckaerts and Doswald-Beck 2005, 344; Paust 2003, 505–507). The procedural requirements needed to prevent arbitrary detentions include the obligation to inform detainees of the reasons for detention and the obligation to bring detainees promptly before a judge where

they have the opportunity to challenge the lawfulness of detention (Henckaerts and Doswald-Beck 2005, 349).

The Bush and Obama administrations failed to meet those standards. On the one hand, both Bush and Obama administrations formulated broad detention criteria that enabled U.S. troops to detain civilians not participating in hostilities. In addition, the U.S. military many times relied on thin "evidence" when detaining people and made mistakes when verifying the identities of detained individuals. On the other hand, both administrations failed to meet the procedural requirements needed to avoid arbitrary detentions. Under the Bush administration, detainees were not informed of the reasons for detention and they were not brought promptly before a judge where they could challenge the lawfulness of detention. Although the Obama administration allowed detainees to be informed of the reasons for detention and challenge the lawfulness of detention before a review board, serious flaws within the new detention policy prevented detainees to fully exercise their rights. Detainees, for example, remained without access to adequate legal assistance and without the opportunity to challenge all the evidence used against them. In addition, the fact that the review board did not have the power to order the release of unlawfully detained individuals undermined both the legitimacy of the board and the ability of detainees to effectively challenge their detention (HRF 2011, 19).

References

AI (Amnesty International). 2009. *USA: Out of Sight, Out of Mind, Out of Court? The Right of Bagram Detainees to Judicial Review*. London: Amnesty International Publications. https://www.amnesty.org/en/documents/AMR51/021/2009/en/. Accessed on 26 April 2018.

———. 2015. *USA Crimes and Impunity*. London: Amnesty International Publications. https://www.amnestyusa.org/files/cia_torture_report_amr_5114322015.pdf. Accessed on 26 April 2018.

Awad v. Obama 646 F. Supp.2d 20 (D.D.C. 2009). https://casetext.com/case/awad-v-obama#p2. Accessed on 7 May 2018.

Bovarnick, Jeff A. 2010. *Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy*. Charlottesville: Judge Advocate General's Legal Center and School.

Bowman, Tom, Steve Inskeep, and Renee Montagne. 2009. "U.S. Gen. Urges Release of Bagram's Detainees." *National Public Radio*, August 20. https://www.npr.org/templates/story/story.php?storyId=112051193. Accessed on 23 April 2018.

CTITF (Counter-Terrorism Implementation Task Force). 2014. *Basic Human Rights Reference Guide: Right to a Fair Trial and Due Process in the Context of Countering Terrorism*. New York: CTITF Publication Series. https://www.ohchr.org/EN/newyork/Documents/FairTrial.pdf. Accessed on 3 July 2018.

Debuf, Els, eds. 2009. "Expert Meeting on Procedural Safeguards for Security Detention in Non-international Armed Conflict." *International Review of Human Rights Law* 91 (876): 859–881. https://doi.org/10.1017/s1816383109990543.

Deeks, Ashley S. 2009. "Administrative Detention in Armed Conflict." *Case Western Reserve Journal of International Law* 40 (33): 403–436.

Dörmann, Knut. 2012. "Detention in Non-international Armed Conflicts." In *Non-international Armed Conflict in the Twenty-First Century*, edited by Kenneth Watkin and Andrew J. Norris, 347–366. Newport: US Naval War College Press.

Elsea, Jennifer K., and Michael John Garcia. 2011. *Detainee Provisions in the National Defense Authorization Bills.* Washington, DC: Congressional Research Service. https://fas.org/sgp/crs/natsec/R41920.pdf. Accessed on 24 April 2018.

Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949. http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.33_GC-IV-EN.pdf. Accessed on 11 May 2018.

Gopal, Anand. 2010. "America's Secret Afghan Prisons." *The Nation*, January 28. https://www.thenation.com/article/americas-secret-afghan-prisons/. Accessed on 23 April 2018.

Graff, Peter. 2010. "McChrystal Bans Night Raids Without Afghan Troops." *Reuters*, March 5. http://www.reuters.com/article/us-afghanistan-raids/mcchrystal-bans-night-raids-without-afghan-troops-idUSTRE6241Y420100305. Accessed on 28 August 2017.

Graham-Harrison, Emma. 2014. "US Finally Closes Detention Facility at Bagram Airbase in Afghanistan." *The Guardian*, December 11. https://www.theguardian.com/world/2014/dec/11/afghanistan-us-bagram-torture-prison. Accessed on 24 April 2018.

Hamlily v. Obama, 616 F. Supp. 2d 63 (D.C. 2009). https://casetext.com/case/hamlily-v-obama-2. Accessed on 2 May 2018.

Henckaerts, Jean-Marie, and Louise Doswald-Beck. 2005. *Customary International Humanitarian Law*. *Volume 1: Rules*. Cambridge: Cambridge University Press.

Horowitz, Jonathan. 2009. "Bagram Prison Threatens Success in Afghanistan." *The Huffington Post*, https://www.huffingtonpost.com/jonathan-horowitz/bagram-prison-threatens-s_b_275495.html. Accessed on 23 April 2018.

HRF (Human Rights First). 2008. *Arbitrary Justice: Trials of Bagram and Guantánamo Detainees in Afghanistan.* New York: Human Rights First. https://www.humanrightsfirst.org/wp-content/uploads/pdf/USLS-080409-arbitrary-justice-report.pdf. Accessed on 17 April 2018.

———. 2009a. *Undue Process: An Examination of Detention and Trials of Bagram Detainees in April 2009*. New York: Human Rights First. https://www.humanrightsfirst.org/wp-content/uploads/pdf/HRF-Undue-Process-Afghanistan-web.pdf. Accessed on 17 April 2018.

———. 2009b. *Fixing Bagram: Strengthening Detention Reforms to Align with U.S. Strategic Priorities.* New York: Human Rights First. http://www.humanrightsfirst.org/wp-content/uploads/pdf/Fixing-Bagram-110409.pdf. Accessed on 2 May 2018.

———. 2011. *Detained and Denied in Afghanistan: How to Make US Detention Comply with the Law*. New York: Human Rights First. https://www.humanrightsfirst.org/wp-content/uploads/pdf/Detained-Denied-in-Afghanistan.pdf. Accessed on 17 April 2018.

HRW (Human Rights Watch). 2004. *"Enduring Freedom": Abuses by US Forces in Afghanistan.* New York: Human Rights Watch. https://www.hrw.org/sites/default/files/reports/afghanistan0304.pdf. Accessed on 17 April 2018.

Mattan v. Obama 618 F. Supp.2d 24 (D.D.C. 2009). https://casetext.com/case/mattan-v-obama#p26. Accessed on 6 May 2018.

Oppel, Richard A. 2009. "U.S. Captain Hears Pleas for Afghan Detainee." *The New York Times*, May 24. https://www.nytimes.com/2009/05/25/world/asia/25detain.html. Accessed on 1 May 2018.

OSF (Open Society Foundations), and TLO (The Liaison Office). 2011. *The Cost of Kill/Capture: Impact of the Night Raid Surge on Afghan Civilians*. Kabul: OSF & TLO. https://www.opensocietyfoundations.org/sites/default/files/Night-Raids-Report-FINAL-092011.pdf. Accessed on 21 August 2017.

Paust, Jordan J. 2003. "Judicial Power to Determine the Status and Rights of Persons Detained Without Trial." *Harvard International Law Journal* 44 (2): 503–532.

Pejic, Jelena. 2005. "Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence." *International Review of Human Rights Law* 87 (858): 375–391.

Porter, Gareth. 2011. "Ninety Percent of Petraeus's Captured 'Taliban' Were Civilians." *IPS*, June 12. http://www.ipsnews.net/2011/06/ninety-percent-of-petraeuss-captured-taliban-were-civilians/. Accessed on 17 April 2018.

Priest, Dana. 2005. "CIA Holds Terror Suspects in Secret Prisons." *The Washington Post*, November 2. http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html. Accessed on 26 April 2018.

Rivera, Ray. 2011. "In an Afghan Village, Living in Fear of Both Sides." *The New York Times*, April 23. https://www.nytimes.com/2011/04/24/world/asia/24paktika.html. Accessed on 10 May 2018.

Sassòli, Marco. 2015. "Legal Framework for Detention by States in Non-international Armed Conflict." *Collegium* 45: 51–65.

Sassòli, Marco, and Laura M. Olson. 2008. "The Relationship Between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-international Armed Conflicts." *International Review of Human Rights Law* 90 (871): 599–627.

U.N. General Assembly. 1948. The Universal Declaration of Human Rights. http://www.un.org/en/universal-declaration-human-rights/. Accessed on 9 May 2018.

———. 1966. *International Covenant on Civil and Political Rights*. Adopted by the General Assembly of the United Nations on 19 December 1966. https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf. Accessed on 8 May 2018.

———. 1988. *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*. Adopted by General Assembly Resolution 43/173 of 9 December 1988. http://www.ohchr.org/Documents/ProfessionalInterest/bodyprinciples.pdf. Accessed on 14 May 2018.

U.N. Human Rights Committee. 1992. *Gordon v. Jamaica*, Communication No. 237/1987, UN Doc CCPR/C/46/D/237/1987. http://hrlibrary.umn.edu/undocs/html/dec237.htm. Accessed on 3 July 2018.

Webber, Diane. 2012. "Preventive Detention in the Law of Armed Conflict: Throwing Away the Key?" *Journal of National Security Law & Policy* 6: 167–205.

5

Systemic Torture, the New Normal: Civilian Victims of "Enhanced Interrogation Techniques" in Afghan Detention Facilities

1 Introduction

Syad Alam Shah, a lawyer at the International Legal Foundation—Afghanistan (ILF-A), represented a man accused of being a member of the Taliban movement. "He worked as a mechanic. He repaired motorcycles. He was from Kandahar province. One day, members of the security forces broke into his house and arrested him," said Shah (pers. comm.) in an interview carried out in 2017. After a trial at a first instance court, his client was found guilty and sentenced to three years in prison, but Shah requested a review of the court's decision, arguing that the main piece of evidence used against his client was an unlawfully obtained confession. "The confession was obtained under torture. That is why I told the court the confession was invalid and should have been rejected," explained Shah. He said he noticed signs of torture on his client's body during their first meeting. Members of a forensic team who later examined the marks on his client's body confirmed that he was tortured. "There were burns on his leg. They [members of the security forces] were grinding cigarettes on the lower part of his leg. My client also said they used other methods of torture, electric shocks and

V. Badalič, *The War Against Civilians*, Palgrave Studies in Victims and Victimology,
https://doi.org/10.1007/978-3-030-12406-9_5

beatings, but we were unable to prove that. Only the burns were visible," said Shah. In addition, Shah argued, the prosecutor made up a story about a Taliban group and claimed that the defendant was part of that group. The prosecutor provided the name of a Taliban commander and the area where the insurgent group, including the defendant, supposedly conducted attacks on checkpoints manned by the Afghan security forces. "In my research, I discovered that that area was completely under government control and there were no Taliban attacks or attacks of any other insurgent groups," recounted Shah. His appeal was successful. The higher court confirmed that the confession of the defendant was obtained in an unlawful manner and, consequently, annulled the judgment.

During his ten-year stint as a lawyer at ILF-A, Shah worked primarily on national security cases, that is, cases in which the defendants faced charges of being part of the insurgency engaged in the fight against Afghan government forces and their foreign backers. Shah worked on hundreds of cases in which his clients were tortured by members of the Afghan security forces. In one case, his client lost his eye after being tortured. "They [members of the Afghan security forces] arrested that man about two years and a half ago in Baghlan province. When they interrogated him, they beat him up. The court found him guilty and sentenced him to 16 years in prison. The only evidence provided by the prosecutor was his [the defendant's] confession," recalled Shah. With the help of a forensic team, which confirmed that his client was tortured, Shah demanded from a higher tribunal to reject the confession obtained under torture. His appeal was successful. The higher tribunal annulled the judgment and his client was released from prison after being unlawfully locked for two years.

"All detainees, including those not linked to the insurgency, are in danger of being tortured. This [torture] is standard practice," said Lal Gul (pers. comm.), head of the Afghanistan Human Rights Organization (AHRO), during an interview in Kabul in 2012. "Most of the interrogators are old people who worked for the intelligence agency during the Soviet occupation. They had never been trained to become interrogators. They don't know the rights of detainees. They know nothing about human rights. They think they are authorized to torture.

They think torture is part of their job," said Lal Gul. Some members of the Afghan security forces even openly admitted to the use of torture in detention centers. Colonel Abdul Hamid, an investigator at a detention facility in Kandahar province, said he knew that torture and ill-treatment were prohibited by law, but he nevertheless defended the use of torture by asserting that the "specific situation" in his province allowed his subordinates to torture detainees (UNAMA and OHCHR 2011, 25).

Research data that included hundreds of documented cases of torture and ill-treatment in Afghan detention facilities confirmed the widespread use of "enhanced interrogation techniques" during interrogations of detainees suspected of committing offenses related to the armed conflict (UNAMA and OHCHR 2011; AIHRC and OSF 2012; UNAMA and OHCHR 2013, 2015, 2017). According to data collected by the United Nations Assistance Mission in Afghanistan (UNAMA), torture was consistently used in numerous Afghan detention facilities—i.e., detention facilities run by the National Directorate of Security (NDS), the Afghan intelligence agency, the Afghan National Police (ANP), the Afghan National Army (ANA), the Afghan Local Police (ALP), and the Afghan Ministry of Justice (MOJ) (UNAMA and OHCHR 2011, v; 2013, 2–3). In its first report on the use of torture in Afghan detention facilities, published in 2011, UNAMA revealed that 46% of the interviewed conflict-related detainees who had been held in NDS detention centers experienced treatment that amounted to torture or to other cruel, inhuman or degrading treatment (UNAMA and OHCHR 2011, 2). In addition, more than one-third of the interviewed detainees had been tortured or ill-treated while being held in custody by the ANP (UNAMA and OHCHR 2011, 3). Over the next years, the incidence of torture and ill-treatment in Afghan detention centers remained high. In its 2013 report, UNAMA found sufficiently credible and reliable evidence that more than 50% of the interviewed detainees experienced torture or ill-treatment in Afghan detention facilities (UNAMA and OHCHR 2013, 2–3). In 2015, UNAMA officials reported that about 35% of the interviewed detainees had been subjected to torture or ill-treatment during arrest or while being held in detention (UNAMA and OHCHR 2015, 17). In the 2017 report, UNAMA

found that 39% of the interviewed detainees gave credible accounts of having experienced torture or other forms of degrading treatment while being detained by the Afghan security forces (UNAMA and OHCHR 2017, 7).

It was not possible to determine how many victims of torture or ill-treatment were innocent civilians who were not members, or supporters, of the Taliban movement or any other insurgent group. The use of torture blurred the line between civilians and combatants because any information obtained through torture was unreliable and, consequently, non-probative of an individual's guilt or innocence. To put it differently, it was not possible to know whether those how had been forced to confess to being involved in carrying out violent acts against the Afghan regime were really insurgents or innocent civilians.[1] Based on cases of people who had been released from prison after higher courts determined that their confessions were obtained under torture, it was evident that many of them were innocent civilians (Syad Alam Shah, pers. comm.).

In order to shed light on the Afghan torture program, this chapter explores—in three sections—the following themes. The first section examines the torture techniques used by the Afghan security forces. The section also shows how members of the Afghan security forces routinely ignored due process guarantees (e.g., the right of detainees to have access to a defense lawyer, the right to see their family members) in order to have free rein in torturing and mistreating detainees. The second section analyzes how Afghan prosecutors and judges relied on confessions obtained through torture to convict individuals accused of committing conflict-related offenses. The last, third section of the chapter examines the practices used by the Afghan authorities to prevent attempts to bring to justice those responsible for torture.

[1]Research evidence shows that the use of torture or any other form of cruel treatment during interrogations of suspects in criminal cases often leads to false confessions and information, thus making it difficult to determine the individual's guilt or innocence. See, for example, Kassin and Gudjonsson (2004, 49–50), Costanzo and Gerrity (2009, 183–184).

2 Methods of Torture

It was during the initial stage of detention, the pre-trial detention, that members of the Afghan security forces subjected detainees to torture and ill-treatment (UNAMA and OHCHR 2011, 3; 2013, 4). In order to provide interrogators with the time to torture and mistreat individuals suspected of committing conflict-related offenses, the Afghan security forces unlawfully kept suspects *incommunicado* during the interrogation process. Under the Afghan Interim Criminal Procedure Code, the Afghan police were allowed to detain an individual for a maximum of 72 hours after arrest (Interim Code of Criminal Procedure 2004). During the 72 hours, they were authorized to conduct initial interviews, prepare charges and hand the case over to a prosecutor who had to decide whether to confirm the charges and the grounds for detention (ibid.). The prosecutor then had 30 days from the time of arrest to investigate the case and file an indictment (ibid.). Despite the clearly defined procedure, the NDS and the Afghan police regularly held alleged insurgents *incommunicado* for long periods of time, sometimes for weeks or even months, in pre-trial detention (UNAMA and OHCHR 2011, 43–44). The security forces thus ensured that the interrogators had enough time to subject detainees to torture and other forms of inhuman treatment.

Although the total isolation of detainees from the outside world is not explicitly prohibited by international human rights law, it is recognized that *incommunicado* detention represents a grave danger for detainees because it is precisely when detainees are being held *incommunicado* that they are at maximum risk of being tortured or ill-treated (U.N. Economic and Social Council 1995a; Svensson-McCarthy 1998, 422; OHCHR 2003, 210).[2] Therefore, if States want to reduce the risk of violations of the prohibition of torture and ill-treatment, they must implement measures for preventing *incommunicado* detention and

[2]The U.N. Human Rights Committee also recognized that specific forms of *incommunicado* detention were violations Article 10(1) of the ICCPR, which states that all individuals deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person (Svensson-McCarthy 1998, 422–424; U.N. General Assembly 1966).

granting, on a regular basis, persons such as doctors, lawyers, and family members access to the detainees (U.N. Human Rights Committee 1982, 1992a). The Afghan authorities did exactly the opposite. In order to enable members of the security forces to torture detainees, they allowed *incommunicado* detentions for long periods of time.

First, the Afghan authorities did not allow detainees to get in contact with their family members during the interrogation process (AIHRC and OSF 2012, 54–56; UNAMA and OHCHR 2013, 69). In many cases, Afghan officials did not even notify a detainee's family about where they had transferred the detainee. The family of a detainee had to find out on its own the whereabouts of their loved one. "If a family knows that one of its members was detained by Afghans, they will go to the police to ask about him. With time, they will find him. But sometimes they need over a year to find him," said Saeed Ahmed (pers. comm.), director of the Legal Aid Organization of Afghanistan (LAOA), an Afghan non-governmental organization that provided legal aid to conflict-related detainees. By not allowing detainees to see or communicate with their family members, the Afghan authorities ignored international standards dealing with the right of detainees to maintain contact with the outside world (OHCHR 2003, 356–357). According to the Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment, the communication of a detainee with the outside world, including his family members, "shall not be denied for more than a matter of days" (U.N. General Assembly 1988). Both after arrest and after each transfer from one detention facility to another, each detainee has to be allowed to inform—without delay—his family members, or any other persons of his choice, about his arrest and detention (U.N. General Assembly 1988; U.N. Economic and Social Council 1995a). While being held in detention, detainees must be allowed to be visited by, or to correspond with, their family members (U.N. General Assembly 1988).

Second, in addition to not allowing detainees to see their family members, Afghan state officials consistently denied detainees the right to have access to a defense lawyer, in particular during the investigation process (UNAMA and OHCHR 2011, 47; 2013, 67–69). "Torture occurs during the investigation. Sometimes I have to wait four

or five months after the arrest to be allowed [by members of the security forces] to see my client," said defense lawyer Syad Alam Shah (pers. comm.). Research evidence indicated that detainees held by the NDS were systemically denied the right to get in contact with a lawyer during pre-trial detention. As one head of an NDS provincial detention center confirmed, it was one of NDS' principles not to allow lawyers to have access to detainees during interrogations because they could "compromise the investigation" (UNAMA and OHCHR 2011, 47).[3] By not allowing lawyers to visit detainees, the Afghan security forces consistently violated both international and domestic law. Article 14(3) of the ICCPR provides for the right of a detainee to communicate with a legal counsel who must be available at all stages of criminal proceedings, including during the pre-trial phase (U.N. General Assembly 1966; CTITF 2014, 28). The Body of Principles (U.N. General Assembly 1988) also stipulates—in Article 18—that a detainee must be entitled to communicate with his legal counsel. A detainee must be allowed to have adequate time and facilities for consultation with his lawyer, without delay or censorship and in full confidentiality (ibid.). In line with international standards, the Afghan Interim Code of Criminal Procedures states—in Article 38—that a defense lawyer has the right "to be present at all times during the interrogation of the suspect" (Interim Code of Criminal Procedures 2004).

It is true that the right of a detainee to maintain contact with the outside world may be suspended or restricted in exceptional circumstances, that is, when the judicial or any other authority concludes that a suspension or restriction is necessary for reasons of "security and good order" (U.N. General Assembly 1988). The Afghan authorities,

[3]The main reason for preventing lawyers from visiting detainees during pre-trial detention was to avoid any interference in the process of extracting a confession from a detainee. Another reason, said commissioner Mohammed Farid Hamidi from the Afghanistan Independent Human Rights Commission (AIHRC), was the lack of legal training for members of the Afghan security forces. "The concept of a defense lawyer is very new in Afghanistan. Many policemen and NDS agents don't even know what the role of a defense lawyer is. That's why they don't allow lawyers to see detainees. They think they have the right to not allow a lawyer to have access to a detainee," said Hamidi (pers. comm.) in 2012. He added that lawyers were denied to see detainees not only in national security cases but also in other cases.

however, did not try to justify, on a case-by-case basis, *incommunicado* detentions by arguing that such detentions were indispensable to maintain security and good order.

While holding suspects in *incommunicado* detention, the Afghan security forces used the following torture techniques. First, probably the most common method were beatings, carried out with various instruments such as electric cables, water hoses, wooden sticks, and iron rods. For example, Detainee 9, who had been tortured in the NDS-run Department 124 in Kabul, recalled how his interrogators put him on his hands and knees in order to hit him on the back with electric cables and a heavy pipe (AIHRC and OSF 2012, 20). He was beaten during interrogations, carried out at least once a day, because the intelligence agents wanted him to confess to being a member of the Taliban movement (ibid.). After being beaten many times, the detainee said, he was unable to walk, and he had to crawl when he went to the bathroom (ibid.). Detainee 100, who was tortured by NDS agents in Khost province, said they had beaten him with two things—a yellow water hose and an electric wire (UNAMA and OHCHR 2011, 29). He was beaten on his soles, on his thighs, on his back, and on his left upper arm (ibid.). When the interrogators wanted to hit him on his soles, he had to lie on the ground and lift his feet on a chair, while when they wanted to hit him on the back, bottom, and thighs, he had to lie flat on his belly (ibid.).

Second, another torture technique used by the Afghan security forces was to hang up detainees to a ceiling or a wall, usually leaving them, with their arms shackled, suspended for hours. One of the victims, Detainee 6, who had been held in detention by the NDS in Department 124, recalled how the interrogators blindfolded him and hung him from a wall so that his feet were above the ground (AIHRC and OSF 2012, 20). They only took him down for meals and for prayer time (ibid.). While hanging, he lost his senses and his feet became "swollen and strange looking" (ibid.).

Third, members of the Afghan security forces sometimes forced detainees to stand for hours, both during the day and night, thus depriving them of sleep. During his first night in detention, recalled Detainee 100, he was forced to stand outside, blindfolded (UNAMA and

OHCHR 2011, 29). During the investigation, he was often brought out to stand still for hours, close to a wall, with his face turned to the wall (ibid.). When they ordered him to stand during the day, he sometimes had to stand in a shadow, sometimes in the sun (ibid.). While he was tortured, he many times collapsed and passed out (ibid.). Another individual, Detainee 350, said that interrogators at the NDS detention center in Kandahar did not allow him to sleep by forcing him to stand the whole time (UNAMA and OHCHR 2017, 25). If he fell asleep, they beat him with a cable (ibid.).

Fourth, detainees held by the NDS were sometimes tortured with electric shocks. One of the victims, Detainee 99, who was held at Department 124, said that his interrogators tied his hands, sit him on a chair, put two clips on his toes, and then used a "machine with electricity" that was giving him electric shocks. While he and other tortured detainees were screaming in pain, his interrogators laughed, smoked cigarettes, and made fun of them (AIHRC and OSF 2012, 14). Another victim, Detainee 360, said he was blindfolded and electrocuted by NDS agents in Farah province (UNAMA and OHCHR 2017, 26). During the interrogations, which continued for almost a week, he was also tied to a door of the interrogation office and hanged from it for a few hours (ibid.).

Fifth, in some cases, interrogators damaged the detainees' genitals. One of the victims, Detainee 6, recalled how members of Afghan security forces several times whipped, with a cable, his testicles and penis. After being tortured, he noticed there was blood in his urine (AIHRC and OSF 2012, 16). Another individual, Detainee 161, told how members of the NDS used a machine—it was like a clip or pliers—to squeeze his sexual parts until he started crying (UNAMA and OHCHR 2015, 47). While being tortured, he confessed to be a member of the insurgency because the interrogators threatened to completely destroy his sexual organs (ibid.). In some cases, a threat of sexual abuse was enough to force a detainee to confess. Detainee 46 said interrogators threatened to rape him (AIHRC and OSF 2012, 15). During an interrogation, the interrogators brought a stick with them, dipped it into chili powder and threatened to insert the stick into the detainee's anus (ibid.). When they tried to pull off his pants, the detainee confessed to everything they wanted (ibid.).

3 Confessions Under Torture

All major human rights treaties and many other human rights instruments, as well as international humanitarian law treaties, prohibit the use of torture and ill-treatment and other cruel, inhuman or degrading treatment or punishment (OHCHR 2003, 318). Recognized as a universal and non-derogable prohibition that is part of customary international law, the prohibition of torture and other forms of similar treatment must be respected, without exception, at all times, including during criminal investigations and judicial proceedings (U.N. General Assembly 1966, 1984; OHCHR 2003, 230; Henckaerts and Doswald-Beck 2005, 315–319). In criminal investigations, any person deprived of liberty by the security forces or held in detention by prosecuting authorities for interrogation into alleged criminal offenses must never be subjected to any psychological or physical violence (OHCHR 2003, 230). If the security forces or the prosecuting authorities use torture or any other form of inhuman treatment to extract a confession from a suspect, such confession is unlawful and must be inadmissible in court (U.N. General Assembly 1984; OHCHR 2003, 230).

In line with international law, Afghan law prohibits the use of torture, including during criminal investigations. Article 29 of the Afghan Constitution states that no one is allowed to use torture "for discovering the truth from another individual who is under investigation, arrest, detention …" (The Constitution of Afghanistan 2004). In addition, the Afghan Constitution stipulates—in Article 30—that a confession to a crime is valid only if it is *made voluntarily before an authorized court* by an individual in a sound state of mind (ibid.). A confession, or testimony, obtained from an individual by means of compulsion is invalid (ibid.).

Despite the prohibition of the use of torture and other forms of cruel treatment in criminal investigations, the Afghan security forces regularly resorted to torture to extract confessions from suspects in conflict-related cases (UNAMA and OHCHR 2011, 3; AIHRC and OSF 2012, 16–17; UNAMA and OHCHR 2013, 4; 2015, 20; 2017, 48). The detainees were forced to provide a confession by either signing a written statement or, if they were illiterate, by affixing

their thumbprint on a written statement (Shabir Ahmad Kamawal, pers. comm.). Such confessions were then used in Afghan courts as evidence—in many cases as the only evidence—against alleged insurgents (UNAMA and OHCHR 2011, 45; 2015, 20). In about half of the national security cases he worked on, said lawyer Syad Alam Shah (pers. comm.), the prosecutors relied on a confession extracted during interrogation as the sole evidence against his clients. The director of ILF-A, Shabir Ahmad Kamawal (pers. comm.), confirmed, in 2017, that members of the Afghan security forces regularly resorted to torture and ill-treatment to compel suspects to confess to being involved in acts of violence against the Afghan regime. In the majority of cases in which ILF-A lawyers represented conflict-related detainees, the prosecutors used confessions as the only evidence against the accused.[4]

This evidentiary practice violated international and domestic law. Although the Afghan Constitution stipulated that a confession to a crime was valid only if it was made voluntarily before an authorized court, Afghan prosecutors and judges regularly accepted confessions unlawfully obtained in NDS and ANP detention centers in order to use them as the primary evidence against individuals charged with conflict-related offenses. Even when defense lawyers raised the issue of confessions forced through torture, Afghan courts usually dismissed the applications and allowed the confessions to be used as evidence (UNAMA and OHCHR 2011, 7). How come judges and prosecutors accepted illegally obtained confessions? "I don't know why they don't respect the Constitution. They [judges] almost always do what the prosecutor expects them to do. This happens many times in conflict-related cases," said Mustafa Razm Kohestani (pers. comm.), head of the Criminal Defense Department at the Legal Aid Organization of Afghanistan (LAOA), in 2012.

By relying on unlawfully obtained confessions, both judges and prosecutors ignored their professional responsibility to do their best to provide help to victims of torture. Under international standards,

[4]In 2016, for example, ILF-A lawyers worked on approximately 5600 cases, about a third of them were national security cases (Shabir Ahmad Kamawal, pers. comm.).

both judges and prosecutors must at all times reject as invalid confessions that had been illegally obtained from suspects through torture or any other form of cruel treatment (OHCHR 2003, 370). In addition, prosecutors must constantly be on the watch for any signs of torture or ill-treatment, and take the necessary legal steps to provide a remedy for victims of torture (ibid.).[5] If, or when, prosecutors notice evidence against suspects that they believe on reasonable grounds was obtained under torture, they must refuse to use such evidence against the suspects and instead use it to bring to justice those responsible for torture (U.N. Congress on the Prevention of Crime and the Treatment of Offenders 1990). Even when governments are unwilling to eradicate the use of torture, judges and prosecutors have a professional responsibility to do what they can to assist the victims and to prevent future occurrences of such treatment (OHCHR 2003, 370).

4 Creating a Culture of Impunity

In order to protect the physical and mental integrity of detainees, States must not only have penal provisions applicable to cases of torture and ill-treatment but must also ensure effective protection "through some machinery of control" (U.N. Human Rights Committee 1982, 1992a). To be more precise, States have the duty to set up independent and competent judicial authorities to investigate promptly and effectively complaints about torture and ill-treatment with the aim to—first—provide remedies to victims of torture and—second—hold responsible those found guilty of torture (U.N. Human Rights Committee 1982, 1992a; U.N. General Assembly 1984; OHCHR 2004, 4).

Despite the substantial research evidence indicating that members of the Afghan security forces regularly resorted to torture or ill-treatment during investigations in conflict-related cases, the Afghan

[5]Under Afghan law, prosecutors had to report any violation of the rights of detainees. Article 91 of the Afghan *Criminal Procedure Code* stipulates that investigating prosecutors have an obligation to report if "the police and national security operatives have committed legal violations in dealing with a case" (UNAMA and OHCHR 2017, 18).

government failed to establish an independent and competent authority to effectively investigate cases of torture (UNAMA and OHCHR 2015, 74–75). Instead of implementing measures to protect its citizens from torture and other similar abusive treatment, the Afghan government helped create, and maintain, a system that protected individuals responsible for torture. The four practices used to protect torturers were as follows. The first practice—the use of secret torture centers—aimed at preventing the collection of evidence about torture. The NDS, for example, used secret temporary torture centers, usually hidden in cellars or truck containers, and thus made it extremely difficult for independent monitoring organizations to collect information about interrogation techniques used in such centers (AIHRC and OSF 2012, 27). A similar practice, used by the ANP, was to torture detainees at police checkpoints before transferring them to the officially recognized detention centers (AIHRC and OSF 2012, 27). By torturing detainees at police checkpoints, the ANP avoided interference of independent monitors who had access to the officially recognized detention centers (ibid.).

The second practice was to keep individuals in *incommunicado* detention for long periods of time in order to ensure that evidence of torture or ill-treatment was no longer visible on their bodies (AIHRC and OSF 2012, 54). By keeping individuals in detention for weeks without allowing them to get in contact with their families, defense lawyers and members of independent monitoring organizations, the Afghan security forces ensured that marks caused by physical abuse—e.g., cuts and bruises—healed, thus making it difficult for lawyers to prove that the detainees were tortured while being held in detention (ibid.). Afghan prosecutors and judges accepted only visible physical injuries as credible evidence proving that an individual was subjected to torture or any other form of cruel treatment (UNAMA and UHCHR 2013, 73). Defense lawyer Syad Alam Shah (pers. comm.) confirmed he had to provide evidence of physical injuries if he wanted to prove that his client was tortured. "We send our clients to the forensic department where they examine them and write a report," explained Shah. Many times, he added, the Afghan security forces allowed him to see his clients four

or five months after they were arrested, and, consequently, he was often unable to prove that the clients were tortured because they had no visible marks of torture on their bodies. When clients claimed they were tortured but there were no visible physical marks of torture, Shah only wrote a statement to inform the court about the alleged use of torture. Such statements were regularly dismissed by the courts. An additional problem was that the NDS often used its own medical personnel to examine individuals who claimed they were tortured (UNAMA and OHCHR 2013, 73). Such practice raised doubts about the independence and impartiality of the medical examination of detainees because it seemed unlikely that an NDS doctor would present medical evidence of torture that incriminated NDS officials (ibid.).

The third practice used by the Afghan authorities was to dismiss reports on torture by accusing detainees of giving false information to independent monitoring organizations. Some Afghan government officials claimed that detainees' testimonials about torture were part of Taliban propaganda—the detainees were supposedly trained to invent stories about torture in order to undermine the legitimacy of the Afghan regime (UNAMA and OHCHR 2011, vii).

The fourth practice was to rely on internal accountability mechanisms in order to protect torturers from being prosecuted. Throughout the war, the numerous allegations of torture and other forms of cruel treatment continued to be investigated by the Afghan security organizations—i.e., the NDS, ANA and MOI—whose members were involved in torture and ill-treatment (UNAMA and OHCHR 2011, 40–43; 2017, 46–50). The results of such internal investigations were usually not made public (UNAMA and OHCHR 2017, 50). Even when internal investigations found evidence that torture or ill-treatment has taken place, very few cases were referred for further investigation or prosecution by the judicial authorities (ibid.). Instead of referring such cases to the judicial authorities, the NDS and the MOI chose to address them internally. The NDS, for example, created special internal "courts" for trying individuals suspected of being involved in torture or ill-treatment (UNAMA and OHCHR 2011, 41). Those courts failed to meet the requirement of institutional independence and were, therefore,

unable to effectively deal with cases of torture.[6] The key element of judicial institutional independence is independence from the two other branches of power, that is, the executive branch and the legislature (U.N. Economic and Social Council 1995b, 22; OHCHR 2003, 120). The NDS "courts" did not have institutional independence because they were part of the executive branch of power.

Based on the above-mentioned practices that aimed to protect members of the Afghan security forces, it was not surprising that very few individuals responsible for torture or ill-treatment were punished. Due to the limited data provided by the Afghan authorities, it was unclear whether any member of the Afghan security forces was convicted of torture or ill-treatment in a court of law (UNAMA and OHCHR 2017, 49–50). It was clear, however, that the internal sanctioning mechanisms within Afghan security organizations rarely punished perpetrators of torture. When, for example, an internal investigation carried out by the NDS concluded there was sufficient evidence to prove that NDS members were involved in torture or ill-treatment, NDS officials chose not to forward the case to the office of the prosecutor, but instead decided to "punish" the perpetrators with minor disciplinary sanctions (UNAMA and OHCHR 2017, 51). The "punishments" included written and verbal warnings, loss of rank, dismissal, suspension from eligibility for promotion, "development training" for a period of 6 months, and disciplinary transfers to other positions within the NDS (UNAMA and OHCHR 2017, 51–52; AIHRC and OSF 2012, 63).

In a system that protected torturers it was very difficult for victims of torture to come forward and openly speak about what happened to them. "When they [the NDS, the ANP] release detainees, we talk to them [the detainees]. If we notice signs of torture, we tell them that we can represent them in court. We tell them we can help them to receive

[6]All major human rights treaties guarantee the right to a fair hearing in criminal proceedings before an independent tribunal (OHCHR 2003, 117–118). The International Covenant on Civil and Political Rights (ICCPR) stipulates—in Article 14(1)—that in criminal cases "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law" (U.N. General Assembly 1966). The right to be tried by an independent tribunal is recognized as a non-derogable right, that is, an absolute right that must not be suspended under any circumstances (U.N. Human Rights Committee 1992b).

compensation. But no one decided to press charges against officials. They're afraid. They are afraid to be detained again if they press charges," said Lal Gul in 2012. He added that most of the victims, usually illiterate farmers, did not know their rights, and, as a result, it was difficult to convince them it was their right to file charges against torturers.

References

Afghanistan Independent Human Rights Commission (AIHRC), and Open Society Foundation (OSF). 2012. *Torture, Transfers, and Denial of Due Process: The Treatment of Conflict-Related Detainees in Afghanistan*. Kabul: AIHRC and OSF. https://www.opensocietyfoundations.org/sites/default/files/conflict-related-detainees-afghanistan-20120319.pdf. Accessed on 6 August 2018.

Costanzo, Mark A., and Ellen Gerrity. 2009. "The Effects and Effectiveness of Using Torture as an Interrogation Device: Using Research to Inform the Policy Debate." *Social Issues and Policy Review* 3 (1): 179–210.

CTITF (Counter-Terrorism Implementation Task Force). 2014. *Basic Human Rights Reference Guide: Right to a Fair Trial and Due Process in the Context of Countering Terrorism*. New York: CTITF Publication Series. https://www.ohchr.org/EN/newyork/Documents/FairTrial.pdf. Accessed on 3 July 2018.

Henckaerts, Jean-Marie, and Louise Doswald-Beck. 2005. *Customary International Humanitarian Law. Volume 1: Rules*. Cambridge: Cambridge University Press.

Interim Code of Criminal Procedure for Courts—Official Gazette No. 820, Published 2004/02/25 (1382/12/06 A.P.). http://www.asianlii.org/af/legis/laws/icocpfcogn820p2004022513821206a675/. Accessed on 7 August 2018.

Kassin, Saul M., and Gisli H. Gudjonsson. 2004. "The Psychology of Confessions: A Review of the Literature and Issues." *Psychological Science in the Public Interest* 5 (2): 33—67. https://doi.org/10.1111/j.1529-1006.2004.00016.x.

Svensson-McCarthy, Anna-Lenna. 1998. *The International Law of Human Rights and States of Exception: With Special Reference to the Travaux Preparatoires and the Case-Law of the International Monitoring Organs*. Leiden: Martinus Nijhoff Publishers.

The Constitution of Afghanistan. 2004. http://www.afghanembassy.com.pl/afg/images/pliki/TheConstitution.pdf. Accessed on 14 August 2018.

U.N. Congress on the Prevention of Crime and the Treatment of Offenders. 1990. *Guidelines on the Role of Prosecutors*. Adopted by the Eighth United

Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990. https://www.ohchr.org/EN/Professionalinterest/Pages/RoleOfProsecutors.aspx. Accessed on 15 August 2018.

U.N. Economic and Social Council. 1995a. *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Report of the Special Rapporteur, Mr. Nigel S. Rodley, U.N. Doc. E/CN.4/1995/34. http://hrlibrary.umn.edu/commission/thematic51/34.htm. Accessed on 9 August 2018.

———. 1995b. *Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers*. Report of the Special Rapporteur, Mr. Param Cumaraswamy, Submitted in Accordance with Commission on Human Rights Resolution 1994/41, E/CN.4/1995/39. http://undocs.org/E/CN.4/1995/39. Accessed on 24 July 2017.

U.N. General Assembly. 1966. *International Covenant on Civil and Political Rights*. Adopted by the General Assembly of the United Nations on 19 December 1966. https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf. Accessed on 8 May 2018.

———. 1984. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Adopted and Opened for Signature, Ratification and Accession by General Assembly Resolution 39/46 of 10 December 1984 Entry into Force 26 June 1987. https://www.ohchr.org/en/professionalinterest/pages/cat.aspx. Accessed on 14 August 2018.

———. 1988. *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*. Adopted by General Assembly Resolution 43/173 of 9 December 1988. http://www.ohchr.org/Documents/ProfessionalInterest/bodyprinciples.pdf. Accessed on 14 May 2018.

U.N. Assistance Mission in Afghanistan (UNAMA), and U.N. Office of the High Commissioner for Human Rights (OHCHR). 2011. *Treatment of Conflict-Related Detainees in Afghan Custody*. Kabul: UNAMA and OHCHR. http://unama.unmissions.org/Portals/UNAMA/Documents/October10_%202011_UNAMA_Detention_Full-Report_ENG.pdf. Accessed on 6 August 2018.

———. 2013. *Treatment of Conflict-Related Detainees in Afghan Custody: One Year On*. Kabul: UNAMA and OHCHR. https://unama.unmissions.org/sites/default/files/master_unama_detention_report_20_jan_2013_final.pdf. Accessed on 6 August 2018.

———. 2015. *Update on the Treatment of Conflict-Related Detainees in Afghan Custody: Accountability and Implementation of Presidential Decree 129*. Kabul: UNAMA and OHCHR. https://unama.unmissions.org/sites/default/files/unama_detention_report_2015_revised.pdf. Accessed on 6 August 2018.

———. 2017. *Treatment of Conflict-Related Detainees: Implementation of Afghanistan's National Plan on the Elimination of Torture*. Kabul: UNAMA and OHCHR. https://unama.unmissions.org/sites/default/files/treatment_of_conflict-related_detainees_24_april_2017.pdf. Accessed on 6 August 2018.

U.N. Human Rights Committee. 1982. CCPR General Comment No. 7: Article 7 (Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment). http://www.refworld.org/docid/4538840021.html. Accessed on 8 August 2018.

———. 1992a. CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment). http://www.refworld.org/docid/453883fb0.html. Accessed on 9 August 2018.

———. 1992b. *M. Gonzalez del Río v. Peru*. Communication No. 263/1987, U.N. doc. CCPR/C/46/D/263/1987. http://hrlibrary.umn.edu/undocs/dec26346.pdf. Accessed on 24 July 2018.

U.N. Office of the High Commissioner for Human Rights (OHCHR). 2003. *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*. New York: United Nations.

———. 2004. *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. New York: United Nations.

6

In Militias We Trust: Civilian Victims of Targeted Killings by Pro-government Armed Groups in Afghanistan

1 Introduction

In the early morning hours of 1 June 2014, a joint force of U.S. and Afghan Special Operations Forces flew by helicopter into the village of Alizai in Ghazni province (Aikins 2014).[1] During a house-to-house search operation, the joint force detained about 100 military-aged men, suspected of being members or supporters of the Taliban movement. Before noon, a local pro-government militia of about 30 men, led by commander Abdullah, reached the compound where the detained villagers were being held. Some of the militia members wore uniforms of the U.S.-funded Afghan Local Police (ALP), while others were dressed in civilian clothes. After arriving at the compound, Abdullah's men started interrogating the detained villagers and singled out three of them—Mohammed Gul, Nasrullah, and Fazaldin. With U.S. troops and their Afghan counterparts looking on them from rooftop positions, Abdullah's men blindfolded the three suspects, tied their hands,

[1]The entire description of the operation in Alizai village is based on the report by Aikins (2014).

V. Badalič, *The War Against Civilians*, Palgrave Studies in Victims and Victimology,
https://doi.org/10.1007/978-3-030-12406-9_6

and drove them on motorcycles to a location on the outskirts of the village. Soon afterward, shots were being heard from that site.

An investigation conducted by UNAMA confirmed that members of a pro-government armed group, called "Andar Uprising," carried out an extrajudicial execution of the three detainees (UNAMA 2014b, 56). After being questioned about the incident, ISAF officials responded that their inquiry found no evidence to substantiate the allegations made by UNAMA. They denied the executions of the three detainees took place and insisted that all three of them were taken into custody for further interrogation and later released. In addition, ISAF officials denied that U.S. troops cooperated with a local paramilitary group (Aikins 2014).

It was perhaps ironic that it was the militia commander Abdullah who gave the lie to the narrative propagated by ISAF officials. "I killed these three men," admitted Abdullah, adding that he believed all three of them were insurgents (Aikins 2014). Commander Abdullah revealed that the armed men under his command were not part of the Afghan security forces but operated as a paramilitary unit that received salaries and weapons from the U.S. military. Wherever Abdullah's gunmen went in Andar, a district in the eastern part of Ghazni province, U.S. troops went with them. If members of the paramilitary unit got injured in battle, the U.S. military helped to evacuate them and provided them with medical treatment (Aikins 2014).

Throughout the war in Afghanistan, the U.S. and the Afghan regime provided political and material support (e.g., training, weapons, salaries, logistic support, food, and shelter) to a bewildering array of pro-government armed groups deemed useful in the fight against the Taliban movement and other rebel groups (Schmeidl and Karokhail 2009, 328; HRW 2011, 2015; Clarke 2017a; Dirkx 2017, 380–381). The existence of pro-government armed groups, created by powerful local figures or the communities themselves, had no legal basis under the laws of Afghanistan, and, consequently, they operated outside any formal military structure of the Afghan state (UNAMA 2016a, 91). In addition to informal armed groups, there were also many semi-formal armed groups, that is, groups that received official recognition as they were included by the U.S. military and the Afghan regime into various "village defense forces" for protecting local communities from

insurgents. Although nominally under the control of the Afghan government, many of those groups continued to operate as de facto independent groups loyal to local strongmen (HRW 2011, 2015). Due to their irregular status, it was difficult to determine exactly how many militias, and how many militia members, operated across the country. In 2012, for example, AIHRC reported that 616 illegal armed groups, each of them consisting of 10–100 men, existed in Afghanistan. It was, however, unclear how many of them were pro-government armed groups (AIHRC 2012a, 34).

Based on the types of operations they carried out for their U.S. sponsors and the Afghan regime, we can divide pro-government militias into three categories. The first category consisted of militias hired to assist the U.S. and their allies in military operations against the Taliban and other insurgent groups. These militias, also called counter-terrorism pursuit teams, were paid and trained by the CIA for collecting intelligence on insurgents, carrying out long-range reconnaissance missions, including cross-border missions in Pakistan, and conducting "hunt and kill" operations against insurgents (Clarke 2017a; Woodward 2010; Dozier 2014; Gibbons-Neff et al. 2017). The counter-terrorism pursuit teams were deployed in the southern and eastern provinces. In Kandahar province, for example, the CIA relied on a 400-strong militia called The Kandahar Strike Brigade, which was created with the help of Ahmad Wali Karzai, the late brother of former President Karzai (Cavendish 2011a). In Kunar province, the CIA managed a 1200-strong militia called 0–4 Team (Clarke 2017a, 3; Graham-Harrison 2013). In Khost province, a militia called Khost Protection Force consisted of about 4000 gunmen, employed by the CIA to conduct night raids against alleged insurgents (Raghavan 2015; UNAMA 2016b, 90–91; 2018, 52–53). In Paktika province, the CIA hired a local militia called Afghan Security Guards, led by commander Azizullah. The militia conducted combat operations with U.S. forces and guarded U.S. military facilities (Cavendish 2011b; HRW 2015, 31–36).

The second category of pro-government armed groups consisted of groups hired for guarding foreign military bases and supply convoys for the U.S.-led occupying forces. From 2003 to 2006, those militias,

which had about 2500 members in total, operated under the name of Afghan Security Force (Clark 2017b, 10). After its disbandment, many militias continued providing security for U.S./ISAF supply convoys by rebranding themselves as subcontractors of Afghan private security companies. This kind of militias mostly operated in the eastern and southern provinces. The main highway connecting Kabul and Kandahar city, for example, was controlled by a roughly 600-strong militia led by commander Ruhullah, the primary subcontractor of Watan Risk Management, a private security company owned by President Karzai's cousins (U.S. Congress 2010, 22–23). The main road between Kandahar city and Tarin Kot, the capital of Oruzgan province, was under the control of a 2000-strong militia, called Oruzgan Security Battalion, led by warlord Matiullah Khan, a close U.S. ally. In order to gain safe passage from Kandahar city to Tarin Kot, all contractors assigned for transporting supplies for U.S./ISAF forces had to make protection payments to Matiullah Khan (U.S. Congress 2010, 25–26). In eastern Paktia and Khost province, it was Pacha Khan Zadran, a warlord with about 2000 fighters under his command, who provided security services to the U.S. military (U.S. Congress 2010, 27). In Helmand province, one of the local warlords working for U.S. forces was Abdul Wali Khan, a militia commander-cum-police chief. After consolidating his position in Helmand, Abdul Wali Khan's private militia started providing protection services for U.S./ISAF convoys (Loyd 2008; Dressler 2011, 28; U.S. Congress 2010, 27–28).

The third category of pro-government armed groups consisted of semi-formal militias branded as "village defense forces," that is, community-based militias mandated to provide security in areas with little or no presence of formal Afghan security forces (HRW 2011, 2015; AIHRC 2012b). One of the first "village defense forces," created by the Afghan regime and the U.S. military in 2006, was the Afghan National Auxiliary Police, a poorly trained paramilitary force deployed in the southern provinces of Helmand, Kandahar, Farah, Oruzgan, Ghazni, and Zabul (Wilder 2007, 13–17; HRW 2011, 18–21). Throughout the war, the U.S. administration financed many similar programs for hiring community-based militias. The Afghan Public Protection Program,

for example, was launched in 2009 by U.S. and Afghan officials in four districts in Wardak province (Goodhand and Hakimi 2014, 19–25; Lefèvre 2012, 1–3). The Community Defense Initiative and the Local Defense Initiative were established by the U.S. military in southern Afghanistan in 2009 (HRW 2011, 22–24; Lefèvre 2012, 3–4). The Interim Security for Critical Infrastructure Program was introduced by the U.S. military in Helmand province in 2010, while a similar program, called Community-Based Security Solutions, was set up in three eastern provinces (HRW 2011, 24; Clark 2017b, 11). The Critical Infrastructure Protection Program, which aimed at recruiting militias in the northern province Kunduz, was launched by the U.S. and German military in mid-2011 (Goodhand and Hakimi 2014, 34).

All of the armed groups recruited through the above-mentioned programs were either disbanded or morphed into the ALP, the largest "village self-defense program" that included a myriad of loosely integrated militias mandated to defend remote rural communities. The ALP, approved by the Afghan government in 2010, consisted of about 30,000 fighters in total, paid by the U.S. government and trained by U.S. Special Operations Forces (HRW 2011). Although nominally under the control of the Afghan Ministry of Interior, many militias rebranded as ALP units remained loyal to local warlords who continued to use the militias to seek financial gains by engaging in illegal activities, including drug trafficking and extortion (Gopal 2014; Felbab-Brown 2016). In addition to the ALP, the Afghan government also greenlighted, in 2015, the creation of "National uprising groups," a maze of local militias operating in 25 provinces (UNAMA 2016a, 65–66). These groups were nominally under the control of the National Directorate of Security (NDS), the Afghan intelligence agency, and the Afghan National Police (ANP) (ibid.). They received financial support from The Independent Directorate for Local Governance (IDLG), while the Afghan Ministry of Interior provided them weapons (ibid.). The number of fighters in "uprising groups," which included civilians and former insurgents, varied from 22 to 500 (ibid.).

Being a member of a pro-government armed group and being a member of the Afghan state security apparatus or a political figure

were many times not mutually exclusive roles. Many militia commanders and rank-and-file members rebranded themselves as political figures (e.g., ministers, provincial governors, members of parliament, district council members) or as members of state security forces (Schmeidl and Karokhail 2009, 327), but, at the same time, retained their links to the militias. The distinction between members of state security forces and members of pro-government armed groups was many times blurred, with the same individuals constantly switching sides or even simultaneously being members of the security forces and informal armed groups (Goodhand and Hakimi 2014, 38–39; HRW 2011, 2015).

Throughout the war, pro-government armed groups regularly carried out human rights abuses, including extrajudicial killings, illegal detention, severe beatings, illegal taxation and other forms of extortion, land theft, property destruction, drug trafficking, and sexual assaults. (UNAMA 2015b, 76; 2016a, 64–67; Faizy and Bengali 2016). This chapter, however, will focus exclusively on deliberate and targeted killings of civilians. The central part of the chapter is divided into three sections. The first section explores the too-broad criteria used by pro-government militias for determining what they believed were legitimate military targets. That section analyzes how the militias regularly targeted civilians perceived to be linked to the insurgency (e.g., family members and relatives of alleged insurgents, civilians suspected of providing assistance to alleged insurgents, and civilians living in areas from where insurgent attacks were launched). The second section of the chapter examines how militia members targeted civilians who, despite not being linked to the insurgency, refused to submit themselves to the authority of the militias (e.g., political and religious figures objecting the militias' activities, civilians refusing to pay illegal taxation imposed by the militias, and civilians involved in personal feuds with militia members). The third section explores how the criteria for determining targets of killings ignored the standard definitions of legitimate military targets in non-international armed conflicts, and, consequently, created circumstances for breaches of the laws of war, in particular the principle of distinction between combatants and civilians.

2 Too-Broad Criteria for Determining Targets of Killings

2.1 Targeting Civilians Linked to the Insurgency

A number of norms concerning the protection of civilians, contained in the Geneva Conventions of 1949 and their Additional Protocols of 1977, have been recognized as part of customary international law, which means that all belligerent parties involved in an armed conflict, international or non-international, are bound to observe them. By adopting the interpretation that the current conflict in Afghanistan is an armed conflict of non-international character, we agree that it should be governed by two sets of treaty rules, that is, Article 3 common to the four Geneva Conventions (Common Article 3) and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) (Bellal et al. 2011, 5–6; Sassòli 2010, 10–11). Both these sets of treaty rules prohibit the targeting of civilians by all belligerent parties, either state parties or non-state armed actors, involved in non-international conflicts. Common Article 3, which deals directly with the conduct of hostilities, prohibits violence to the life of persons taking no active part in hostilities (Rogers 2004, 221). Moreover, Article 13 of the Additional Protocol II stipulates that the civilian population should not be the object of military attacks (Henckaerts and Doswald-Beck 2005a, 5).

Pro-government armed groups operating across Afghanistan were therefore bound to comply with the principle of distinction between combatants and civilians, a key principle in international humanitarian law, in order to avoid killing or injuring civilians in military operations. While participating in the conflict, Afghan pro-government militias were permitted to target in military operations only persons actively taking part in hostilities, that is, regular members of insurgent groups and civilians directly participating in hostilities. On the one hand, regular members of insurgent groups, defined as individuals who continuously participate in planning and carrying out military operations,

can be targeted at any time during an armed conflict (Melzer 2009a, 31–36). On the other hand, civilians directly participating in hostilities are defined as individuals who temporarily join an insurgent group, and, while fighting on behalf of an insurgent group, conduct attacks that result in adverse military affects such as death, injury, or property destruction (Melzer 2009a, 41–46; 2009b, 328–334). Civilians participating in hostilities can be lawfully targeted only for such time as they take part in hostilities (Melzer 2009a, 65).

In order to see how Afghan pro-government armed groups ignored the two standard definitions of legitimate military targets and, consequently, violated the principle of distinction, we need to examine the target selection criteria they used for determining what they believed were legitimate targets in their targeted killing program. A comparison of the target selection criteria used by the militias and the criteria established in international humanitarian law will show us how the militias broadened the notion of legitimate military targets by including in it individuals defined as civilians under international humanitarian law.

Although pro-government militias, usually operating as loosely integrated units without a central governing body, did not formulate a common target selection process, it was possible to discern which groups of civilians they targeted by analyzing the numerous cases of targeted killings. Based on cases of targeted killings carried out by militia members it became evident that they targeted two categories of civilians. The first category consisted of civilians perceived to be linked to the insurgency. While they pursued the objective to eliminate all individuals who prevented them from gaining and/or retaining control over territory and the local population, the militias not only conducted operations, alongside or with the complicity of the U.S. military and the Afghan regime, against the insurgency, but also targeted civilians perceived to be in any way supporting the insurgency.

This category of civilian targets consisted of three groups of people. The first group included family members and relatives of alleged members of insurgent groups (UNAMA 2018, 52). In 2017, for example, UNAMA investigated a few incidents of deliberate targeting of civilians with family links to insurgents. Two of those incidents occurred

in the northern Faryab province. In April 2017, pro-government armed group members shot dead a civilian related to a member of the insurgency, while in May 2017 militia members shot dead the father of a recruit of an insurgent group in Faryab (UNAMA 2017, 60). By adopting the idea that family members and relatives of insurgents were legitimate military targets, pro-government armed groups abandoned the two standard definitions of legitimate military targets in international humanitarian law. Family members and relatives of insurgents were neither regular members of insurgent groups who continuously participated in hostilities nor civilians who temporarily took part in hostilities. As a result, this criterion for determining targets led to attacks against protected persons under international humanitarian law, and thus created circumstances for breaches of the principle of distinction.

Second, pro-government armed groups targeted individuals they believed provided non-military support to members of the insurgency. The targets included individuals suspected of providing shelter to insurgents and selling or giving food to insurgents. In Ghazni province in late January 2014, for example, ALP members beat to death a shopkeeper after accusing him of selling food to the Taliban (UNAMA 2014b, 49). In a similar incident, which occurred in Balkh province in January 2017, a member of a pro-government armed group shot dead a civilian boy suspected of providing food to an injured insurgent (UNAMA 2017, 60). An attack in which members of a pro-government militia killed civilians suspected of providing shelter to insurgents occurred in the village of Tangarhi, Paktika province, in early 2009 (Cavendish 2011b; HRW 2015, 32). In that incident, a paramilitary group led by commander Azizullah raided a house, killing nine people, at least three of them children aged 6–10 (ibid.). A local resident revealed that Azizullah's men conducted the raid based on faulty intelligence—informers incorrectly identified the owner of the targeted house as a supporter of the insurgency who provided shelter to insurgents (ibid.). By adopting the assumption that individuals providing food and shelter to insurgents were legitimate military targets, members of pro-government armed groups again deliberately ignored the two standard definitions of legitimate military targets. Under international

humanitarian law, individuals providing—willingly or unwillingly—food and shelter to members of insurgent groups are not legitimate targets because they are neither regular fighters of insurgent groups nor civilians directly participating in hostilities. If individuals provide only indirect assistance to insurgent groups, which includes supplying food and shelter to insurgents, they are not directly participating in hostilities, and, as a result, cannot be lawfully targeted in military operations (Goldman 1993, 84; Melzer 2009b, 322). Therefore, by targeting protected persons under international humanitarian law, pro-government armed groups breached the principle of distinction between civilians and combatants.

Third, pro-government militias targeted civilians living in areas from where insurgents carried out attacks against militia members or people supporting the militias (UNAMA 2015a, 83; 2016b, 93). This kind of revenge killings usually happened in the immediate aftermath of insurgent attacks on militia members and their supporters. In Oruzgan province in August 2012, for example, a local pro-government militia consisting of members of the Hazara ethnic group went on a killing spree in a number of Pashtun villages in retaliation for the killings of two Hazara men, both of them allegedly killed in an ambush by Taliban insurgents (Rubin and Rahimi 2012; Van Bijlert 2013; HRW 2015, 25).[2] In order to avenge the deaths of their two fellow Hazaras, the militia led by commander Shujayee moved through Pashtun villages from where local Taliban commanders came from. Based on the guilt-by-association logic, the villagers living in areas with Taliban presence were held responsible for the deaths of the two Hazara men. In addition to killing at least nine people, including at least one child, the militia members trashed and burned houses, looted property, and allegedly raped several women. In a similar incident, which occurred in early September 2013, a local pro-government armed group led by commander Qadirak attacked the village of Kanam, some 15 kilometers northeast of Kunduz city, in retaliation for the death of one of their fighters, Jalil Chunta (Hewad 2012;

[2]The description of this incident is based on reports by Rubin and Rahimi (2012), Van Bijlert (2013), and HRW (2015, 25).

UNAMA 2014a, 57; Sarfraz and Nordland 2012).[3] After being kidnapped by unidentified individuals, Jalil Chunta's dead body was found in Kanam by local residents who claimed they had picked it up to keep it safe and inform Jalil's family. After discovering that Jalil Chunta was killed, hundreds of militia members from various groups operating in that area descended on Kanam. During the attack on the village, which lasted two to three hours, militia members first randomly fired rockets into the village, then entered it, and forced villagers out of their houses. In total, 12 villagers were killed, while eight were wounded. More than 20 villagers were beaten up, most of them in front of their family members.

By carrying out revenge killings of civilians residing in areas from where insurgent attacks had been launched, pro-government militias again ignored the two standard definitions of legitimate military targets in international humanitarian law. The individuals killed in such attacks were neither regular members of the insurgency nor civilians directly taking part in hostilities. It was not possible to determine that the targeted individuals were legitimate military target solely on the basis of the fact that they resided in an area where insurgents operated. As a result, this targeting criterion necessarily led to violations of the principle of distinction between combatants and civilians.

2.2 Targeting Civilians Who Objected the Militias' Activities

The second category of civilian targets consisted of civilians who, despite not being supporters of the insurgency, refused to subject themselves to the authority of pro-government militias. This category of targets included three groups of civilians. First, pro-government militias targeted civilians they perceived as their political opponents, including government officials, tribal elders, and religious leaders. For example, in the northern province of Takhar in April 2016, a local militia of

[3]The description of this incident is based on reports by Hewad (2012), UNAMA (2014a, 57), and Sarfraz and Nordland (2012).

about 500 men, led by commander Perim Qul, carried out an attack on Aynuddin Rustaqi, a provincial council member, who was a vocal critic of the militia (Rassmusen 2016). After an argument between the militia leader and the politician turned violent and two militia members were killed, about 200 armed men loyal to Perim Qul surrounded the local government headquarters and killed Rustaqi alongside three supporters and another person (ibid.). In another incident, which occurred in Takhar province in August 2017, a local militia led by Bashir Qanet, a former Hizbi-i-Islami member, opened fire on worshipers at a mosque, killing six and injuring 36 civilians (Ahmadi 2017; Nordland 2017). The militia targeted the mosque because the local imam, Mawlavi Mahfozullah, was about to deliver a speech to condemn the illegal activities of Qanet's gunmen (ibid.). Before the attack, Mawlavi Mahfozullah many times criticized the militia. Describing Qanet as an infidel, Mawlavi Mahfozullah even declared jihad against the militia commander (ibid.). Members of pro-government armed groups also targeted tribal elders they perceived as rivals. For example, after the fall of the Taliban regime two warlords from Oruzgan province, Jan Mohammad Khan and Matiullah Khan, started attacking some of their tribal rivals after falsely accusing them of having links to the insurgency (Hyland 2010). Some of the victims were murdered, while others were targeted by U.S. Special Operations Forces based on faulty intelligence provided by the two warlords (ibid.).

Second, pro-government militias targeted civilians who opposed the militias' illegal activities for obtaining financial gain in the territories under their control. This kind of targets included civilians who refused to pay illegal taxation imposed by the militias. In areas where they operated, pro-government armed groups regularly demanded from local residents either direct cash payments or non-cash assistance (e.g., food, firewood, motorcycles, guns, carpets) (UNAMA 2013, 55; 2014a, 52; 2015a, 82; IRIN 2015). The civilians who refused to meet the demands made by the militias were either intimidated into submission or killed. In early February 2017, for example, members of a pro-government armed group operating in Khamab district, Jawzjan province, killed a shopkeeper of a carpet shop who refused to pay tax to the armed group (UNAMA 2017, 60). The militia members placed a magnetic

improvised explosive device in the carpet shop, thus killing the shopkeeper and injuring three other civilians (ibid.). In a similar incident, which occurred in Qasyar district, Faryab province, in January 2017, pro-government armed group members beat and stabbed a civilian to death for refusing to pay illegal taxation (UNAMA 2017, 60). The individuals targeted by militias members also included civilians who did not want to surrender their land to the militias. After the fall of the Taliban regime, many pro-government militia commanders started to illegally seize land in order to maintain or increase power in areas where they operated (TLO 2008, 53–55). When confronted by people who refused to give up their land, the militias many times resorted to violence. In Oruzgan province, for example, warlord Matiullah Khan led gunmen that killed stubborn farmers who refused to surrender their land to the former governor, Matiullah Khan's uncle Jan Mohammed Khan (Reuter 2009).

Third, members of pro-government armed groups sometimes targeted individuals who were their rivals in local feuds. In early 2006, for example, the Afghan Ministry of Interior's Criminal Investigation Department conducted an investigation into the killings of 16 young men outside Spin Boldak, a city on the Pakistan–Afghanistan border (Aikins 2011; HRW 2015, 76–77).[4] In the aftermath of the killings, Abdul Raziq Achakzai, a powerful militia leader-turned-police chief in Kandahar province, claimed that his unit killed at least 15 Taliban fighters, led by Taliban commander Mullah Shin, in a gun battle. The investigation, however, revealed that the primary target of Raziq's gunmen was Shin Noorzai, a smuggler, who had a feud with Raziq. The tribes to which Raziq and Shin belonged had been fighting for control over smuggling routes between Afghanistan and Pakistan. In addition, Raziq held Shin responsible for the killing of his brother in 2004. After kidnapping Shin and 15 companions traveling with him, Razik's gunmen summarily executed all of them, shooting at them at close range. All victims were civilians.

[4]The entire description of these killings is based on reports by Aikins (2011) and HRW (2015, 76–77).

3 Deliberate Indiscriminate Killings of Civilians

Article 35 of the Protocol Additional I, which provides the legal framework for the protection of victims of international armed conflicts, prohibits the use of methods of warfare that cause superfluous injury or unnecessary suffering. In that context, the phrase "methods of warfare" generally refers to the way in which weapons are being used during an armed conflict (Sandoz et al. 1987, 621). While Additional Protocol II, which regulates the protection of victims of non-international conflicts, does not include an explicit reference to the obligation to do everything possible to avoid using methods of warfare that would cause superfluous injury and unnecessary suffering, more recent treaty law applicable in non-international armed conflicts does so, for example, the Second Protocol to the Hague Convention for the Protection of Cultural Property (Henckaerts and Doswald-Beck 2005a, 57–58). As Henckaerts and Doswald-Beck (2005a, 58) pointed out, it can be argued that the principle of distinction, which is customary in international and non-international armed conflicts, inherently requires respect for the rule prohibiting methods of warfare that cause superfluous injury and unnecessary suffering. As a result, all belligerent parties involved in a non-international armed conflict are prohibited to use methods of warfare that would cause superfluous injury and unnecessary suffering.

When using the above-mentioned too-broad criteria for determining targets, Afghan pro-government armed groups failed to take all feasible precautions with the intention to choose a method of warfare that would avoid, or at least minimize, civilian casualties. From an international humanitarian law perspective, the above-mentioned categories of individuals targeted by pro-government armed groups were not legitimate military targets. The targeted civilians were neither regular members of insurgent groups nor individuals who temporarily joined an armed group in order to actively participate in hostilities. By employing the too-broad criteria for determining targets that were inconsistent with international humanitarian law, the pro-government groups used a method of warfare that blurred the line dividing legitimate military

targets and civilians, and, as a result, created circumstances for deliberate indiscriminate attacks against civilians—i.e., attacks targeting military objectives and civilians without distinction (Melzer 2009b, 355; Henckaerts and Doswald-Beck 2005a, 40; 2005b, 247–291). First, killings by members of pro-government militias were indiscriminate because they were directed at civilians and not specific military objectives. Second, the killings were indiscriminate because they relied on a method of combat—i.e., targeted killings based on broad target selection criteria—that necessarily led to attacks that could not be directed at specific military objectives. And third, the killings were indiscriminate because they relied on a method of combat the effects of which could not be limited as required by international humanitarian law. For example, the effects of the method of combat used by pro-government armed groups could not be limited as required by the principle of distinction between civilians and combatants.

By refusing to observe the prohibition of indiscriminate attacks, which is recognized as part of customary law (Henckaerts and Doswald-Beck 2005a, 38–39), pro-government militias regularly carried out attacks that violated the laws of armed conflicts.

References

Ahmadi, Nematullah. 2017. "Takhar Residents Complain of Illegal Armed Group's Tyranny." *Tolo News*, August 14. http://www.tolonews.com/afghanistan/takhar-residents-complain-illegal-armed-group%E2%80%99s-tyranny. Accessed on 2 February 2018.

AIHRC (Afghanistan Independent Human Rights Commission). 2012a. *Citizens Access to Justice.* Kabul: AIHRC. http://www.aihrc.org.af/media/files/AIHRC%20Report%20on%20Decree%2045%20(English)-final.pdf. Accessed on 1 January 2018.

———. 2012b. *From* Arbaki *to Local Police: Today's Challenges and Tomorrow's Concerns.* Kabul: AIHRC. http://www.aihrc.org.af/media/files/Reports/Research/English/Report%20on%20Afghan%20Local%20Police%20(Final%20Draft,%20English).pdf. Accessed on 1 January 2018.

Aikins, Matthieu. 2011. "Our Man in Kandahar." *The Atlantic*, November issue. https://www.theatlantic.com/magazine/archive/2011/11/our-man-in-kandahar/308653/. Accessed on 9 February 2018.

———. 2014. "A US-Backed Militia Runs Amok in Afghanistan." *Al Jazeera*, July 23. http://america.aljazeera.com/articles/2014/7/23/exclusive-a-kill-inginandar.html. Accessed on 1 January 2018.

Bellal, Annyssa, Gilles Giacca, and Stuart Casey-Maslen. 2011. "International Law and Armed Non-State Actors in Afghanistan." *International Review of the Red Cross* 93 (881): 1–33. https://doi.org/10.1017/s1816383111000051.

Cavendish, Julius. 2011a. "CIA Trains Covert Units of Afghans to Continue the Fight Against the Taliban." *The Independent*, July 19. http://www.independent.co.uk/news/world/asia/cia-trains-covert-units-of-afghans-to-continue-the-fight-against-taliban-2317182.html?printService=print. Accessed on 4 February 2018.

———. 2011b. "Afghanistan's Dirty War: Why the Most Feared Man in Bermal District is a U.S. Ally." *Times*, October 4. http://content.time.com/time/world/article/0,8599,2096079,00.html. Accessed on 4 February 2018.

Clark, Kate. 2017a. *CIA-Proxy Militias, CIA-Drones in Afghanistan: 'Hunt and Kill' déjà vu*. Kabul: Afghanistan Analysts Network. https://www.afghanistan-analysts.org/cia-proxy-militias-cia-drones-in-afghanistan-hunt-and-kill-deja-vu/. Accessed on 1 January 2018.

———. 2017b. *More Militias? Part 1: Déjà vu Double Plus with the Proposed 'Afghan Territorial Army'*. Kabul: Afghanistan Analysts Network. https://www.afghanistan-analysts.org/more-militias-part-1-deja-vu-double-plus-with-the-proposed-afghan-territorial-army/. Accessed on 17 January 2018.

Dozier, Kimberly. 2014. "Exclusive: CIA Falls Back in Afghanistan." *The Daily Beast*, May 4. https://www.thedailybeast.com/exclusive-cia-falls-back-in-afghanistan. Accessed on 29 January 2018.

Dirkx, Toon. 2017. "The Unintended Consequences of US Support on Militia Governance in Kunduz Province, Afghanistan." *Civil Wars* 19 (3): 377–401. https://doi.org/10.1080/13698249.2017.1416851.

Dressler, Jeffery. 2011. *Counterinsurgency in Helmand: Progress and Remaining Challenges*. Washington, DC: Institute for the Study of War.

Faizy, Sultan, and Shashank Bengali. 2016. "Afghanistan Tries to Clean Up Its Militias, Both Legal and Illegal." *Los Angeles Times*, October 21. http://www.latimes.com/world/la-fg-afghanistan-militias-snap-story.html. Accessed on 3 February 2017.

Felbab-Brown, Vanda. 2016. "Hurray for Militias? Not So Fast: Lessons from the Afghan Local Police Experience." *Small Wars & Insurgencies* 27 (2): 258–281. https://doi.org/10.1080/09592318.2015.1129169.

Gibbons-Neff, Thomas, Schmitt Eric, and Adam Goldman. 2017. "A Newly Assertive C.I.A. Expands Its Taliban Hunt in Afghanistan." *The New York Times*, October 22. https://www.nytimes.com/2017/10/22/world/asia/cia-expanding-taliban-fight-afghanistan.html. Accessed 2 January 2018.

Goldman, Robert Kogod. 1993. "Americas Watch's Experience in Monitoring Internal Armed Conflicts." *American University Journal of International Law and Policy* 9: 49–94.

Goodhand, Jonathan, and Aziz Hakimi. 2014. *Counterinsurgency, Local Militias and State-Building*. Washington, DC: United States Institute of Peace. https://www.usip.org/sites/default/files/PW90-Counterinsurgency-Local-Militias-and-Statebuilding-in-Afghanistan.pdf. Accessed on 2 January 2018.

Gopal, Anand. 2014. "The Wrong Afghan Friends." *The New York Times*, May 30. https://www.nytimes.com/2014/05/31/opinion/the-wrong-afghan-friends.html. Accessed on 31 January 2018.

Graham-Harrison, Emma. 2013. "Hamid Karzai Seeks to Curb CIA Operations in Afghanistan." *The Guardian*, April 19. https://www.theguardian.com/world/2013/apr/19/hamid-karzai-curb-cia-afghanistan-operations. Accessed on 31 January 2018.

Henckaerts, Jean-Marie, and Louise Doswald-Beck. 2005a. *Customary International Humanitarian Law. Volume 1: Rules*. Cambridge: Cambridge University Press.

———. 2005b. *Customary International Humanitarian Law. Volume 2: Practice—Part I*. Cambridge: Cambridge University Press.

Hewad, Gran. 2012. *For a Handful of Bolani: Kunduz's New Problem with Illegal Militias*. Kabul: Afghanistan Analysts Network. http://www.afghanistan-analysts.org/for-a-handful-of-bolani-kunduzs-new-problem-with-illegal-militias/. Accessed on 2 February 2017.

HRW (Human Rights Watch). 2011. *"Just Don't Call It a Militia": Impunity, Militias, and the "Afghan Local Police."* New York: HRW. https://www.hrw.org/sites/default/files/reports/afghanistan0911webwcover.pdf. Accessed on 24 December 2017.

———. 2015. *"Today We Shall All Die:" Afghanistan's Strongmen and the Legacy of Impunity*. New York: HRW. https://www.hrw.org/sites/default/files/report_pdf/afghanistan0315_4up.pdf. Accessed on 24 December 2017.

Hyland, Tom. 2010. "Our Mate, the Bloody Warlord." *The Sydney Morning Herald*, August 8. http://www.smh.com.au/world/our-mate-the-bloody-warlord-20100807-11pd8.html. Accessed on 5 February 2018.

IRIN. 2015. "Abuses Rise Along with Pro-Afghan Government Militias." *IRIN*, September 7. http://www.irinnews.org/feature/2015/09/07/abuses-rise-along-pro-afghan-government-militias. Accessed on 3 February 2018.

Lefèvre, Mathieu. 2012. *The Afghanistan Public Protection Program and the Local Defense Initiatives*. Kabul: Afghanistan Analysts Network. https://www.afghanistan-analysts.org/wp-content/uploads/downloads/2012/09/11_Lefevre_The_AP3_and_the_LDI.pdf. Accessed on 24 March 2018.

Loyd, Anthony. 2008. "Former Drug Lord Koka Is NATO's New Poster Boy and Police Chief." *The Times*, July 11. http://www.thetimes.co.uk/tto/news/world/asia/article2608863.ece. Accessed on 5 February 2018.

Melzer, Nils. 2009a. *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*. Geneva: International Committee of the Red Cross.

———. 2009b. *Targeted Killing and International Law*. Oxford: Oxford University Press.

Nordland, Rod. 2017. "In Afghanistan, a Destructive 'Game of Thrones'." *The New York Times*, August 18. https://www.nytimes.com/2017/08/18/world/asia/in-afghanistan-a-destructive-game-of-thrones.html. Accessed on 5 February 2018.

Raghavan, Sudarsan. 2015. "CIA Runs Shadow War with Afghan Militia Implicated in Civilian Killings." *The Washington Post*, December 3. https://www.washingtonpost.com/world/cia-backed-afghan-militias-fight-a-shadow-war/2015/12/02/fe5a0526-913f-11e5-befa-99ceebcbb272_story.html?utm_term=.5a2299950b77. Accessed on 24 December 2017.

Rassmusen, Sune Engel. 2016. "Afghanistan Funds Abusive Militias as US Military 'Ignores' Situation, Officials Say." *Guardian*, December 26. https://www.theguardian.com/world/2016/dec/26/afghanistan-us-military-militia-funding-human-rights. Accessed on 2 February 2018.

Reuter, Christoph. 2009. "The Warlord of the Highway." *Vice*, November 2. https://www.vice.com/en_us/article/ppzb8z/warlord-of-the-highway-226-v16n11. Accessed on 5 February 2018.

Rogers, A. P. V. 2004. *Law on the Battlefield* (2nd edition). Manchester: Manchester University.

Rubin, Alissa J., and Sangar Rahimi. 2012. "Afghan Officials Cite Revenge Killings in Latest Outbreak of Ethnic Hatred." *The New York Times*, August 3. http://www.nytimes.com/2012/08/04/world/asia/9-afghans-killed-in-latest-ethnic-violence.html. Accessed on 22 March 2018.

Sandoz, Yves, Swinarski, Christophe, and Bruno Zimmermann, eds. 1987. *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*. Geneva: ICRC/Martinus Nijhoff.

Sarfraz, Abdul Matin, and Rod Nordland. 2012. "Afghans Protest Vengeful Militias." *The New York Times*, September 2. http://www.nytimes.com/2012/09/03/world/asia/afghan-villagers-protest-vengeful-militias.html. Accessed on 10 February 2018.

Sassòli, Marco. 2010. "Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law." *Journal of International Humanitarian Legal Studies* 1 (1): 5–51. https://doi.org/10.1163/187815210x12766020139767.

Schmeidl, Susanne, and Masood Karokhail. 2009. "The Role of Non-State Actors in 'Community-Based Policing'—An Exploration of the Arbakai (Tribal Police) in South-Eastern Afghanistan." *Contemporary Security Policy* 30 (2): 318–342. https://doi.org/10.1080/13523260903060193.

TLO (Tribal Liaison Office). 2008. *Land Based Conflict in Afghanistan: The Case of Paktia*. Kabul: TLO. http://www.tloafghanistan.org/Land%20Based%20Conflict%20in%20Paktia%20(2008).pdf. Accessed on 16 April 2018.

UNAMA (United Nations Assistance Mission in Afghanistan). 2013. *Afghanistan Mid-year Report 2013: Protection of Civilians in Armed Conflict.* Kabul: UNAMA. https://unama.unmissions.org/sites/default/files/2013_mid-year_report_eng.pdf. Accessed on 16 April 2018.

———. 2014a. *Afghanistan Annual Report 2013: Protection of Civilians in Armed Conflict.* Kabul: UNAMA. https://unama.unmissions.org/sites/default/files/feb_8_2014_poc-report_2013-full-report-eng.pdf. Accessed on 3 February 2018.

———. 2014b. *Afghanistan Midyear Report 2014: Protection of Civilians in Armed Conflict.* Kabul: UNAMA. https://unama.unmissions.org/sites/default/files/english20edited20light.pdf. Accessed on 12 December 2017.

———. 2015a. *Afghanistan Annual Report 2014: Protection of Civilians in Armed Conflict.* Kabul: UNAMA. https://unama.unmissions.org/sites/default/files/2014-annual-report-on-protection-of-civilians-final.pdf. Accessed on 12 December 2017.

———. 2015b. *Afghanistan Mid-year Report 2015: Protection of Civilians in Armed Conflict.* Kabul: UNAMA. https://unama.unmissions.org/sites/default/files/unama_protection_of_civilians_armed_conflict_midyear_report_2015_final_august.pdf. Accessed on 11 April 2018.

———. 2016a. *Afghanistan Annual Report 2015: Protection of Civilians in Armed Conflict.* Kabul: UNAMA. https://unama.unmissions.org/sites/default/files/poc_annual_report_2015_final_14_feb_2016.pdf. Accessed on 12 December 2017.

———. 2016b. *Afghanistan Midyear Report 2016: Protection of Civilians in Armed Conflict*. Kabul: UNAMA. https://unama.unmissions.org/sites/default/files/protection_of_civilians_in_armed_conflict_midyear_report_2016_final_rev.1-9sept.pdf. Accessed on 19 March 2018.

———. 2017. *Afghanistan Midyear Report 2017: Protection of Civilians in Armed Conflict*. Kabul: UNAMA. https://unama.unmissions.org/sites/default/files/protection_of_civilians_in_armed_conflict_midyear_report_2017_july_2017.pdf. Accessed on 12 December 2017.

———. 2018. *Afghanistan Annual Report 2017: Protection of Civilians in Armed Conflict.* Kabul: UNAMA. https://unama.unmissions.org/sites/default/files/afghanistan_protection_of_civilians_annual_report_2017_final_6_march.pdf. Accessed on 15 March 2018.

United States Congress House Committee on Oversight and Government Reform. Subcommittee on National Security and Foreign Affair. 2010. *Warlord, Inc: Extortion and Corruption Along the US Supply Chain in Afghanistan*. US House of Representatives. https://www.cbsnews.com/htdocs/pdf/HNT_Report.pdf. Accessed on 5 February 2018.

Van Bijlert, Martine. 2013. *Security at the Fringes: The Case of Shujai in Khas Oruzghan*. Kabul: Afghanistan Analyst Network. https://www.afghanistan-analysts.org/security-at-the-fringes-the-case-of-shujai-in-khas-uruzgan/. Accessed on 31 January 2018.

Wilder, Andrew. 2007. *Cops or Robbers? The Struggle to Reform the Afghan National Police*. Kabul: Afghanistan Research and Evaluation Unit. https://www.ecoi.net/en/file/local/1222549/432_1186393076_cops-or-robbers-reforming-the-anp-ip-1.pdf. Accessed on 21 March 2018.

Woodward, Bob. 2010. *Obama's Wars*. New York: Simon & Schuster.

Part II

The Pakistani Security Forces

7

The "White Detainees": Civilian Victims of Arbitrary Detentions in Pakistan

1 Introduction

A gaunt, dark-haired 30-year-old man from Istanbul, who for fear of reprisals from the Pakistani authorities wanted to speak on condition of anonymity, shyly stared at the floor in front of him. After dropping out of medical college in 2009, he said, he decided to join the holy war against the U.S.-led military coalition in Afghanistan. In order to join the Taliban under Mullah Omar's command, he first traveled to Pakistan to meet his contacts among the insurgency who were supposed to help him get across the border into Afghanistan. At the very beginning of his journey, only two weeks after arriving in Pakistan, he was arrested in South Waziristan. "I was on a bus. The police stopped us. They arrested me because I was a foreigner. I didn't have the permission to go to the tribal areas," he recalled. The tribal areas were off-limits for foreigners. In theory, it was possible to go there with permission from the Pakistani authorities, but, in practice, almost nobody received such permission. The Pakistani authorities, therefore, arrested foreigners who illegally entered the tribal areas, presupposing they were members or supporters of the insurgency.

V. Badalič, *The War Against Civilians*, Palgrave Studies in Victims and Victimology,
https://doi.org/10.1007/978-3-030-12406-9_7

After being captured, the would-be jihadi was not charged and brought to court. Those who detained him had no evidence he was really an insurgent. The only minor offense he could have been charged with was that he had entered the tribal areas without permission from the Pakistani authorities. Although he was never found guilty of participating in "terrorist" activities, the Pakistani army illegally held him for about a year in one of its secret detention facilities, without allowing him to get in contact with his parents and relatives, without providing him access to legal assistance, without giving him the opportunity to challenge the lawfulness of detention before an impartial and independent tribunal.

After he was released, it was extremely difficult for him to recount the details of the ordeal he went through while in prison. He was set free only a week before I met him, and the memories of the abusive and humiliating treatment he received in prison were still too vivid. With his head slightly bent down, his eyes fixed to the floor, he slowly spoke. "I was in a prison cell that was smaller than that toilet room," he said, pointing his index finger toward the toilet room, of about 40 square feet, on his left side. "We were four men in that cell. The cell had no windows. I never knew whether it was day or night. They recorded us with a camera 24/7. We were allowed to take a shower only once a month. When they took us to the bathroom, they gave us only two minutes to shower. We were allowed to go to the toilet only once a day, at twelve o'clock. If we had to go to the toilet at any other hour of the day, we had to use a chamber pot they left for us in the cell. We received food once a day, usually only bread and dirty water." He said he had been tortured during the interrogations, but he declined to talk about the torture techniques used on him. During the interrogations, he said, they sometimes threatened to rape him. What did the interrogators want to know from him? "They asked me why I wanted to join the Taliban. Who were my contacts? Where was I supposed to meet my contacts in South Waziristan?"

After spending about a year in detention, he was finally brought before a judge at the Peshawar High Court. Although he never finished medical college, his defense lawyer claimed in court that he was a physician who came to Pakistan to work for an NGO providing medical

assistance to people in the tribal areas. There was no evidence indicating he was linked to the insurgency, or that he committed any criminal offense, so the judge ordered his release. Despite being still visibly shaken by the treatment he received in detention, he believed he did the right thing when he tried to join the insurgency. "Our faith in Allah makes us strong. Our faith in what Allah promised us makes us strong. He promised us two things. If we win on the battlefield, we'll be the victors. But if we die in battle, we'll also win because we'll go to heaven," he said.

During the "war on terror," arbitrary detentions became a standard method used by the Pakistani security forces in the fight against insurgents and people linked to insurgent groups (AI 2010, 66, 103; 2017, 8–10). Due to the secretive nature of the detention program, which relied on a network of at least 43 interment centers set up in the tribal areas and Khyber-Pakhtunkhwa province (Siddiqui and Walsh 2015), it was not possible to determine exactly how many people were held in detention and how many of them were civilians. In 2009, for example, Major General Athar Abbas, a Pakistani army spokesperson, revealed in a rare public admission that the army held in detention about 900 individuals (Khan 2009). In 2010, the *Washington Post* reported, citing U.S. and Pakistani officials, that about 2500 persons—the vast majority of them Pakistani citizens but also Arabs, Uzbeks and Chechens—were held in special military detention centers (Witte and DeYoung 2010). In 2014, during the peace negotiations between the Pakistani government and Tehreek-e-Taliban Pakistan (TTP), the Pakistani Taliban Movement, the Taliban leadership stated that about 4000 insurgents were held in detention by the Pakistani security forces (Pakistan Taliban 2014).

Although most detainees were insurgents detained during military operations, cases of detentions brought to the courts by family members of the detainees indicated that there were hundreds of civilians held in detention. In June 2012, for example, the Peshawar High Court ordered the release of 1035 male individuals held in custody by the Pakistani authorities. The Peshawar High Court considered those individuals to be "white detainees," that is, individuals not considered to be involved with the Pakistani Taliban Movement or any other insurgent group

(AI 2012, 43).[1] According to the Pakistani Taliban, the Pakistani authorities held in detention about 760 civilians, mostly family members of insurgents, in 2014 (Maulana Yousuf Shah, pers. comm.).

Besides Pakistan's reluctance to provide data on detainees and to allow independent monitoring groups access to its detention facilities, one of the reasons affecting the collection of data was that many families of detainees decided not to report detentions to non-governmental human rights organizations. "People are afraid. They prefer not to talk about it [arbitrary detentions]. I know of a case in which the cousin of a friend of mine had been detained by the intelligence agency [ISI], but his family didn't want to report it," said, in 2010, Ghulam Dastaghir, head of the Peshawar office of the Human Rights Commission of Pakistan (pers. comm.). "Many people believe they will make the army angry if they go public with cases of arbitrary detentions. Many people believe the army will take revenge on them by torturing the detainees. People are also afraid that they will be detained if they speak."

In order to shed light on the impact of the detention program on the civilian population in Pakistan, this chapter aims to examine a range of factors that led to unlawful detentions of civilians. The chapter focuses on administrative detention, that is, a deprivation of liberty ordered by the executive branch, as opposed to the judiciary, without criminal charges being brought against the detained individuals (Pejic 2005, 375). The chapter, therefore, excludes detentions for the purposes of criminal proceedings.

The central part of the chapter is divided into three sections. The first section examines two factors that influenced the selection of targets for detention (e.g., vaguely defined grounds for detention, reliance on faulty intelligence). The second section analyzes how the Pakistani authorities

[1]The Pakistani army divided conflict-related detainees in three categories. In addition to "white detainees," there were "black detainees," individuals considered by the Pakistani authorities to be members of the Taliban or any other insurgent group, and "grey detainees," individuals suspected of being members of the insurgency (Siddique 2013, 394; AI 2012, 43). The three categories of detainees had to wear different clothes in internment centers. The "black detainees" had to wear black clothes, those still under investigation were given blue clothes, while the detainees under a lower level of suspicion had to wear red clothes (AI 2012, 26).

failed to establish procedural standards that would meet the requirements of international human rights law (e.g., detainees were denied the right to challenge the lawfulness of detention in a court of law, they had no access to information about the reasons of detention, no access to legal assistance, and no opportunity to confront the evidence and witnesses used against them). And, finally, the third section of the chapter examines how both the vaguely defined grounds for detention and the inadequate procedural safeguards led to arbitrary detention of civilians.

2 Broad Grounds for Detention

2.1 Vague Criteria for Determining Detainable Individuals

During the "war on terror," the Pakistani military became involved in a non-international armed conflict with a range of insurgent groups (e.g., the TTP and its many splinter groups) that operated throughout its territory, particularly in the tribal areas near the Pakistan-Afghanistan border (Bellal 2017, 29). As a state party to a non-international armed conflict, Pakistan was bound by international humanitarian and human rights law applicable in non-international armed conflicts, including norms governing administrative detention.

International humanitarian law applicable in a non-international armed conflict does not specify the grounds for deprivation of liberty (Sassòli 2015, 58). This chapter, however, adopts the concept of "imperative reasons of security" as the minimum legal standard for making detention decisions in non-international armed conflicts (Dörmann 2012, 356; Debuf 2009, 864). This standard, formulated in Article 78 of the Fourth Geneva Convention (1949), is applicable in international armed conflicts, but it can also be used in non-international conflicts (Pejic 2005, 383). Although there is still no consensus on the exact meaning of the "imperative reasons of security" concept (Debuf 2009, 865), this chapter adopts the view that direct participation in hostilities is an activity that meets that standard (Dörmann 2012, 356). The concept of direct participation in hostilities defines the circumstances under

which civilians lose their protection from military attacks, and, therefore, it is reasonable to argue that individuals taking an active part in hostilities may also be subject to administrative detention (ibid.). By adopting such position, this chapter argues that only two categories of individuals that fall under the definition of direct participation in hostilities—i.e., members of insurgent groups engaged in hostilities and civilians temporarily directly participating in hostilities—may be subject to detention.

In order to see whether the Pakistani authorities adopted the concept of direct participation in hostilities as a standard for making detention decisions, we first need to examine the two laws that provided the legal framework for the detention program. The first law, which was used to manage the Federally Administered Tribal Areas (FATA), was the *Frontier Crimes Regulations 1901* (FCR), a century-old law created by the British Empire to exert control over the restive tribal areas near the Pakistan–Afghanistan border. After gaining independence in 1947, Pakistan continued to use the FCR as the primary formal mechanism for the administration of justice in FATA (Teney-Renaud 2002; ICG 2006, 5–9). The second law was *The Actions (in Aid of Civil Power) Regulations 2011* (AACPR), a new law, passed under the Zardari administration in 2011, that gave the Pakistani military broad authority to arrest and detain alleged members of insurgent groups in both FATA and the Provincially Administered Tribal Areas (PATA), the semi-tribal areas adjacent to FATA (AI 2012, 37–38).

There were two major problems with both laws providing the legal framework for detentions. The first problem was the vague definitions of the grounds for detention. The FCR, for example, gave the Political Agent, the President's official representative in the tribal areas, powers to require surety from anyone "who is likely to do any wrongful act or commit any offense, which may cause breach of peace or disturb the public tranquility." Although the terms "wrongful act" and "any offense" were not clearly defined, those who failed to provide the required security could be deprived of their liberty, at the sole discretion of the Political Agent, for up to two years (AI 2012, 41). In addition, the AACPR (2011) provided the following vaguely defined grounds for detention: any person "who may obstruct actions in aid of civil power in any manner whatsoever," any person who may "strengthen the miscreants' ability to

resist the Armed Forces or any law enforcement agency," and any person who "by any action or attempt may cause a threat to the solidarity, integrity or security of Pakistan." By including in the legislation vague phrases such as "to obstruct in any manner whatsoever" and "strengthen the miscreants' ability to resist" and "any attempt that may cause a threat to the solidarity of Pakistan," the Pakistani authorities failed to formulate what exactly constituted the grounds for detention. It remained unclear which acts of violence fell under the above-mentioned definitions.

By relying on such vague definitions, the Pakistani authorities violated the principle of legality. Under the principle of legality, all prohibitions prescribed by the law must be formulated with sufficient precision so that individuals can regulate their conduct (U.N. Commission on Human Rights 2005, 13). If laws are not formulated with sufficient precision, individuals cannot tell whether their conduct would amount to a crime, and, therefore, they cannot adjust their behavior to avoid committing criminal offenses (U.N. Human Rights Committee 2011, 6).

The second problem with the laws providing the legal framework for detentions was that they included the concept of non-military "support" for the insurgency and the concept of "being linked" to the insurgency as valid reasons for detention. On the one hand, the AACPR defined—in Article 16—as detainable anyone "linked with any private army and an armed group or an insurrectional movement that has expressed hostility against the state of Pakistan, its Armed Forces, officials, civilians and their properties" (AACPR 2011), but it did not provide a precise definition of what does it mean to be "linked with" an insurgent group. On the other hand, the concept of "support" was more clearly defined—it included "spreading literature, delivering speeches electronically or otherwise thus inciting the people in commissioning any offense under any law," granting refuge to "miscreants," and financing insurgents (ibid.).

By formulating vague definitions of detainable individuals, and by introducing the concepts of "support" for the insurgency and "being linked" to the insurgency, the Pakistani authorities ignored the concept of direct participation in hostilities as a key standard in making detention decisions, and, as a result, gave ample room to the Pakistani security forces to create a detention program that targeted not only members of the insurgency but also civilians with no or very limited

connection to insurgents. Based on cases of detentions carried out during the "war on terror," it was evident that the Pakistani security forces relied on the too-broad detention criteria to regularly detain various categories of civilians who did not directly participate in hostilities.

The first category consisted of family members and relatives of insurgents, including children (e.g., brothers, fathers, and sons of members of insurgent groups) (AI 2008, 19–20). According to lawyers who represented families of detainees, there were two reasons why the Pakistani forces detained family members and relatives of insurgents. Abdul Latif Afridi (pers. comm.), a lawyer and politician from Peshawar, explained, in 2010, that one of the reasons was to extract information from detainees about the Pakistani Taliban Movement and other insurgent groups. Mohammed Arif Jan (pers. comm.), a lawyer from Peshawar who represented hundreds of families whose members were detained, said, in 2014, that the Pakistani security forces sometimes detained family members of insurgents because they wanted to use them as a bargaining chip in negotiations in which they tried to compel insurgents to surrender to the authorities. If insurgents surrendered to the Pakistani forces, their family members and relatives were released. Both these reasons for detentions were illegal. It is illegal to use administrative detention for the sole purpose of intelligence gathering (Pejic 2005, 380; Debuf 2009, 865). It is also illegal to detain individuals in order to use them as hostages to put pressure on members of insurgent groups to surrender. According to the ICRC, which defines hostage taking as illegally detaining a person to compel a third party to do something (e.g., surrender to the authorities) as a condition for releasing the hostage, hostage taking is illegal in both international and non-international armed conflicts (ICRC 2002).

The second category of detained civilians consisted of individuals who briefly met with members of insurgent groups. This category of detainees, for example, included tribal elders who carried out negotiations with insurgent groups. "Sometimes a tribe authorizes some of its members to negotiate with the Taliban. They negotiate with the Taliban on how to achieve peace, or they warn them [the Taliban] not to come to the tribe's area because the tribe is ready to fight against them," said Abdul Latif Afridi (pers. comm.). Such meetings with members of insurgent groups were reason enough for the Pakistani security forces

to detain the tribal elders, perceived as being linked to the insurgency. In addition to such cases, there were many more cases of detentions of civilians who briefly came in contact with insurgents. "Once they detained a doctor because he provided medical assistance to Taliban fighters. They also detained a farmer who tended cattle on a farm owned by a Taliban fighter. He was released after four years. For four years, he was not allowed to talk to his family," said lawyer Mohammed Arif Jan (pers. comm.). In another case, added Jan, the security forces detained a hairdresser who provided his services to members of the insurgency.

The third category of civilian detainees consisted of religious leaders and students enrolled in madrasas. In the aftermath of international or domestic terrorist attacks, the Pakistani security forces many times carried out mass detention operations across the country in which they targeted religious leaders and students studying at madrasas perceived to be linked to insurgent groups (AI 2006, 13–14). The security forces' responses to terrorist attacks many times consisted almost exclusively of 'rounding up' dozens, or even hundreds, of suspects believed to be insurgents or, at least, linked to insurgent groups (ibid.). In the aftermath of the terrorist attack in London on 7 July 2005, for example, the Pakistani security forces detained hundreds of people—clerics, students, members of Pakistani Islamist groups—at local madrasas after it emerged that some of the suicide bombers had visited madrasas in Pakistan (ibid.). Many of the arrested people were arbitrarily held in detention without charge or trial (ibid.). In probably one of the largest mass detention operations, carried out after the bomb attack in Lahore on Easter Sunday in March 2016, the security forces again targeted madrasas and initially rounded up 5221 individuals from various parts of Punjab province (Punjab Operation 2016). Almost all of them—5005 individuals—were soon released, while the others remained in custody (ibid.). Detaining hundreds of people in mass detention operations was inconsistent with two key principles of international law. First, by detaining people on the basis of their religious affiliation, the security forces breached the principle of non-discrimination, a key principle of both international humanitarian and human rights law (Pejic 2005, 382). Recognized as a fundamental guarantee by common Article 3 of the Geneva Conventions (1949) and Additional

Protocol II (1977), the principle of non-discrimination prohibits adverse distinction in the application of international humanitarian law founded on race, color, sex, political opinion, religion or belief, or on any other similar criteria. Second, the Pakistani security forces violated the prohibition of *en bloc* detentions. The Pakistani authorities should have made the initial decisions on detentions, and any subsequent decisions to maintain them, on an individual basis in order to avoid making detentions a measure resulting in collective punishment (Pejic 2005, 381–382; Debuf 2009, 865–866). By collectively detaining individuals because of their religious affiliation, the Pakistani security forces failed to make the initial decisions on detentions on an individual basis and thus violated the prohibition of collective punishment.

2.2 Detaining Civilians Based on Faulty Intelligence

In addition to the too-broad detention criteria, there were two other factors that led to detentions of civilians. Both factors included the use of faulty intelligence to detain innocent civilians. The first factor was that individuals close to the Pakistani military, or the police, provided false information to accuse their local rivals of being members of insurgent groups. According to Latif Abdul Afridi (pers. comm.), sometimes individuals who had friends within the army and the police provided false tips because they wanted to use the security forces to help them get rid of their local rivals.

The second factor was that "bounty hunters" seeking rewards promised by the U.S. administration used false information to present captured civilians as members of insurgent groups and then sold them to the U.S. Many members of the Pakistani security forces—i.e., army personnel, policemen, border officials—and private individuals became involved in capturing terror suspects after the U.S. started, in early 2002, to distribute flyers across Pakistan offering rewards for the capture of insurgents (AI 2006, 18–20). One flyer, for example, promised "wealth and power beyond your dreams" to those providing intelligence on members of insurgent groups (Denbeaux and Denbeaux 2006, 1221). The flyer said that "[y]ou can receive millions of dollars helping the anti-Taleban forces catch al-Qaida and Taleban murderers.

This is enough money to take care of your family, your village, your tribe for the rest of your life. Pay for livestock and doctors and school books and housing for all your people" (ibid.). Although the rewards for providing information on the whereabouts of top-level Taliban and al Qaeda commanders reached millions of U.S. dollars, the rewards for low-level members of insurgent groups were usually about U.S. $5000 (AI 2006, 19–20; Berenson 2014). It was the rewards for the rank-and-file members of the insurgency—i.e., individuals who were not known terror suspects facing international arrest warrants—that led to detentions of civilians. The problem was that the determination of the combatant status of the captured individuals many times depended on unreliable evidence provided by the bounty hunters, that is, the people who directly benefited from detentions (AI 2006, 20). Faulty evidence not verified by the U.S. military was in many cases the sole ground for detention, which led to detentions of civilians (ibid.).

3 No Adequate Procedural Safeguards

3.1 No Right to Challenge the Lawfulness of Detention in a Court of Law

Under international humanitarian law, state parties involved in an international armed conflict are allowed to choose whether they will use courts of law or administrative boards for reconsidering the initial decision on detention of civilians (Pejic 2005, 386–387). In a non-international armed conflict, however, state parties are not allowed to rely on administrative boards because they must guarantee detainees the right to challenge the lawfulness of detention in an independent and impartial court of law (Henckaerts and Doswald-Beck 2005, 350–351). The ICCPR states—in Article 9(4)—that "[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful" (U.N. General Assembly 1966). In contrast to the ICCPR, which does not list the right to liberty among non-derogable rights, the jurisprudence of both universal

and regional human rights bodies confirmed that the right to challenge the lawfulness of detention is non-derogable (Pejic 2005, 383).

During the "war on terror," the Pakistani authorities consistently denied detainees the right to challenge the lawfulness of detention in a court of law. Although the Constitution of Pakistan enshrines a range of human rights into domestic law, including the right to challenge the lawfulness of detention, these protections were not enforceable in FATA, nor, after the AACPR was passed during the Zardari administration, in PATA (AI 2012, 37). On the one hand, FATA, which is administered separately from Pakistan's provinces, has long been excluded from the jurisdiction of Pakistan's courts. Under Article 247(7) of the Constitution of Pakistan, the Supreme Court and the provincial High Courts cannot exercise jurisdiction in relation to FATA unless otherwise specified in a parliamentary law. On the other hand, PATA were subject to the jurisdiction of Pakistan's regular court system since 1973, but the AACPR changed that in order to give the military free rein in carrying out counter-terrorism operations in PATA (ICG 2006, 5; AI 2012, 37–38). It did so by invoking Article 245(3) of the Constitution which excludes the high courts from jurisdiction on fundamental rights issues in relation to any area in which the Pakistan military is requested to assist civil power (AI 2012, 38). As a result, in both FATA and PATA the courts were prevented from ruling on the lawfulness of detention of conflict-related detainees.

Instead of providing detainees the right to challenge the lawfulness of detention in a court of law, the Pakistani authorities opted for establishing review boards for revising detention cases. Although both the FCR and the AACPR provided detainees the opportunity to have their cases reconsidered by review boards, serious flaws within the review process prevented detainees from effectively challenging the lawfulness of the detention.[2] One of the flaws was that the review boards were not independent and impartial bodies. The FCR, for example, provided the legal framework for establishing the so-called FATA Tribunal, a final appeal authority with the power to order the release of unlawfully detained

[2]This section examines only the fact that the review boards were not independent and impartial bodies. The other deficiencies are examined below.

individuals, but the Tribunal did not meet the international standards required for an authority to constitute an independent and impartial court (AI 2012, 42–43). Under international human rights law, the requirements that need to be met to constitute an independent and impartial court include guarantees relating to the security of tenure of members of the court and "the conditions governing promotion, transfer, suspension and cessation of their functions, and the actual independence of the judiciary from political interference by the executive branch and the legislature" (U.N. Human Rights Committee 2007, 5). These requirements were not met by the FATA Tribunal. Under the FCR, the chairman and the two members of the FATA Tribunal were directly subjected to the Governor—they did not have security of tenure as they were appointed for only three years or "during the pleasure of the Governor," and on the terms and conditions determined by the Governor.

The AACPR, on the other hand, provided the legal framework for establishing the so-called oversight boards that were authorized to review the case of each detained individual. These oversight boards, which comprised of two civilian and two military officers, were not independent and impartial bodies because they did not have the power to order the release of unlawfully detained individuals, which is a key element of the required independence (Pejic 2005, 387). The ICCPR stipulates—in Article 9(4)—that anyone should have the right to proceedings before a court of law that has the power to order the release of those unlawfully detained (U.N. General Assembly 1966). The oversight boards established under the AACPR did not have the authority to order the release of unlawfully detained individuals because that authority lied with the Provincial Government. The oversight boards were only authorized to prepare reports on cases of detention that were given for consideration to the Provincial Government.

3.2 No Right to Have Access to Information on the Reasons for Detention

Article 9(2) of the ICCPR provides that "[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him" (U.N. General Assembly 1966).

The Pakistani authorities denied detainees the right to be informed of the reasons for detention. Both the FCR and the AACPR did not have any explicit provision requiring the Interning Authority to provide detainees the reasons for detention. Although Article 8(1) of the AACPR stipulated that the Interning Authority "may issue an order of interment," this order, if it was issued, did not have to include a detailed description of the reasons for the detention. The lawyers representing the families of detainees revealed that the only indication that the detainees had been detained under the AACPR was the appearance of their name in detention lists prescribed under the regulations. There was no indication of the legal basis for the arrest, including charges against the detainee (AI 2012, 23). Given that neither the FCR nor the AACPR incorporated the right to be informed on the reasons for detention, the Pakistani authorities systemically violated Article 9(2) of the ICCPR.

3.3 No Right to Have Legal Representation

Although neither humanitarian nor human rights treaty law provides for the right to have access to a defense lawyer for individuals held in administrative detention, human rights soft law and the jurisprudence of human rights bodies provide the grounds to fill that gap (Pejic 2005, 388). For example, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states—in Principle 17—that "a detained person shall be entitled to have the assistance of a legal counsel" (U.N. General Assembly 1988). In addition, the U.N. Human Rights Committee (2007, 10) argued that all accused persons should have a legal counsel of their own choosing.

During the "war on terror," the Pakistani authorities denied conflict-related detainees the right to have a defense lawyer. Neither the FCR nor the AACPR provided detainees the right to have access to legal representation (AI 2012, 46). On the one hand, the FCR contained no provision providing for the right to have access to a legal counsel (ICG 2006, 7). On the other hand, the AACPR, which also lacked a provision providing the right to have a lawyer, only allowed detainees or family members and relatives of the detainees to *request* the Interning Authority to withdraw the

order on internment. Consequently, the lawyers who represented the families of detainees only filed petitions requesting the release of the detainees.

3.4 No Right to Challenge Evidence and Witnesses

Article 14(3) of the ICCPR ensures that a person facing criminal charges should have the opportunity to "examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as the witnesses against him" (U.N. General Assembly 1966). Although the ICCPR does not provide an unlimited right to obtain the attendance of all witnesses requested by the accused, a violation of the right to a fair trial may result if the attendance of a witness is requested and refused (U.N. Human Rights Committee 1992; CTITF 2014, 33).

In Pakistan, both the FCR and the AACPR denied detainees the right to confront the evidence and witnesses used against them (AI 2012, 46). Under the FCR, detainees were not allowed to present material evidence or cross-examine witnesses used against them (ICG 2006, 7). Under the AACPR, detainees were also denied the right to challenge the evidence and witnesses used against them, mainly because any evidence presented by the Interning Authority or any of its officials was already "deemed sufficient to prove the facts in issue or the relevant facts" (AACPR 2011). In other words, due to the assumption that the evidence presented by Pakistani officials was conclusive about the facts that served as the basis for detention, the detainees were denied the right to challenge the evidence and witnesses used against them.

4 The Institutionalization of Arbitrary Detentions

Not unlike the U.S. military deployed on the Afghan side of the Durand line, the Pakistani military created an arbitrary detention program that was based on the suspension of specific human rights. By using the practices examined above, the Pakistani authorities systemically violated the

prohibition of arbitrary detention, a norm of customary international law (Henckaerts and Doswald-Beck 2005, 344). Both international humanitarian law and human rights law insist that two basic standards have to be met in order to avoid arbitrary detention: first, the grounds for detention must be based on security needs, and second, the detaining power has to adopt the procedural safeguards needed to prevent arbitrary detentions (ibid.). The procedural requirements include the obligation to inform detainees of the reasons for detention and the obligation to bring detainees promptly before a judge where they have to be given the opportunity to challenge the lawfulness of detention (Henckaerts and Doswald-Beck 2005, 349).

During the "war on terror," the Pakistani authorities failed to meet those two standards, and thus paved the way for the creation of an arbitrary detention program. On the one hand, the Pakistani authorities formulated too-broad detention criteria, with vague definitions of insurgents and those supporting them, which led to detentions of civilians not participating in hostilities. On the other hand, successive Pakistani governments failed to create a legal framework that would meet procedural requirements needed to avoid arbitrary detentions. Under both the FCR and the AACPR, detainees were not provided with due process of law. When detained, individuals were not informed of the reason for detention and they were not brought promptly before a judge where they could challenge the lawfulness of detention. Detainees were not allowed to have access to legal representation nor they were given the opportunity to challenge the evidence and witnesses used against them.

References

Actions (in Aid of Civil Power) Regulations 2011 (AACPR). http://www.isj.org.pk/the-actions-in-aid-of-civil-power-regulation-2011/. Accessed on 7 June 2018.

AI (Amnesty International). 2006. *Pakistan: Human Rights Ignored in the "War on Terror."* London: AI Publications. https://www.amnesty.org/en/documents/ASA33/036/2006/en/. Accessed on 30 May 2018.

———. 2008. *Denying the Undeniable: Enforced Disappearances in Pakistan.* AI Publications. https://www.amnesty.org/download/Documents/ASA330182008ENGLISH.pdf. Accessed on 12 June 2018.

———. 2010. *"As if Hell Fell on Me": The Human Rights Crisis in Northwest Pakistan*. London: AI Publications. https://www.amnesty.org/en/documents/asa33/004/2010/en/. Accessed on 1 June 2018.

———. 2012. *"The Hands of Cruelty": Abuses by Armed Forces and Taliban in Pakistan's Tribal Areas*. London: AI Publications. https://www.amnesty.org/en/documents/asa33/019/2012/en/. Accessed on 25 May 2018.

———. 2017. *Pakistan: Widespread Human Rights Violations Continue: Amnesty International Submission for the UN Universal Periodic Review, 28th Session of the UPR Working Group.* London: AI Publications. https://www.ecoi.net/en/file/local/1403989/1226_1500446246_asa3365132017english.pdf. Accessed on 10 June 2018.

Bellal, Annyssa. 2017. *The War Report: Armed Conflicts in 2016*. Geneva: The Geneva Academy of International Humanitarian Law and Human Rights. https://www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202016.pdf. Accessed on 1 June 2018.

Berenson, Tessa. 2014. "Top 10 Rewards for Terrorists." *The Times*, June 17. http://time.com/2890054/terrorist-rewards-for-justice/. Accessed on 28 June 2018.

Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949. https://ihl-databases.icrc.org/ihl/WebART/375-590006. Accessed on 28 June 2018.

CTITF (Counter-Terrorism Implementation Task Force). 2014. *Right to a Fair Trial and Due Process in the Context of Countering Terrorism*. New York: CTITF Publication Series. https://www.ohchr.org/EN/newyork/Documents/FairTrial.pdf. Accessed on 3 July 2018.

Debuf, Els, eds. 2009. "Expert Meeting on Procedural Safeguards for Security Detention in Non-international Armed Conflict." *International Review of Human Rights Law* 91 (876): 859–881. https://doi.org/10.1017/s1816383109990543.

Denbeaux, Mark, and Joshua Denbeaux. 2006. "Report of Guantánamo Detainees: A Profile of 517 Detainees Through Analysis of Department of Defense Data." *Seton Hall Law Review* 41 (4): 1211–1229.

Dörmann, Knut. 2012. "Detention in Non-international Armed Conflicts." In *Non-international Armed Conflict in the Twenty-First Century*, edited by Kenneth Watkin and Andrew J. Norris, 347–366. Newport: US Naval War College Press.

Frontier Crimes Regulations 1901 (Amended in 2011) (FCR). http://www.isj.org.pk/the-frontier-crimes-regulations-amended-in-2011/. Accessed on 7 June 2011.

Henckaerts, Jean-Marie, and Louise Doswald-Beck. 2005. *Customary International Humanitarian Law*. *Volume 1: Rules*. Cambridge: Cambridge University Press.

ICG (International Crisis Group). 2006. *Pakistan's Tribal Areas: Appeasing the Militants*. ICG. https://d2071andvip0wj.cloudfront.net/125-pakistan-s-tribal-areas-appeasing-the-militants.pdf. Accessed on 5 June 2018.

ICRC (International Committee of the Red Cross). 2002. "ICRC Position on Hostage-taking." *International Review of the Red Cross* 846. https://www.icrc.org/eng/resources/documents/article/other/5c6cln.htm. Accessed on 24 June 2018.

Khan, Iftikhar A. 2009. "Army Has Nothing to Do with Mass Graves, Says ISPR's DG." *Dawn*, August 19. https://www.dawn.com/news/485190. Accessed on 31 May 2018.

"Pakistan Taliban Sets Tough Terms for Peace." 2014. *Al Jazeera*, February 10. https://www.aljazeera.com/news/asia/2014/02/pakistan-taliban-sets-tough-terms-talks-20142108485710749.html. Accessed on 26 June 2018.

Pejic, Jelena. 2005. "Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence." *International Review of Human Rights Law* 87 (858): 375–391.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II), 8 June 1977. https://ihl-databases.icrc.org/ihl/INTRO/475?OpenDocument. Accessed on 28 June 2018.

"Punjab Operation to be Jointly Conducted by Civil, Military Agencies: Rana Sanaullah." 2016. *The Express Tribune*, March 29. https://tribune.com.pk/story/1074929/punjab-operation-will-include-all-law-enforcement-agencies-rana-sanaullah/. Accessed on 24 June 2018.

Sassòli, Marco. 2015. "Legal Framework for Detention by States in Non-international Armed Conflict." *Collegium* 45: 51–65.

Siddique, Osama. 2013. *Pakistan's Experience with Formal Law: An Alien Justice*. Cambridge: Cambridge University Press.

Siddiqui, Taha, and Declan Walsh. 2015. "In Pakistan, Detainees Are Vanishing in Covert Jails." *The New York Times*, July 25. https://www.nytimes.com/2015/07/26/world/asia/detainees-vanish-in-secretive-facilities-as-pakistan-fights-taliban.html. Accessed on 10 June 2018.

Teney-Renaud, François. 2002. "Post-colonial Pluralism, Human Rights and the Administration of Criminal Justice in the Federally Administered Tribal Areas of Pakistan." *Singapore Journal of Comparative and International Law* 6: 541–596.

U.N. Commission on Human Rights. 2005. Promotion and Protection of Human Rights, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Martin Scheinin, E/CN.4/2006/98. https://undocs.org/E/CN.4/2006/98. Accessed on 17 June 2018.

U.N. General Assembly. 1966. *International Covenant on Civil and Political Rights*. Adopted by the General Assembly of the United Nations on 19 December 1966. https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf. Accessed on 8 May 2018.

———. 1988. *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*. Adopted by General Assembly Resolution 43/173 of 9 December 1988. http://www.ohchr.org/Documents/ProfessionalInterest/bodyprinciples.pdf. Accessed on 14 May 2018.

U.N. Human Rights Committee. 1992. *Gordon v. Jamaica*, Communication No. 237/1987, UN Doc CCPR/C/46/D/237/1987. http://hrlibrary.umn.edu/undocs/html/dec237.htm. Accessed on 3 July 2018.

———. 2007. General Comment No. 32: Article 14: Right to Equality Before Courts and Tribunals and to Fair Trial, CCPR/C/GC/32 (23 August 2007). http://www.refworld.org/docid/478b2b2f2.html. Accessed on 27 June 2017.

———. 2011. General Comment No. 34: Article 19: Freedoms of Opinion and Expression, CCPR/C/GC/34 (12 September 2011). http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf. Accessed on 5 June 2018.

Witte, Griff, and Karen DeYoung. 2010. "Pakistan Holding Thousands in Indefinite Detention, Officials Say." *Washington Post*, April 22. http://www.washingtonpost.com/wp-dyn/content/article/2010/04/21/AR2010042102658.html. Accessed on 1 June 2018.

8

The "Disappeared": Civilian Victims of Enforced Disappearances in Pakistan

1 Introduction

"This is my brother Irshad. He was detained on 20 February 2012," said Hanifullah, holding in his hands a picture of his 24-year-old brother (pers. comm.). It was August 2014. We were standing in front of the Peshawar High Court, where Hanifullah, a resident of Bajaur district, pleaded with court officials to help him find his brother who "disappeared" while being held in custody by the Pakistani security forces.

Why did the Pakistani forces detain Irshad? About five months before being detained, Irshad traveled with his mother and sister to Afghanistan. He took his sister to Afghanistan because she was going to get married to a Taliban fighter. After spending six days in Afghanistan, Irshad and his mother returned home, while his newly wed sister stayed with her husband in Afghanistan. "When my mother and Irshad came back to Pakistan, they arrested him," explained Hanifullah. Although his brother, Hanifullah claimed, never joined any insurgent group, he was detained because of their family's link to a member of the Taliban. Who detained Irshad? Where and how did they detain him? "A member of the Frontier Corps called my brother. He told my brother to

V. Badalič, *The War Against Civilians*, Palgrave Studies in Victims and Victimology,
https://doi.org/10.1007/978-3-030-12406-9_8

come to them to paint the bungalow of a Frontier Corps' commander. My brother is a painter. When he got there, they detained him," said Hanifullah and showed me a paper with the names and ranks of those he claimed were responsible for detaining his brother. The three members of the Frontier Corps who allegedly arrested Hanifullah's brother were sepoy Islamuddin, subedar Nawal Ali and subedar Amin.

For roughly a year and a half, the Frontier Corps unlawfully kept Irshad locked in a detention facility in Khar, the largest city in Bajaur. While being held in detention, he was not charged with any crime and brought to court. He was not allowed to see a lawyer. He was, however, allowed from time to time to communicate with his brother Hanifullah. "We spoke a few times over the phone. He said he had been beaten. He said they wanted to force him to sign a confession to admit that he helped murder some people. In that period of time, I often visited Frontier Corps officials and pleaded with them for the release of my brother. I once went to see them with tribal elders who vouched for my brother's innocence. Frontier Corps officials promised many times to release my brother," said Hanifullah. But instead of releasing him, Frontier Corps' officers one day simply said that Irshad was not in their custody. Irshad "disappeared." From then on, Hanifullah received no information about his brother. He did not know his brother's whereabouts. He did not know whether he was still alive.

It was after Pakistan decided to join the U.S.-led "war on terror" that the incidence of enforced disappearances significantly increased across the country (Shafiq 2013, 389). Under the pretext of fighting against terrorists, the Pakistani security forces detained hundreds of individuals—most of them Pakistani citizens but also foreign nationals—who "disappeared" while being held in detention (AI 2006, 8–9; 2008, 10; HRW 2014b). Without access to defense lawyers, family members and courts of law, the "disappeared" were held in secret places of detention run by various branches of the Pakistani state's security apparatus (AI 2008, 10). The main perpetrators of such abuses were the Pakistani military and its two intelligence agencies (the Inter-Services Intelligence Directorate and the Military Intelligence), assisted by the police, the Interior Ministry-run Intelligence Bureau and the Frontier Corps, a paramilitary force operating in the western provinces

of Baluchistan and Khyber Pakhtunkhwa (AI 2008, 10; HRW 2011, 25; ICG 2014, 21–22). The targets of enforced disappearances were not only individuals allegedly members of, or linked to, the Pakistani Taliban or other insurgent groups, but also other opponents of the government, in particular political activists, human rights defenders and lawyers of Baluch and Sindhi ethnic groups involved in the struggle for greater autonomy and rights for their communities (AI 2008, 10; HRW 2011, 2014b; AHRC 2013, 2–3). The list of the "disappeared" also included journalists, researchers, and social workers (FH 2015). Enforced disappearances—most often of men and boys—thus regularly occurred throughout Pakistan, mostly in the provinces of Baluchistan and Khyber-Pakhtunkhwa, but also in Punjab and Sindh (HRCP 2014, 69–70; HRW 2014b; Ijaz 2015).

Due to the refusal by Pakistani authorities to provide data on enforced disappearances, and the threats by members of the security forces to the families of the "disappeared" not to report the disappearances of their loved ones, it was not possible to determine exactly how many people were subjected to enforced disappearances (AI 2008, 8).[1] The various lists of "disappeared" individuals compiled by human rights groups consisted of only those individuals whose families had been brave enough to publicly expose themselves. According to Amina Masood Janjua from the Defense of Human Rights Pakistan, a Rawalpindi-based human rights non-governmental organization, about 2300 people "disappeared" in Pakistani detention facilities from 2001 to mid-2015 (pers. comm.). She said, in 2015, that most of the people on the list had been detained during counter-terrorism operations conducted in the tribal areas alongside the border with Afghanistan.

[1]The Pakistani authorities rarely issued statements on the "disappeared." During the Musharraf regime, the authorities denied that individuals were subjected to enforced disappearances. In 2007, President Musharraf rejected the allegation that hundreds of individuals "disappeared" after being detained by Pakistani security forces (Khattak 2007). Musharraf claimed that many of those who "disappeared" were actually recruited by insurgent groups (ibid.). In one of the rare public statements by Pakistani officials, made in July 2013, Pakistan's new Attorney General, Munir Malik informed the Pakistani Supreme Court that over 500 "disappeared" persons were being held in custody by security agencies (Omer 2013). That revelation came after security agencies had for years denied involvement in enforced disappearances (ibid.).

"The number [of the 'disappeared'] is constantly increasing. The list includes people from all four provinces, but most of them come from Khyber-Pakhtunkhwa and Punjab. The majority of them, a little less than half of them, come from Khyber-Pakhtunkhwa and the tribal areas," said Janjua (pers. comm.). According to the Asian Legal Resource Center (ALRC), the total number of enforced disappearances was much higher. In 2014, ALRC reported that conservative estimates indicate that the number of the "disappeared" in Baluchistan province was between 10,000 and 15,000 (ALRC 2014).

This chapter explores the impact of enforced disappearances on the civilian population in Pakistan.[2] Drawing on the International Convention for the Protection of all Persons from Enforced Disappearance (ICPPED), the chapter adopts the definition of enforced disappearance as any form of deprivation of liberty (e.g., arrest, detention, or abduction) by the state or by individuals acting with the authorization or acquiescence of the state, "followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law" (U.N. General Assembly 2007). In order to examine Pakistan's program of enforced disappearances, the central part of the chapter is divided into three sections. The first section explores two key elements of enforced disappearances—i.e., the concealment of the fate or whereabouts of the "disappeared" and their exclusion from the protection of the law. The section examines the measures used by Pakistani authorities to conceal the fate or whereabouts of the "disappeared" (e.g., not registering detainees; locking detainees in secret detention facilities; frequently transferring detainees between secret detention facilities…). Also, the section provides an analysis of how enforced disappearances violated a range of human rights enshrined in international and Pakistani law (e.g., the right to life, freedom, and personal safety, the right not to be arbitrarily detained or arrested, and the right to a just and fair trial). The second section of the chapter examines the deaths of detainees who "disappeared" while being held in

[2]The examination of factors that led to detentions of civilians is provided in Chapter 7.

custody by the Pakistani authorities. Based on the examination of how the deaths occurred and how the detaining authorities refused to investigate them, the section argues that such deaths should be regarded as prima facie arbitrary executions. The last, third section examines how the Pakistani authorities failed to respond to the continuing abuses by the Pakistani armed forces and thus helped foster a culture of impunity.

2 Enforced Disappearances, a Routine Practice

2.1 Concealing the Fate or Whereabouts of the "Disappeared"

The definition of enforced disappearances includes the following two key elements: the refusal by agents of the state to acknowledge the deprivation of liberty of the "disappeared," and the concealment of the fate and whereabouts of the "disappeared" (Pérez Solla 2006, 8; Vermeulen 2012, 53). In Pakistan, numerous cases of enforced disappearances indicated that the armed forces and intelligence agencies many times did not refuse to acknowledge the arrest of individuals who later "disappeared" while being held in detention. The security forces many times detained the targeted individuals in crowded public areas, in broad daylight, and in front of multiple eye-witnesses, including family members and relatives of the detainees (AI 2008, 16; HRW 2011, 32). For example, one of the enforced disappearance victims detained in front of witnesses was 31-year-old Azrar Khan from Swat district in north-western Pakistan. He was detained on 21 July 2009 in Saidu Sharif, a town adjacent to Mingora, the largest town in Swat. "They [the police] detained him after the military offensive in spring 2009. We were displaced during the offensive. For a few months, we lived in Mardan. When we returned home, a group of policemen showed up at our house. They demanded from my mother to hand over her son, my brother. They said to her that he was suspected of supporting the Taliban," said Alam Gheer, Azrar Khan's older brother

(pers. comm.). Alam Gheer claimed he knew the names of two of the policemen involved in the arrest of his brother—their names were Shakil and Kifayat, both of them from the Saidu Sharif police station. "They took my brother to the police station where they allowed me to visit him many times," recalled Alam Gheer. But after about two months, the policemen changed their narrative. They started claiming that Azrar Khan was not held in custody. Azrar Khan "disappeared." From then on, Alam Gheer did not receive any new information about the fate of his brother. "We didn't see him again. Mother is always asking about him, but we have no information," he said. Although he filed a petition at the Peshawar High Court to seek help in searching for his brother, nothing happened. When he tried to press charges against the two policemen he claimed were responsible for his brother's detention, he received threats from the police. "They did not want me to press charges against the two policemen. They wanted me to press charges against unknown perpetrators. They tried to force me to do that, but I refused," he said.

Mohammed Arif Jan, a lawyer from Peshawar who represented more than 300 families whose members "disappeared," most of them in Swat district, said that he was able to prove that all these detainees "disappeared" after being taken into custody by the Pakistani security forces (pers. comm.). Based on the data provided by the families of the "disappeared," he confirmed, in an interview in 2014, that in many cases members of the security forces came to the house of the targeted individual during the day and took him away in front of witnesses. Some of the "disappeared" voluntarily went to the police after they found out the police were looking for them. "Those people then disappeared while being held in custody," said Jan (pers. comm.).

Although the Pakistani authorities many times did not try to hide the fact that they captured the victims of enforced disappearances, they did conceal the fate and whereabouts of the "disappeared" when they held them in detention. In order to do that, the Pakistani authorities resorted to a range of tactics. First, the Pakistani authorities refused to provide accurate official registers of the detainees (AI 2006, 8). Under international human rights law and standards, the detaining authorities have to maintain official up-to-date registers and/or records of all detainees

(U.N. General Assembly 1988, 1992, 2007). This rule, which overlaps with the prohibition of enforced disappearances, is a norm of customary international law applicable in both international and non-international armed conflicts (Henckaerts and Doswald-Beck 2005, 439–442). The data contained in registers and/or records of detainees have to be made available to the detainees' family members, their defense lawyers and any other individuals having a legitimate interest in the information unless a wish to the contrary has been manifested by a detainee (U.N. General Assembly 1988, 1992, 2007). In addition, the data must be available to "any judicial or other competent and independent national authority and to any other competent authority entitled under the law of the State concerned or any international legal instrument to which a State concerned is a party, seeking to trace the whereabouts of a detained person" (U.N. General Assembly 1992).[3] By refusing to keep records of the detainees and provide the information to the detainees' family members and relatives, their defense lawyers and the judicial authorities, the Pakistani security forces routinely ignored a basic human right guarantee (AI 2006, 8).

Second, Pakistan concealed the whereabouts of detainees by passing a law that allowed the detaining authorities not to disclose the locations of detention facilities where the "disappeared" had been locked up (AI 2008, 15). In 2014, Pakistan's National Assembly passed a law—the Protection of Pakistan Act—that allowed the security forces to withhold information about the whereabouts of detainees. Article 9 of the Protection of Pakistan Act stipulated that the government and the armed forces were allowed to withhold information about the

[3]Article 17 of ICPPED stipulates that the information contained in such registers and/or records must include, as a minimum, the following: the identity of the detainee; the date, time and place where the individual was detained and the identity of the detaining authority; the authority that ordered the detention and the grounds for detention; the authority responsible for supervising the detention; the place of detention, the date and time of admission to the place of detention and the authority responsible for the detention facility; elements relating to the state of health of the detainee; in the event of death during detention, the circumstances and cause of death and the destination of the remains of the detainee; the date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer (U.N. General Assembly 2007).

location of detainees if it was in the interest of the security of Pakistan or in the interest of the security of its personnel or for the safety of the detainees (Protection of Pakistan Act 2014). It is true that the detaining authorities were not allowed to withhold the information from the High Courts and the Supreme Court, but the judges to whom the disclosures were made were expected to treat that information as privileged information in the public interest—i.e., secret information that was legally protected so that it did not have to be given to the public (ibid.). By not disclosing the locations of detention centers, the Pakistani authorities violated the norm prohibiting the use of secret detention centers. Under international human rights law, all detainees should be held in "places officially recognized as places of detention" (U.N. Human Rights Committee 1992). The places of detention should be "kept in registers readily available and accessible to those concerned," including family members, relatives, and friends of the detainees (ibid.).

Third, the Pakistani authorities concealed the whereabouts of the "disappeared" by frequently transferring them between secret detention facilities. By moving the "disappeared" between various secret detention facilities, the authorities made it difficult for the families of the "disappeared" to trace their loved ones (AI 2008, 27–29). When trying to locate the "disappeared," the families of the "disappeared" relied, to a large extent, on the testimonies of persons who had been released after a period of enforced disappearance. After being released, former "disappeared" persons were sometimes able to provide information about the other "disappeared" they met while being held in detention, and thus helped the families to find out the whereabouts of their "disappeared" members (AI 2008, 16). By moving the "disappeared" between detention centers, the detaining authorities made it much more difficult for the families of the "disappeared" to precisely locate the secret places of detention where their loved ones were being kept.

Fourth, the Pakistani authorities tried to conceal enforced disappearances by preventing the families of the "disappeared" from collecting information on the "disappeared." On the one hand, intelligence agencies, and sometimes unidentified individuals, threatened the families of the "disappeared" with repercussions for the "disappeared" and the

families themselves if they pursued seeking their loved ones (AI 2006, 62; 2008, 8). As a result, many families decided not to report cases of enforced disappearances to the judicial authorities, human rights groups and the news media. On the other hand, the Pakistani authorities tried to convince the families not to talk in public about enforced disappearances by assuring them that keeping quiet would be beneficial to the "disappeared." Some families, for example, were contacted by Pakistani intelligence agencies with promises that their loved ones would be released if the families kept quiet (AI 2008, 29; HRCP 2008).

Fifth, when trying to conceal enforced disappearances, the Pakistani authorities did not only target families of the "disappeared" but also the "disappeared" who had been released from detention. Some of the released "disappeared" were threatened by Pakistani state agents with dire consequences if they publicly spoke about what happened to them while being held in detention (AI 2006, 8).

2.2 Placing the "Disappeared" Outside the Protection of the Law

The second key element of the definition of enforced disappearances is the exclusion of the "disappeared" from the protection of the law. By holding individuals *incommunicado* in secret detention facilities, the Pakistani authorities placed the "disappeared" outside of the protection of domestic and international humanitarian and human rights law.

Any act of enforced disappearance represents a grave violation of several human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and further developed in many international instruments in the field of human rights (U.N. General Assembly 1992; ICRC 1981, 319). This section will briefly explore how acts of enforced disappearances committed by the Pakistani authorities violated human rights enshrined in core international human rights treaties and the Constitution of Pakistan (U.N. Human Rights Council 2013, 6–7).

First, by depriving the "disappeared" of liberty and keeping them in prolonged indefinite detention without complying with procedures as

established by law, the Pakistani authorities violated the right to liberty and personal safety (U.N. General Assembly 1948, 1966). The Pakistani authorities also violated Article 9 of the Constitution of Pakistani, which stipulates that "[n]o person shall be deprived of life or liberty save in accordance with law."

Second, the Pakistani authorities denied the "disappeared" the right not to be arbitrarily detained or arrested (U.N. General Assembly 1948, 1966). By not informing the "disappeared" about the grounds of detention, and by not allowing them to challenge the lawfulness of detention in an independent and impartial court of law, the Pakistani authorities violated Article 10(1) of the Constitution, which states that no detainee shall be held in custody without being informed, as soon as possible, of the grounds of detention, nor shall be denied the right to be defended by a lawyer of his choice. In addition, the Pakistani authorities violated Article 10(2) of the Constitution, which provides for the right of detainee to be produced before a magistrate within a period of twenty-four hours after the deprivation of liberty, excluding the time necessary for the journey from the place of arrest to the court of the nearest magistrate. In addition, Article 10(2) states that no detainee shall be held in custody beyond the said period of time without the authority of a magistrate.

Third, by not bringing the "disappeared" in front of a judge, the Pakistani authorities denied them the right to a just and fair trial (U.N. General Assembly 1948, 1966). Article 10A of the Constitution of Pakistan stipulates that any person charged with a criminal offense shall be entitled to a fair trial and due process.

Fourth, the Pakistani authorities denied the "disappeared" the right not to be subjected to torture or any other cruel, inhuman or degrading treatment or punishment (U.N. General Assembly 1948, 1966, 1984). According to the U.N. Human Rights Committee, holding individuals in indefinite detention without allowing them to get in contact with their family members and relatives is a form of cruel, inhuman or degrading treatment (U.N. Human Rights Committee 2003). By committing acts of enforced disappearances, the Pakistani authorities violated Article 14 of the Constitution of Pakistan, which confirms that the dignity of all persons shall be inviolable and prohibits the use of torture.

3 Deaths in Custody

The Pakistani authorities released many individuals subjected to enforced disappearance, in some cases after keeping them in prison for two or three years (AI 2008). Some of the "disappeared" were released on the orders of the interning authorities (AI 2008, 16). Some of the "disappeared" were released after being unlawfully transferred to other countries' custody, mostly the U.S. (ibid.). Some of the "disappeared," including over 100 persons whose families sent petitions to Pakistan's Supreme Court, were released on the orders of the higher judiciary (ibid.). In 2006 and 2007, for example, 186 individuals, all of whom were included in the list of 458 cases of enforced disappearances at the Supreme Court, were either released or they "reappeared" in a known detention center (AI 2008, 6).

Not all "disappeared" made it alive out of secret detention facilities. Throughout the "war on terror," dead bodies of young men, many of them marked with signs of torture and ill-treatment, appeared months or years after the arrests took place (AI 2006, 33–34; 2015, 282–283; AHRC 2014). According to official records, 4557 dead bodies of "missing persons" were recovered across the country between 2010 and 2015, albeit it was unclear how many of them were individuals subjected to enforced disappearance by Pakistan's security forces and intelligence agencies (Malik 2015). The largest number of dead bodies—2600—were recovered in the province of Khyber Pakhtunkhwa, while the second largest number—1299—was recorded in Punjab (ibid.).

Some of the bodies of the "disappeared" were dumped on the streets. In 2012, for example, the Peshawar High Court ordered several times an investigation into more than 100 bodies that were found on the streets of Peshawar, the capital city of Khyber-Pakhtunkhwa province, and in the surrounding areas (AI 2013, 202; U.S. Department of State 2012, 6). Some of the bodies, which were usually found packed in sacks, were the bodies of the "disappeared" whose cases had been brought before the court by their families (U.S. Department of State 2012, 6). In 2013, 180 bodies of "disappeared" persons were dumped on the streets, probably victims of extrajudicial executions carried out in secret detention facilities (AHRC 2013, 3).

In addition to the "disappeared" whose bodies were dumped on the streets, many "disappeared," Pakistani security forces claimed, died of a natural cause while being held in custody. Pakistani military officials claimed that many young insurgents, most of them aged 20–40, died of "cardiac arrest" while in detention. The number of such deaths was truly exceptional. In early June 2014, *The News* reported that over the past years in total 225 individuals died of "cardiac arrest" while being held in detention centers (Two Militants Die in Security Forces' Custody in Swat 2014). When I visited Pakistan in the summer of 2014, such deaths occurred practically every week, with young, previously healthy detainees dying of "cardiac arrest" at an astonishing rate. On 20 July 2014, for example, three alleged insurgents—Inamur Rehman, Fazle Mullah, and Sadiq Shah—died of a "cardiac arrest" in a military prison in Kohat (Three More Militants Die in Custody 2014a). Members of the security forces, who handed the bodies of the deceased to their families for burial, claimed that the victims had been ill for some days before suffering a sudden "cardiac arrest" (ibid.). Less than a week later, on 26 July 2014, Pakistani officials informed the public that two more detainees died of "cardiac arrest" while in custody (Two Militants Die in Custody of Forces in Swat 2014). A few days later, on 2 August 2014, news came of three more detainees dying of "cardiac arrest." Two of them died in a prison in Kohat, while the third victim was locked in a prison in Malakand district (Three More Militants Die in Custody 2014b). On 8 August 2014, two more alleged insurgents—Nisaruddin and Azizullah—died of "cardiac arrest" while held in custody in Swat district. Both men were detained during the military operation in Swat in 2009 (Two More Militants Die of Cardiac Arrest 2014). Pakistani officials, who claimed that both men suffered from a heart disease, handed over the bodies of the victims to their relatives for burial (ibid.). About two weeks later, on 23 August 2014, Pakistani officials revealed that three more alleged insurgents—Niamat Ali, Zaman, and Sher Ali—died of "cardiac arrest" while being held in custody in the internment center in Kohat (Three Militants Die of Cardiac Arrest 2014). The detainees had been arrested during the military operation in Swat in 2009 (ibid.).

"We asked the army why so many cardiac arrests had occurred. The army provided no answers. They [military officers] just said that those people [the detainees] were under pressure. They said those people were weak," said Rahimullah Yusufzai, editor at the Peshawar office of *The News*, in 2014 (pers. comm.). Because *The News* regularly published articles about alleged insurgents dying of "cardiac arrest" while being held in custody, one of their journalists, a local correspondent from Swat, received a warning from the Pakistani military. "The Army was very angry because we published the data. Most of those who died in custody were from Swat. They [military officials] told our correspondent to stop publishing the data," explained Yusufzai.

Given that the Pakistani authorities refused to carry out medical examinations of those who supposedly died of "cardiac arrest," it was not possible to know with certainty what were the actual causes of deaths. The security forces also prevented families of the deceased "disappeared" to conduct autopsies. When members of the security forces called the parents or relatives of a "disappeared" person to come to pick up the body of their loved one, they ordered them to sign papers in which they had to promise not to speak to the news media and not to seek justice in a court of law. "If family members of the victim want to receive the body, they have to sign those papers. All the families sign them because they are too weak to oppose them [the security forces]," said Amina Masood Janjua from the Defense of Human Rights Pakistan (pers. comm.). Due to the pressure from the security forces, she added, many families decided not to report the deaths of the "disappeared," and, therefore, the total number of detainees who died of "cardiac arrest" was probably much higher than the number published in the news media. Mohammed Arif Jan, the lawyer from Peshawar who represented hundreds of families of the "disappeared," agreed that many families refused to talk about deaths in custody because they feared reprisals from the security forces and intelligence agencies. "The families who received the bodies of their beloved ones are too scared to demand an autopsy to find out the cause of death," he said (pers. comm.).

By not conducting medical examinations of those who died in custody, and by not carrying out thorough investigations into the

circumstance of the deaths, the Pakistani authorities were in breach of their international obligations (AI 2012, 17). Under international human rights law, States must take measures to investigate cases of disappeared persons in circumstances that may involve a violation of the right to life (U.N. Human Rights Committee 1982; 2010b, 8). A "death of any kind in custody should be regarded as prima facie a summary or arbitrary execution," and state authorities should conduct "thorough, prompt and impartial investigation to confirm or rebut the presumption, especially when complaints by relatives or other reliable reports suggest unnatural death" (U.N. Human Rights Committee 2010a; AI 2012, 17). A failure to investigate a death of a detained individual to determine whether the State was responsible for unlawfully depriving the individual of his life may give rise to a breach of the International Covenant on Civil and Political Rights (ICCPR) (U.N. Human Rights Committee 2004, 6).

4 The Culture of Impunity

The prohibition of enforced disappearances is recognized as a norm of customary international law applicable both in international and non-international armed conflicts (Henckaerts and Doswald-Beck 2005, 340). By recognizing the norm prohibiting enforced disappearances as a peremptory norm, or jus cogens, the international community agreed that no exceptional circumstances (e.g., an armed conflict or a threat of an armed conflict, internal instability or any other public emergency) may be used as a justification to set aside or suspend this norm (U.N. General Assembly 1992, 2007; U.N. Human Rights Committee 2001; Augusto and Trindade 2012). The Pakistani authorities, therefore, had the duty to adhere to the prohibition of enforced disappearances at all times and in all circumstances.

The Pakistani authorities also had an obligation to ensure that those responsible for enforced disappearance were brought to justice. As Henckaerts and Doswald-Beck (2005, 340) pointed out, there is extensive practice showing that the prohibition of enforced disappearance includes the duty to investigate cases of alleged enforced disappearance.

A failure to bring to justice the perpetrators of violations of the norm prohibiting enforced disappearances could give rise to a breach of the ICCPR (U.N. Human Rights Committee 2004, 6).

Instead of trying to bring those responsible for enforced disappearances to justice, the Pakistani authorities used a range of measures to prevent the judiciary from effectively investigating and prosecuting state officials who committed, ordered, or were accomplices in enforced disappearances. The first measure used by the Pakistani authorities aimed at concealing the identities of state agents involved in enforced disappearances in order to prevent the judiciary from identifying them as suspects. The detaining authorities, for example, frequently transferred the "disappeared" between various secret detention facilities to make it difficult for the judiciary to identify state agents involved in "disappearances" (AI 2008, 15). In addition, the detaining authorities tried to conceal the identities of the perpetrators of enforced disappearances by transferring the "disappeared" to the police before releasing them. As official Supreme Court records and testimonies obtained from the "disappeared" showed, members of the detaining authorities wanted to obscure their identities by transferring the "disappeared" to the custody of other agencies before releasing them (AI 2008, 25). When the police released the "disappeared," it remained unclear which state agency was keeping the "disappeared" in detention.

Second, in many cases of enforced disappearances, the police refused to register First Information Reports (FIR), a document needed to start a police investigation (AI 2006, 65). In some cases, police officers claimed they had no competence to register FIRs because the "disappeared" were captured by the intelligence agencies (ibid.). By not allowing families of the "disappeared" to start police investigations into cases of enforced disappearance, the police not only undermined the families' chances to find their loved ones but also made it more difficult to bring those responsible for the disappearance in front of a judge.

Third, even when the families of the "disappeared" were able to identify the perpetrators of enforced disappearances, it was practically impossible to prosecute them because the Pakistani authorities enacted legislation providing them de facto immunity. By passing the 2014 Protection of Pakistan Act, Pakistan's National Assembly facilitated

enforced disappearances by legitimizing detention at secret detention facilities and providing immunity to state agents responsible for the disappearances. Article 20 of the Protection of Pakistan Act stipulated that members of the police, armed forces or "civil armed forces" acting in aid of civil authority shall not be liable for the "acts done in good faith during the performance of their duties" (HRW 2014a; Protection of Pakistan Act 2014). By providing blanket immunity for abuses by the security forces, the Pakistani authorities violated Article 2(3) of ICCPR, which requires state authorities to provide an effective remedy for any individual whose fundamental rights were violated (HRW 2014b).

By relying on the above-mentioned measures to prevent the judiciary from prosecuting state officials responsible for enforced disappearances, the Pakistani authorities supported the widespread and systematic practice of enforced disappearance, a practice that constitutes a crime against humanity (U.N. General Assembly 2007).

References

AHRC (Asian Human Rights Commission). 2013. *The State of Human Rights in Pakistan, 2013, Country Has Turned into a Killing Field*. Hong Kong: AHRC. http://www.humanrights.asia/resources/hrreport/2013/AHRC-SPR-005-2013.pdf/view. Accessed on 11 July 2018.

———. 2014. "Pakistan: Balochistan—160 Persons Extra Judicially Killed, 510 Disappeared and 50 Decomposed Bodies Were Found During 2013." *AHRC*, January 7. http://www.humanrights.asia/news/ahrc-news/AHRC-STM-007-2014. Accessed on 18 July 2018.

AI (Amnesty International). 2006. *Pakistan: Human Rights Ignored in the "War on Terror"*. London: AI Publications. https://www.amnesty.org/en/documents/ASA33/036/2006/en/. Accessed on 30 May 2018.

———. 2008. *Denying the Undeniable: Enforced Disappearances in Pakistan.* AI Publications. https://www.amnesty.org/download/Documents/ASA330182008ENGLISH.pdf. Accessed on 16 June 2018.

———. 2012. *'The Hands of Cruelty': Abuses by Armed Forces and Taliban in Pakistan's Tribal Areas*. London: AI Publications. https://www.amnesty.org/download/Documents/20000/asa330192012en.pdf. Accessed on 16 June 2018.

———. 2013. *Amnesty International Report 2013*. London: AI Publications. http://files.amnesty.org/air13/AmnestyInternational_AnnualReport2013_complete_en.pdf. Accessed on 5 July 2018.

———. 2015. *Amnesty International Report 2014/15: The State of the World's Human Rights*. London: AI Publications. https://www.amnestyusa.org/pdfs/AIR15_English.PDF. Accessed on 18 July 2018.

ALRC (Asian Legal Resource Center). 2014. *Pakistan: Disappearances*. A Written Statement Submitted to the UN Human Rights Council by the Asian Legal Resource Center. http://alrc.asia/pakistan-disappearances/. Accessed on 16 June 2018.

Augusto, Antônio, and Cançado Trindade. 2012. "Enforced Disappearances of Persons as a Violation of Jus Cogens: The Contribution of the Jurisprudence of the Inter-American Court of Human Rights." *Nordic Journal of International Law* 81 (4): 507–536.

FH (Freedom House). 2015. *Pakistan: Freedom in the World 2015*. https://freedomhouse.org/report/freedom-world/2015/pakistan#.VWwbds_BzGc. Accessed on 14 July 2018.

Henckaerts, Jean-Marie, and Louise Doswald-Beck. 2005. *Customary International Humanitarian Law: Volume 1: Rules*. Cambridge: Cambridge University Press.

HRCP (Human Rights Commission of Pakistan). 2008. *State of Human Rights in 2007*. Lahore: HRCP.

———. 2014. *State of Human Rights in 2013*. Lahore: HRCP. http://www.hrcp-web.org/hrcpweb/report14/AR2013.pdf. Accessed on 17 June 2018.

HRW (Human Rights Watch). 2011. *'We Can Torture, Kill, or Keep You for Years': Enforced Disappearances by Pakistan Security Forces in Balochistan*. New York: HRW Publications. https://www.hrw.org/sites/default/files/reports/pakistan0711WebInside.pdf. Accessed on 12 July 2018.

———. 2014a. *Pakistan: Withdraw Repressive Counterterrorism Law*. HRW, July 3. https://www.hrw.org/news/2014/07/03/pakistan-withdraw-repressive-counterterrorism-law. Accessed on 23 July 2018.

———. 2014b. *Pakistan: Impunity Marks Global Day for Disappeared*. HRW, August 29. https://www.hrw.org/news/2014/08/29/pakistan-impunity-marks-global-day-disappeared. Accessed on 15 June 2018.

ICG (International Crisis Group). 2014. *Policing Urban Violence in Pakistan*. Brussels: ICG Publications.

ICRC (International Committee of the Red Cross). 1981. "Resolutions of the XXIVth International Conference of the Red Cross." *International Review of the Red Cross* 225: 318–345.

Ijaz, Saroop. 2015. "Dispatches: Identifying Pakistan's 'Disappeared.'" *Human Rights Watch*, February 12. https://www.hrw.org/news/2015/02/12/dispatches-identifying-pakistans-disappeared. Accessed on 4 July 2018.

Khattak, Inamullah. 2007. "Jihadi Groups Blamed for Disappearances." *The News*, March 28. https://www.dawn.com/news/239698. Accessed on 6 July 2018.

Malik, Hasnaat. 2015. "Gone Without Trace: SC Urges Joint Efforts to Trace Missing Persons." *The Express Tribune*, February 11. https://tribune.com.pk/story/836387/gone-without-trace-sc-urges-joint-efforts-to-trace-missing-persons/. Accessed on 18 July 2018.

Omer, Reema. 2013. "Justice for the 'Disappeared.'" *Dawn*, July 29. https://www.dawn.com/news/1032711/justice-for-the-disappeared. Accessed on 16 June 2018.

Pérez Solla, Mariá Fernanda. 2006. *Enforced Disappearances in International Human Rights*. Jefferson: McFarland & Company.

Protection of Pakistan Act. 2014. http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=&p_isn=101680&p_classification=01.04. Accessed on 23 July 2018.

Shafiq, Aysha. 2013. "The War on Terror and the Enforced Disappearances in Pakistan." *Human Rights Review* 14 (4): 387–404.

"Three Militants Die of Cardiac Arrest." 2014. *The News*, August 24. https://www.criticalthreats.org/briefs/pakistan-security-brief/pakistan-security-brief-august-25-2014#_edn485789e8720d144af85648464663f06717. Accessed on 6 July 2018.

"Three More Militants Die in Custody." 2014a. *The News*, July 21. https://www.thenews.com.pk/archive/print/639316-three-more-militants-die-in-custody. Accessed on 6 July 2018.

"Three More Militants Die in Custody." 2014b. *The News*, August 3. https://www.criticalthreats.org/briefs/pakistan-security-brief/pakistan-security-brief-august-4-2014. Accessed on 6 July 2018.

"Two More Militants Die of Cardiac Arrest." 2014. *The News*, August 9. https://www.thenews.com.pk/archive/print/639662-two-more-militants-die-of-cardiac-arrest. Accessed on 6 July 2018.

"Two Militants Die in Custody of Forces in Swat." 2014. *The News*, July 27. https://www.criticalthreats.org/briefs/pakistan-security-brief/pakistan-security-brief-july-28-2014#_ftn21. Accessed on 6 July 2018.

"Two Militants Die in Security Forces' Custody in Swat." 2014. *The News*, June 1. https://www.criticalthreats.org/briefs/pakistan-security-brief/pakistan-security-brief-june-2-2014#_edn1961f93f0f9de35f4698f060ee5129249. Accessed on 6 July 2018.

U.N. General Assembly. 1948. *The Universal Declaration of Human Rights*. Adopted and Proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948. https://www.ohchr.org/Documents/Publications/CoreTreatiesen.pdf. Accessed on 9 May 2018.

———. 1966. *International Covenant on Civil and Political Rights*. Adopted by the General Assembly of the United Nations on 19 December 1966. https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf. Accessed on 8 May 2018.

———. 1984. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Adopted and Opened for Signature, Ratification and Accession by General Assembly Resolution 39/46 of 10 December 1984. https://www.ohchr.org/Documents/Publications/CoreTreatiesen.pdf. Accessed on 20 July 2018.

———. 1988. *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment*, A/RES/43/173. http://www.un.org/documents/ga/res/43/a43r173.htm. Accessed on 16 June 2018.

———. 1992. *Declaration on the Protection of All Persons from Enforced Disappearance*, A/RES/47/133. http://www.un.org/documents/ga/res/47/a47r133.htm. Accessed on 16 June 2018.

———. 2007. *International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED)*. https://treaties.un.org/doc/Publication/CTC/Ch_IV_16.pdf. Accessed on 3 July 2018.

U.N. Human Rights Committee. 1982. *CCPR General Comment No. 6: Article 6 (Right to Life)*. http://www.refworld.org/docid/45388400a.html. Accessed on 22 July 2018.

———. 1992. *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*. http://www.refworld.org/docid/453883fb0.html. Accessed on 16 June 2018.

———. 2001. *CCPR General Comment No. 29: Article 4 (Derogations During a State of Emergency)*, CCPR/C/21/Rev.1/Add.11. http://www.refworld.org/docid/453883fd1f.html. Accessed on 19 July 2018.

———. 2003. *Mr. S. Jegatheeswara Sarma v. Sri Lanka*, Communication No. 950/2000, U.N. Doc. CCPR/C/78/D/950/2000 (2003). file:///C:/Users/vasja/Downloads/INTCCPR424237%20(1).pdf. Accessed on 19 July 2018.

———. 2004. *General Comment No. 31 (The Nature of the General Legal Obligation Imposed on States Parties to the Covenant)*, CCPR/C/21/Rev.1/Add.13. http://www.refworld.org/docid/478b26ae2.html. Accessed on 22 July 2018.

———. 2010a. *Olimzhon Eshonov v. Uzbekistan*, Communication No. 1225/2003, U.N. Doc. CCPR/C/99/D/1225/2003 (2010). http://hrlibrary.umn.edu/undocs/1225-2003.html. Accessed on 4 July 2018.

———. 2010b. *Salem Saad Ali Bashasha v. The Libyan Arab Jamahiriya*, Communication No. 1776/2008, U.N. Doc. CCPR/C/100/D/1776/2008. http://www.worldcourts.com/hrc/eng/decisions/2010.10.20_Ali_Bashasha_v_Libya.pdf. Accessed on 22 July 2018.

U.N. Human Rights Council. 2013. *Report of the Working Group on Enforced or Involuntary Disappearances on Its Mission to Pakistan, Addendum: Mission to Pakistan*, A/HRC/22/45/Add. 2. http://www.refworld.org/docid/513715d02.html. Accessed on 5 July 2018.

U.S. Department of State. 2012. *Country Reports on Human Rights Practices for 2012: Pakistan*. https://www.state.gov/documents/organization/204621.pdf. Accessed on 18 July 2018.

Vermeulen, Marthe Lot. 2012. *Enforced Disappearance: Determining State Responsibility Under the International Convention for the Protection of All Persons from Enforced Disappearance*. Cambridge: Intersentia.

9

Death Sentences on Twitter: Civilian Victims of Secret Military Courts in Pakistan

1 Introduction

The Pakistani security forces arrested Maulana Qari Zahir Gul, a religious leader from the tribal area of Bajaur, on 27 April 2011.[1] When he was deprived of liberty, Qari Zahir lived in Jalozai, a camp for internally displaced people located east of Peshawar. He and his family found shelter in Jalozai after fleeing from Bajaur during a military operation against local insurgent groups. After taking Qari Zahir into custody, the security forces refused to inform him about the reason for detention and did not allow him to challenge the lawfulness of detention in an independent and impartial tribunal. He was also not allowed to see his family nor a defense lawyer. The security forces refused to provide his family—his parents, his wife and four children, three sons and a daughter—information about his fate and whereabouts. While being held in custody at an unknown detention facility, Qari Zahir "disappeared."

[1]This account about the detention of Maulana Qari Zahir Gul is based on an interview, carried out in 2015, with Mohammed Ajmal Khan, a lawyer from Peshawar who represented Anwar Bibi, Qari Zahir Gul's mother.

V. Badalič, *The War Against Civilians*, Palgrave Studies in Victims and Victimology,
https://doi.org/10.1007/978-3-030-12406-9_9

In 2012, Qari Zahir's family filed a petition at the Peshawar High Court to request the security forces to disclose the place of detention of their "disappeared" family member. After a long wait, the detaining authority finally allowed them, in July 2014, to visit Qari Zahir. They were allowed to visit him only once. The next time they received information about Qari Zahir was in early April 2015, when they learned that he was sentenced to death by a then newly established secret military court. Qari Zahir's parents, who were illiterate, learned from their friends that their son had been given the death penalty. Their friends discovered what happened to Qari Zahir after seeing a report on military courts in the news media.

Before and during the trial, the Pakistani military did not deem it necessary to provide any information about Qari Zahir's case to his family members. It was only after the trial—on 2 April 2015—that the military informed the public at large about the first sentences, including Qari Zahir's death sentence, awarded by the military court. Major General Asim Salim Bajwa, director-general of the Inter-Services Public Relations (ISPR), the media wing of Pakistan's military, used his Twitter account to relay the news to the public (Kine 2015). The tweet read: "#Mil Courts: Army Chief confirms death sentence of 6 hard-core terrorists tried by the recently established mil courts… Were involved in heinous act of terror, men slaughter, suicide bombing, loss of life and property" (ibid.). The military also disclosed in a short statement that Qari Zahir and five individuals—Noor Saeed, Murad Khan, Inayatullah, Israruddin, and Haider Ali—were given death penalties, while one of the convicts, a man called Abbas, was sentenced to life imprisonment (Yousaf 2015). Although military officials claimed the convicts had been found guilty of various crimes, they did not explain which individual committed a specific crime (ibid.).

The military also refused to show to the public a reasoned judgment providing details about Qari Zahir's case. "We don't know what he was charged with. We don't know where they tried him. We don't know what kind of evidence they presented against him and who were the witnesses used against him. We don't know who represented him in court. We don't know who the prosecutor was," said Mohammed Ajmal Khan (pers. comm.), a defense lawyer from Peshawar who

represented Anwar Bibi, Qari Zahir Gul's mother. On behalf of Anwar Bibi, Mohammed Ajmal filed a petition at the Peshawar High Court against Qari Zahir's conviction, but the court dismissed the plea (Shah 2015; Ali 2015). Another petition seeking to annul the conviction of Qari Zahir was filed by human rights lawyer Asma Jahangir at Pakistan's Supreme Court (Malik 2015b). The petition contended that the military courts violated the defendant's right to a fair trial, including the right to a public hearing, the right to have access to a legal counsel of his choice, and the right to confront the evidence used against him (Malik 2015a). The petition claimed that the military coerced Qari Zahir to confess to a crime he did not commit and recorded his confession illegally (ibid.). The author of the petition also revealed that the military court denied her access to the records of the defendant when she was preparing the appeal (ibid.). In August 2016, the Supreme Court ruled that the petitioner was unable to prove the military violated the constitutional rights of the defendant, and, as a result, upheld the verdict made by the military court (Hashim 2016). After the Supreme Court upheld Qari Zahir's death sentence, it remained unclear whether the military carried out the execution. The military did not provide new information about Qari Zahir's fate.

The secret military courts for trying civilians charged with terrorism-related offenses were established after the 16 December 2014 attack on the Army Public School in Peshawar, claimed by Tehreek-e-Taliban Pakistan (TTP), the Pakistani Taliban Movement (ICJ 2016b). In the aftermath of the attack, in which 148 people had been killed, almost all of them children, the Pakistani government decided to step up its fight against rebel groups operating in the border areas with Afghanistan (Kaphle 2014). Only nine days after the attack, Prime Minister Nawaz Sharif unveiled a new counter-terrorism strategy, the twenty-point National Action Plan (NAP), which included the creation of secret military courts (ICG 2015, 5–7). In early January 2015, Pakistan's National Assembly, the lower house of Pakistan's Parliament, passed with 247 votes—14 more than the required two-thirds majority—a constitutional amendment and an amendment of the Army Act to provide the legal basis for the establishment of military courts (Khan 2015). With public opinion in favor of the new drastic counter-terrorism measure, not

even one member of the National Assembly dared to vote against the two amendments. The political parties opposing the amendments—Pakistan Tehreek-e-Insaf (PTI), Jamaat-e-Islami (JI), and Jamiat Ulema-e-Islam-Fazl (JUI-F)—abstained from voting (ibid.). The Senate, the upper house of Pakistan's Parliament, also voted for the amendment with a solid majority—out of 104 senators, 78 voted for the amendment (ibid.). According to Tahira Abdullah (pers. comm.), a human rights activist from Islamabad, the military put pressure on political parties to vote for the amendments. "The military courts are a new milestone on the path to a silent coup d'état in Pakistan. The military doesn't even have to install a general as president of the country. The military already has all the power it needs," said Tahira Abdullah (pers. comm.).

After President Mamnoon Hussein signed the amendments into law in January 2015, the military courts started to operate with the authority to try any individual who belonged to any terrorist group using "the name of religion or a sect" (The Constitution Act 2015) and committed acts of violence against the government (e.g., attacking military installations, kidnapping for ransom …) or assisted the people who committed such violent acts (ICJ 2016a, 6–7). Both amendments had a "sunset clause" of two years, and, therefore, they ceased to be in effect in early January 2017 (ICJ 2016b). However, in March 2017, Pakistan's Parliament unanimously voted to reinstate military courts for two more years (Shams 2017).

When the government set up the first military courts, a senior government official, speaking on condition of anonymity due to the sensitivity of the issue, explained that around 3000 suspected "jet black terrorists" detained during military operations in Swat, South and North Waziristan, and 300–400 terror suspects being tried at anti-terrorism courts, were to be sent to the military courts (Gishkori 2015). The statement indicated that the military courts were established to try individuals who had been for years arbitrarily detained, and many of them subjected to enforced disappearance, by the Pakistani security forces.

At least eleven military courts were set up across Pakistan (Cheema 2017). From April 2015, when the first convictions were announced, to March 2017, when Pakistan's Parliament voted to reinstate the courts for two more years, military officials acknowledged that the courts

delivered 275 convictions, including 161 death sentences and seven life imprisonment sentences (Hassan 2017; Cheema 2017). In that period, the military carried out at least 17 executions (Hassan 2017).

In order to shed light on the trials of civilians at secret military courts, this chapter explores—in three sections—the following issues. The first section examines how the military courts failed to meet the standards required for independent tribunals. On the one hand, the Pakistani authorities failed to provide institutional independence to military courts (e.g., by keeping the courts within the executive branch of power), while, on the other hand, they also failed to secure the individual independence of judges (e.g., judges were military officers who had no legal training and no security of tenure). In addition to the lack of institutional independence of military courts and the lack of individual independence of judges, which are both necessary to establish fair court proceedings, Pakistan's military courts also failed to meet some other key requirements for a fair trial. The second section of the chapter, therefore, explores which requirements for a fair trial were not met by the military courts (e.g., defendants had no right to a public hearing, no right to be represented by a defense lawyer of their own choice, no right to a written judgment, no right to have their conviction reviewed by a civilian court). The last, third section of the chapter briefly explains how the imposition of the death penalty by the military courts was inconsistent with Pakistan's obligations to protect the right to life.

2 No Access to Independent Courts

All general universal and many regional human rights treaties guarantee the right to a fair hearing in criminal proceedings before an independent and impartial tribunal (OHCHR 2003, 117–118). The Universal Declaration of Human Rights states—in Article 10—that everyone "is entitled in full equality to a fair and public hearing by an *independent* and impartial tribunal [emphasis added]" (U.N. General Assembly 1948). Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR) stipulates that "in the determination of any criminal charge against him, or of his rights and obligations in a suit

of law, everyone shall be entitled to a fair and public hearing by a competent, *independent* and impartial tribunal established by law [emphasis added]" (U.N. General Assembly 1966). The right to be tried by an independent and impartial tribunal is a non-derogable right, that is, "an absolute right that may suffer no exception" (U.N. Human Rights Committee 1992a). This right is therefore applicable at all times in all circumstances and to all courts, whether ordinary or specialized, civilian or military (U.N. Human Rights Committee 2007a, 6).

Although international standards support the idea that the jurisdiction of military courts should be restricted to specifically military offenses committed by members of the armed forces (U.N. Economic and Social Council 2006; U.N. Human Rights Committee 1997a, 4; 2007b, 4), the use of such courts for trying civilians is not explicitly prohibited (U.N. Human Rights Committee 2007a, 6). In exceptional circumstances, when government officials can prove that trials on military courts are justified by objective and serious reasons, governments are allowed to set up military courts for trying civilians (U.N. Human Rights Committee 2007a, 6–7). If such special courts are established, however, they must carry out trials that are in full conformity with the requirements of Article 14 of the ICCPR, including the right to a fair trial by an independent tribunal (ibid.).

The Pakistani authorities were therefore allowed to establish military courts, but they had to ensure the courts were independent. By examining how the military courts lacked both institutional and individual independence, this section aims to show that these courts were not independent.

2.1 No Institutional Independence

The key principle upon which the requirement of judicial independence is based is the separation of powers (U.N. Economic and Social Council 1995, 22). Within the system of separation of powers, the judiciary has to be allowed to operate independently from the two other branches of power, namely the executive branch and the legislature (OHCHR

2003, 120). Although international law does not provide a list of specific measures needed to create the conditions for the institutional independence of the judiciary, it does provide some basic guidelines that should be followed by States (OHCHR 2003, 120–122). For example, governments should provide to the judiciary independence in administrative and financial matters, independence as to decision making (i.e., other institutions have to respect and observe the decisions made by the judiciary), and jurisdictional competence (i.e., the judiciary must have autonomy in the determination of questions of competence) (ibid.).

The Pakistani military courts did not have institutional independence because they were part of the executive branch of power. All judges at the courts were military officers who did not enjoy independence from the military hierarchy and the government (ICJ 2016a, 14). The lack of institutional independence was also visible in the fact that military courts did not have autonomy in the determination of questions of competence. An independent judiciary must have the exclusive authority to decide whether the issues submitted are within its competence as defined by law (OHCHR 2003, 120–122). The Pakistani military courts did not have such authority. It was the Ministry of Interior that had the authority to make the final decision on which cases of individuals charged with terrorism-related offenses had to be referred to the military courts for trial (ICJ 2016a, 10). Officials from the Ministry of Interior examined the list of cases sent to them by provincial apex committees and then decided which cases had to be referred to the military courts (ibid.). The Ministry of Interior did not disclose the criteria being used for the selection of such cases (ibid.).

2.2 No Individual Independence

Another key component of an independent judiciary is the individual independence of judges. In order to establish an independent judiciary, States have to secure the individual independence of judges by using a range of measures, for example, by selecting judges on the basis of their professional qualifications and personal integrity, by providing them long-term security of tenure, adequate remuneration, promotions based

on objective factors, and by establishing independent organs responsible for evaluating unethical behavior (OHCHR 2003, 123–135). We will focus here on two key elements of the concept of individual independence—i.e., the selection procedure for judges and their security of tenure—to show how the Pakistani authorities failed to secure for judges at military courts the needed individual independence.

First, the selection process of individuals for judicial office should be based on the criteria of the candidates' professional qualifications and personal integrity (U.N. General Assembly 1985). Only individuals with "appropriate training or qualifications in law" (ibid.) should be considered for judicial office because any other criteria, for example, their political views and religious beliefs, would compromise the independence of both the judge and the judiciary as such (OHCHR 2003, 123). By appointing military officers as judges at the secret military courts, the Pakistani authorities failed to secure the individual independence of the judges. The military courts consisted of three to five serving members of the armed forces who were not required to have a law degree (ICJ 2016a, 9–10; The Pakistan Army Act 1952). They were not required to have any judicial or legal training (ICJ 2016a, 14).

Second, in order to secure the individual independence of judges, States have to provide them long-term security of tenure. Judges must have "guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists" (U.N. General Assembly 1985). The Pakistani authorities failed to provide security of tenure for judges/military officers appointed to the military courts. Without permanent tenure, the individual independence of those judges was compromised.

3 No Fair Trial Standards

3.1 Denying the Right to a Public Hearing

According to Article 14(1) of the ICCPR, all individuals have the right to a public hearing in both criminal and civil cases (U.N. General Assembly 1966). The courts must provide to the public information on

the time and venue of the hearings and make available a facility for the attendance of interested members of the public, including members of the press (U.N. Human Rights Committee 1990).

Despite recognizing that the right to a public hearing is an important safeguard in the interest of the defendant and the public at large, the international community agreed that in exceptional circumstances the public may not be allowed to attend all or only parts of the trial (OHCHR 2003, 263). The list of legitimate reasons for excluding the public from a hearing includes morals, public order or national security in a democratic society, the interest of the parties' private lives, and situations in which the court establishes that publicity would prejudice the interests of justice (U.N. General Assembly 1966). When a court decides, on the basis of one or more of the above-mentioned reasons, to hold a close, or in camera, hearing, it must be able to prove that the exclusion of the public was necessary and proportionate (CTITF 2014, 19). A court must be able to show that the exclusion of the public was necessary to prevent a serious risk to the administration of justice and that the positive effects of the exclusion outweigh the negative impact on the rights of the parties and the public, for example, the right of the defendant to a fair and public trial (ibid.). Any restriction on the public to attend trials must be assessed on a case-by-case basis (CTITF 2014, 18).

By not disclosing the locations and time of the trials at military courts, the Pakistani military prevented interested members of the public (e.g., family members and relatives of the defendants, human rights groups, local and international journalists, and trial monitors) to attend trials (ICJ 2016a, 15). The procedures for trial of alleged insurgents at military courts followed the procedures of a court-martial as defined by the Pakistan Army Act (ICJ 2016a, 10). Given that the Army Act did not require the military to hold public hearings, the military did not have to guarantee public hearings at the military courts. The military officers at the courts were authorized to hear cases either through a video link or in camera (Raza 2015). By allowing the military to rely on the Army Act as the legal basis for trials against alleged insurgents, the Pakistani government provided to the military *carte blanche* to hold closed hearings. The military was not required to give, on a case-by-case

basis, a reason for excluding the public from a trial and prove that the exclusion was necessary and proportionate. When holding in camera hearings, the military did not have to prove that the exclusion of the public was necessary to prevent a serious risk to the administration of justice and that the positive effects of the exclusion outweighed the negative impact on the rights of the parties and the public. It was true that one of the main arguments used by the Pakistani military to promote the establishment of military courts was that these courts were necessary to provide protection to judges and prosecutors, as well as their families, from attacks of insurgent groups (ICJ 2016a, 8), but such a blanket statement was not sufficient to justify holding in camera hearings at all trials. As we have seen above, any restriction aiming to prevent the public from attending a hearing should be made on a case-by-case basis.

By holding secret trials, the Pakistani military violated the right to a public hearing and the right to be tried by an independent court. According to the U.N. Human Rights Committee (1997b), ad hoc military courts composed of anonymous, or "faceless," judges are not compatible with Article 14 of the ICCPR because they do not guarantee one of the key aspects of a fair trial, namely that the tribunal must be independent. A system of trial by "faceless judges"/military officers, which is predicated on the exclusion of the public from the proceedings, does not guarantee neither the independence nor the impartiality of the judges (ibid.).

3.2 Denying the Right to a Defense Lawyer

The right to legal representation is a key element of a fair trial in criminal cases, particularly in cases in which individuals face charges for which the death penalty may be provided (U.N. General Assembly 1966; U.N. Economic and Social Council 1995). In capital cases, it is required to provide to the accused a defense lawyer of his/her own choice at every stage of the proceedings, including during the preliminary investigation and detention, and the protection provided must be above and beyond the protection afforded in non-capital cases (U.N. Human Rights Committee 2003, 2005).

In Pakistan's secret military courts, the accused were not provided with the adequate assistance of a legal counsel. "The right to choose a lawyer is a constitutionally guaranteed right, but in military courts the accused are not allowed to choose a lawyer. The army appoints them a defense lawyer – a military officer," explained Tahira Abdullah (pers. comm.). She added that military officers, who had no legal training, were not qualified to work as defense lawyers. Moreover, junior military officers/defense lawyers were subordinated to senior military officers/judges, so it was difficult for them to effectively represent the accused.

By not allowing defendants to be represented by a defense lawyer of their own choice, the Pakistani military also violated the defendants' right to equality of arms. The concept of equality of arms, an essential component of a fair trial, means that during proceedings there must be at all times a balance between the prosecution and the defense (U.N. Human Rights Committee 1993). The equality of arms includes, among other things, the right of the defendant to properly instruct his legal representative (U.N. Human Rights Committee 1992c). Consequently, if the defendant is not allowed to have a defense lawyer, his/her right to equality of arms is violated.

3.3 Denying the Right to a Reasoned Judgment

When a secret military court passed judgment on a case, the military refused to provide information about how—i.e., based on what evidence and legal reasoning—the court reached its decision. The information about a decision reached by a military court was always extremely limited. On 13 August 2015, for example, the military announced in a brief statement that General Raheel Sharif, the Pakistani Army's Chief of Staff, approved eight new sentences (ISPR 2015). The military claimed that 7 convicts—Hazrat Ali, Mujeeb ur-Rehman, Sabeel, Maulana Abdus Salam, Taj Mohammed, Ateeq ur-Rehman and Kifayatullah—had been involved in the Taliban attack on the Army Public School in Peshawar in December 2014, while one of the convicts, a man called Muhammad Farhan, had been involved in an

attack on Pakistani soldiers in the city of Karachi (ibid.). Six convicts were allegedly active members of an insurgent group called Toheedwal Jihad Group, one of them, Taj Mohammed, was allegedly a member of the Tehrik-i-Taliban Pakistan, while Muhammad Farhan supposedly belonged to Jaish-e-Muhammad (ibid.). The military claimed that all of them confessed to their crimes. Six of them received a death penalty, while Kifayatullah was sentenced to life imprisonment (ibid.). That was all the information about the trial provided by the military. The brief statement disclosed only the names of the convicts, the crimes they allegedly committed, the names of insurgent groups they were allegedly members of, the claim that they all confessed to their crimes, and the sentences they received. The military provided no detailed explanation about how the court came to its decision.

One of the key elements of a fair trial is a written, reasoned judgment that should include a summary of the evidence and the essential findings of the case and the legal aspects on which the decision reached by the court is based (ICJ 2016a, 16). According to Article 14(1) of the ICCPR, "any judgment rendered in a criminal case or in a suit of law shall be made public" (U.N. General Assembly 1966). There are only a few exceptions where a court is allowed not to make a judgment available to the public (e.g., where the interest of juvenile persons requires so, or the proceedings concern matrimonial disputes or the guardianship of children) (ibid.).

The Pakistani military consistently refused to produce detailed written judgments and provide them to the convicted persons, their families and the public at large (ICJ 2016a, 16). Brief press releases prepared by the military were the only official source of information about trials on military courts (Cheema 2017). Throughout the "war on terror," the short notices provided by the military usually included only the names of the convicts, the names of insurgent groups they allegedly belonged to, short descriptions of the crimes they allegedly committed, information about whether they confessed to their crimes or not, and the sentences they received (Siddiqui 2017; ISPR 2015). The case files of the convicts remained secret (Houreld 2015).

By not providing a written judgment to persons convicted in a military court, the Pakistani authorities also violated the convicts' right to

appeal before a higher tribunal. According to international standards, any convicted person is entitled to receive a written judgment to use it for all instances of appeal (OHCHR 2003, 293–295). The failure to provide a reasoned judgment, however, was not the only reason that prevented convicted persons from exercising the right to have their cases reviewed by a higher tribunal.

3.4 Denying the Right to Appeal to Civilian Courts

Article 14(5) of the ICCPR provides that "everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law" (U.N. General Assembly 1966). A complete judicial review must focus on both the legal and material aspects of the person's conviction and sentence (OHCHR 2003, 306). The review process must, therefore, examine the formal and legal aspects of the conviction, re-evaluate the evidence used against the defendant and the conduct of the trial (U.N. Human Rights Committee 1998, 2000). For the right to appeal to be effectively available, the convicted person is entitled to have access to a written judgment and the transcripts of the trial, and the possibility to re-examine the evidence used against him (OHCHR 2003, 307).

According to the U.N. Economic and Social Council (2006), the authority of military courts should be limited to ruling in the first instance, while recourse procedures, particularly appeals, should be brought before civilian courts. When the Pakistani authorities created military courts, they provided to convicted persons the right to appeal to a military appellate court and the right to a limited review of their cases by civilian courts. Both review processes, however, failed to meet the requirements of a complete review carried out by an independent tribunal. On the one hand, the Pakistan Army Act—in Article 133—allowed convicts to have their cases reviewed at a military appellate court (ICJ 2016a, 15–16). The main problem with this kind of appellate courts was that they were not independent and impartial tribunals—the courts were composed of military officers, and presided over by a senior military officer, who were not required to have any legal

training (ICG 2015, 23; ICJ 2016a, 16). Also, the military officers at the appellate courts were subjected to the military chain of command (ICJ 2016a, 16).

On the other hand, civilian courts were allowed to carry out only a limited review of cases related to military courts. The civilian courts were authorized only to review cases where the actions of the military were either coram non judice (i.e. not in the presence of a judge, before a court that did not have the authority to hear and decide the case in question), mala fide (i.e., the decision made by the military court was made in bad faith) or without proper jurisdiction (ICJ 2016a, 15). As a result, civilian courts did not have the authority to re-examine the evidence used against convicted persons, a key requirement of a complete judicial review (ibid.).

4 Violating the Right to Life

In cases in which a death sentence may be pronounced, there should be no exception to the obligation of courts to observe rigorously all the guarantees for a fair trial set out in Article 14 of the ICCPR (U.N. Human Rights Committee 1992b). To put it differently, the death penalty may only be imposed on the basis of a reasoned judgment made by an independent, impartial, and competent court after a legal process that provides all possible safeguards to ensure a fair trial, in particular those safeguards set out in Article 14 of the ICCPR (U.N. Human Rights Committee 1982; ICJ 2016a, 17; U.N. Human Rights Council 2017, 3). If a death sentence is imposed upon the conclusion of a trial that does not meet the requirements of fairness, the right to life guaranteed under Article 6 of the ICCPR is violated (U.N. Human Rights Committee 1987).

As we have seen above, Pakistan's secret military courts were not independent and failed to provide some key safeguards needed to ensure a fair trial. By imposing death sentences after trials that did not meet many important requirements of fairness (e.g., the defendants were denied the right to a public hearing, the right to have a defense lawyer, the right to a reasoned judgment, and the right to a complete judicial review), the military courts violated the defendants' right to life.

References

Ali, Fawad. 2015. "To Be Hanged Till Death: PHC Upholds Death Sentence of Two Convicted Terrorists by Military Court." *The Express Tribune*, October 15. https://tribune.com.pk/story/972950/to-be-hanged-till-death-phc-upholds-death-sentence-of-two-convicted-terrorists-by-military-court/. Accessed on 26 July 2018.

Cheema, Hasham. 2017. "The Sun Has Set on Pakistan's Military Courts—Here's Why It Should Never Rise Again." *Dawn*, March 6. https://www.dawn.com/news/1306792/the-sun-has-set-on-pakistans-military-courts-heres-why-it-should-never-rise-again. Accessed on 26 July 2018.

CTITF (Counter-Terrorism Implementation Task Force). 2014. *Basic Human Rights Reference Guide: Right to a Fair Trial and Due Process in the Context of Countering Terrorism*. New York: CTITF Publication Series. https://www.ohchr.org/EN/newyork/Documents/FairTrial.pdf. Accessed on 3 July 2018.

Gishkori, Zahid. 2015. "Speedy Trial: Military Courts to Try Nearly 3400 Terrorists." *The Express Tribune*, January 8. http://tribune.com.pk/story/818571/speedy-trial-military-courts-to-try-nearly-3400-terrorists/. Accessed on 24 July 2018.

Hashim, Asad. 2016. "Pakistan Supreme Court Dismisses Civilian Appeals Against Military Convictions." *Dawn*, August 29. https://www.reuters.com/article/us-pakistan-military-court-idUSKCN1140O4. Accessed on 25 July 2018.

Hassan, Syed Raza. 2017. "Pakistan's Parliament Votes to Reinstate Secret Military Courts." *Reuters*, March 21. https://www.reuters.com/article/us-pakistan-military-court-idUSKBN16S2CC. Accessed on 26 June 2018.

Houreld, Katherine. 2015. "Militants in Minority in Pakistan Execution Drive, Deterrent Effect Debated." *Reuters*, July 26. http://www.reuters.com/article/2015/07/27/us-pakistan-executions-insight-idUSKCN0Q00W420150727. Accessed on 25 June 2018.

International Commission of Jurists (ICJ). 2016a. *Military Injustice in Pakistan: A Briefing Paper.* Geneva: ICJ. https://www.icj.org/wp-content/uploads/2016/06/Pakistan-Military-court-Advocacy-Analysis-brief-2016-ENG.pdf. Accessed on 24 July 2018.

———. 2016b. *Military Injustice in Pakistan: Questions and Answers.* Geneva: ICJ. https://www.icj.org/wp-content/uploads/2016/12/Pakistan-military-courts-QA-Advocacy-2016-ENG.pdf. Accessed on 26 July 2018.

International Crisis Group (ICG). 2015. *Revisiting Counter-Terrorism Strategies in Pakistan: Opportunities and Pitfalls*. Brussels: ICG. https://d2071andvip0wj.cloudfront.net/271-revisiting-counter-terrorism-strategies-in-pakistan-opportunities-and-pitfalls.pdf. Accessed on 24 July 2018.

"ISPR: Army Chief Approves Death Sentences of 7 Terrorists." 2015. *Dawn*, August 13. http://www.dawn.com/news/1200269. Accessed on 24 July 2015.

Kaphle, Anup. 2014. "Pakistan Announces a National Plan to Fight Terrorism, Says Terrorists' Days Are Numbered." *The Washington Post*, December 24. https://www.washingtonpost.com/news/worldviews/wp/2014/12/24/pakistan-announces-a-national-plan-to-fight-terrorism-says-terrorists-days-are-numbered/?utm_term=.b41ec2769102. Accessed on 26 July 2018.

Khan, Azam. 2015. "NA, Senate Pass 21st Constitutional Amendment, Army Act Amendment." *The Express Tribune*, January 6. https://tribune.com.pk/story/817471/pm-meets-parliamentarians-to-discuss-constitutional-amendment/. Accessed on 26 July 2018.

Kine, Phelim. 2015. "Dispatches: Hashtag Injustice via Pakistan's Military Courts." *Human Rights Watch*, April 6. https://www.hrw.org/news/2015/04/06/dispatches-hashtag-injustice-pakistans-military-courts. Accessed on 24 July 2018.

Malik, Hasnaat. 2015a. "Convicted of Terror: Woman Moves SC Against Verdict of Military Court." *The Express Tribune*, November 8. https://tribune.com.pk/story/987236/convicted-for-terror-woman-moves-sc-against-verdict-of-military-court/. Accessed on 26 July 2018.

———. 2015b. "SC Suspends Two Military Court Death Sentences." *The Express Tribune*, December 7. https://tribune.com.pk/story/1005433/sc-suspends-two-military-court-death-sentences/. Accessed on 25 June 2018.

OHCHR (U.N. Office of the High Commissioner for Human Rights). 2003. *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*. New York: United Nations.

Raza, Syed Irfan. 2015. "Security for Military Court Judges and Prosecutors." *Dawn*, February 25. https://www.dawn.com/news/1165793. Accessed on 5 August 2018.

Shah, Waseem Ahmad. 2015. "PHC Upholds Terror Convictions by Military Courts." *Dawn*, October 14. https://www.dawn.com/news/1213212. Accessed on 25 July 2018.

Shams, Shamil. 2017. "The Civilian Surrender—Pakistan Reinstate Military Courts." *Deutsche Welle*, March 22. https://www.dw.com/en/the-civilian-surrender-pakistan-reinstates-military-courts/a-38066926. Accessed on 26 July 2018.

Siddiqui, Naveed. 2017. "3 Terrorists Convicted by Military Courts Executed in KP: ISPR." *Dawn*, October 4. https://www.dawn.com/news/1361654#comments. Accessed on 26 July 2018.

The Constitution (Twenty-First Amendment) Act (Act No. I of 2015). 2015. http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/101679/122625/F76813101/PAK101679.pdf. Accessed on 26 July 2018.

The Pakistan Army Act (XXXIX of 1952). 1952. http://pja.gov.pk/system/files/Army%20Act%201952.pdf. Accessed on 26 July 2018.

U.N. Economic and Social Council. 1989. *Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, Resolution 1989/64*. https://www.unodc.org/documents/commissions/CCPCJ/Crime_Resolutions/1980-1989/1989/ECOSOC/Resolution_1989-64.pdf. Accessed on 27 July 2018.

———. 1995. *Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers: Report of the Special Rapporteur, Mr. Param Cumaraswamy, Submitted in Accordance with Commission on Human Rights Resolution 1994/41*, E/CN.4/1995/39. http://undocs.org/E/CN.4/1995/39. Accessed on 24 July 2017.

———. 2006. *Draft Principles Governing the Administration of Justice Through Military Tribunals*, U.N. Doc. E/CN.4/2006/58 at 4. http://hrlibrary.umn.edu/instree/DecauxPrinciples.html. Accessed on 27 July 2018.

U.N. General Assembly. 1948. *The Universal Declaration of Human Rights.* Adopted and Proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948. https://www.ohchr.org/Documents/Publications/CoreTreatiesen.pdf. Accessed on 9 May 2018.

———. 1966. *International Covenant on Civil and Political Rights*. Adopted by the General Assembly of the United Nations on 19 December 1966. https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf. Accessed on 8 May 2018.

———. 1985. *Basic Principles on the Independence of the Judiciary*. Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders Held at Milan from 26 August to 6 September 1985 and Endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx. Accessed on 28 July 2018.

U.N. Human Rights Committee. 1982. *CCPR General Comment No. 6: Article 6 (Right to Life)*. http://www.refworld.org/docid/45388400a.html. Accessed on 2 August 2018.

———. 1987. *Carlton Reid v. Jamaica*, Communication No. 250/1987, U.N. Doc. CCPR/C/39/D/250/1987. http://hrlibrary.umn.edu/undocs/session39/250-1987.html. Accessed on 5 September 2018.
———. 1990. *G. A. van Meurs v. The Netherlands*, Communication No. 215/1986, U.N. Doc. CCPR/C/39/D/215/1986. http://hrlibrary.umn.edu/undocs/session39/215-1986.html. Accessed on 1 August 2018.
———. 1992a. *M. Gonzalez del Río v. Peru*, Communication No. 263/1987, U.N. Doc. CCPR/C/46/D/263/1987. http://hrlibrary.umn.edu/undocs/dec26346.pdf. Accessed on 24 July 2018.
———. 1992b. *Alrick Thomas v. Jamaica*, Communication No. 272/1988, U.N. Doc. CCPR/C/44/D/272/1988. http://www.worldcourts.com/hrc/eng/decisions/1992.03.31_Thomas_v_Jamaica.htm. Accessed on 31 July 2018.
———. 1992c. *Dieter Wolf v. Panama*, Communication No. 289/1988, U.N. Doc. CCPR/C/44/D/289/1988 at 80. http://hrlibrary.umn.edu/undocs/html/289-1988.html. Accessed on 1 August 2018.
———. 1993. *John Campbell v. Jamaica*, Communication No. 307/1988, U.N. Doc. CCPR/C/47/D/307/1988. http://hrlibrary.umn.edu/undocs/html/307-1988.html. Accessed on 1 August 2018.
———. 1997a. *Concluding Observations of the Human Rights Committee: Slovakia*, CCPR/C/79/Add.79. http://www.refworld.org/docid/3ae6b032c.html. Accessed on 27 July 2018.
———. 1997b. *R. Espinoza de Polay v. Peru*, Communication No. 577/1994, U.N. Doc. CCPR/C/61/D/577/1994. http://www.worldcourts.com/hrc/eng/decisions/1997.11.06_Espinoza_de_Polay_v_Peru.htm. Accessed on 27 July 2018.
———. 1998. *Domukovsky et al. v. Georgia*, Communications No. 623/1995, 624/1995, 626/1995 and 627/1995, CCPR/C/62/D/623, 624, 626 & 627/1995. http://www.univie.ac.at/bimtor/dateien/hrc_1998_domukovsky_vs_georgia.pdf. Accessed on 2 August 2018.
———. 2000. *Cesario Gómez Vázquez v. Spain*, Communication No. 701/1996, U.N. Doc. CCPR/C/69/D/701/1996. http://hrlibrary.umn.edu/undocs/session69/view701.htm. Accessed on 2 August 2018.
———. 2003. *Azer Garyverdy ogly Aliev v. Ukraine*, Communication No. 781/1997, U.N. Doc. CCPR/C/78/D/781/1997. http://hrlibrary.umn.edu/undocs/781-1997.html. Accessed on 27 July 2018.
———. 2005. *Valichon Aliboev v. Tajikistan*, Communications No. 985/2001, U.N. Doc. CCPR/C/85/D/985/2001. http://hrlibrary.umn.edu/undocs/985-2001.html. Accessed on 27 July 2018.

———. 2007a. *General Comment No. 32: Article 14 (Right to Equality Before Courts and Tribunals and to Fair Trial)*, CCPR/C/GC/32. http://www.refworld.org/docid/478b2b2f2.html. Accessed on 24 July 2018.

———. 2007b. *Concluding Observations of the Human Rights Committee: Chile*, CCPR/C/CHL/CO/5. http://www.refworld.org/country,,HRC,,CHL,,46712bef2,0.html. Accessed on 27 July 2018.

U.N. Human Rights Council. 2017. *Capital Punishment and the Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty: Yearly Supplement of the Secretary-General to His Quinquennial Report on Capital Punishment*, A/HRC/36/26. https://www.ohchr.org/en/hrbodies/hrc/regularsessions/session36/pages/listreports.aspx. Accessed on 25 July 2017.

Yousaf, Kamran. 2015. "Tackling Terrorism: Military Courts Award Death Sentence to Six." *The Express Tribune*, April 3. https://tribune.com.pk/story/863556/tackling-terrorism-military-courts-award-death-sentence-to-six/. Accessed on 5 August 2018.

10

The Reverse Exodus: The Forced Repatriation of Afghan Refugees in Pakistan

1 Introduction

"The problems with the police started this summer [in 2016]. One day, they [the Pakistani police] came to our house and said that we had to leave the country. They were nice to us because they came for the first time to our house. But I knew that if they had to come again, they would not be nice," said 35-year-old Sher Ali (pers. comm.), an Afghan refugee who lived in Pakistan for more than three decades. After the police ordered him and his family to repatriate, Sher Ali told me, it became difficult for him to continue carrying out his daily activities because the police started to arbitrarily arrest Afghan refugees residing in his neighborhood. All Afghans felt insecure, afraid that at any moment they could get locked up in a detention center. The police also ordered refugees to stop working. "All Afghan shops were closed. I could not continue working because they [the police] told me I had to stop," recounted Sher Ali.

Sher Ali was born in a village in Mohammed Agha district in Logar province in central Afghanistan. During the Soviet occupation in the 1980s, his parents fled to Pakistan, where they lived for about 15 years

V. Badalič, *The War Against Civilians*, Palgrave Studies in Victims and Victimology,
https://doi.org/10.1007/978-3-030-12406-9_10

in a refugee camp on the outskirts of Peshawar. After spending his childhood in the refugee camp, where he received no formal education, Sher Ali moved to Islamabad. He lived in the capital city for almost two decades, working as a fruit and vegetable street vendor, earning about $150 a month. He was married, all of his children were born and raised in Pakistan. While living in Pakistan, he only once briefly returned to his native country to attend a funeral of one of his uncles. He never intended to repatriate permanently because he remained convinced that, after decades of continuous war, the security and economic situation in his home country would never improve.

All members of Sher Ali's family possessed a Proof of Registration (PoR) card, an identity document proving they were refugees legally residing in Pakistan. From late 2006 to early 2007, the Pakistani authorities, with UNHCR's assistance, conducted the first and only registration of Afghan refugees. During the registration process, about 2.15 million Afghans, who received a legal status of "Afghan citizen temporarily residing in Pakistan," were issued with PoR cards (HRW 2017, 20). Despite having a legal status, Sher Ali's family was forced by Pakistani security forces to return to their country of origin in early October 2016. When Pakistani forces started, in July 2016, to put pressure on them and the entire Afghan refugee community, they realized they had no choice but to return to a war-torn country they barely knew.

When they repatriated, Afghan returnees who lived legally in Pakistan made a short stop at the UNHCR Encashment Center, located in the Pul-e-Charkhi area on the eastern fringes of Kabul. After signing the voluntary repatriation form, which served as "evidence" of the voluntary nature of return, each returnee received a cash grant of $400, a meager sum that helped returnees to meet their most immediate humanitarian needs during the first few months in Afghanistan. All returnees I spoke to at the UNHCR Encashment Center in early October 2016, when about 20,000 Afghan refugees per week were returning from Pakistan, said they were forced to repatriate. Pakistani security forces, the returnees told me, were carrying out a campaign of harassment and intimidation in order to coerce refugees to return home. "Recently, the police came every day to the [refugee] camp and said that we had to leave. The last time they came to our camp was three days ago.

The police told everybody in the camp to leave. Everybody left. Over the past few days, they [the police] were also stopping us on the street, telling us that we had to leave. They didn't allow us to work. They prohibited us to move outside the camp," recounted 40-year-old Mahboub from Laghman province in eastern Afghanistan (pers. comm.). After his parents fled their village at the beginning of the Soviet occupation, Mahboub spent almost his entire life in a refugee camp in the vicinity of Peshawar, where he worked as a carpenter. Although he possessed a PoR card, he was compelled to repatriate in October 2016.

In the second half of 2016, the Pakistani security forces launched a widespread campaign of intimidation and violence against Afghan refugees, which led to the forced repatriation of almost 620,000 Afghans, both registered refugees and undocumented migrants (OCHA 2017, 1). The reason for initiating a new anti-refugee campaign, a hostile culmination of a series of anti-refugee measures implemented by Pakistan in the post-9/11 era, was an incident at Torkham border crossing in June 2016. In the aftermath of the armed clash that erupted at the border between Afghan and Pakistani security forces, which resulted in 4 soldiers killed and about 40 wounded, the Pakistani authorities decided to accelerate the repatriation of Afghan refugees (Joshi 2016). Many Afghans returned to their homeland after being ordered by Pakistani security officials to leave. "Until this year [2016], we never had problems with the police. About six months ago, the police said to our tribal elders that we had to leave our camp and return to Afghanistan. About three months ago, they [the police] came again to our camp and ordered us to leave," said Hashim Gul (pers. comm.), who lived with his family in the vicinity Mardan, a city in north-western Pakistan. He was a young man when his parents fled from Logar province in the 1980s. In Mardan, he found work at a butcher's shop, earning about $100 per month. In the past three decades, he rarely visited his home country. "I returned to Afghanistan seven or eight times in my entire life. I returned only for short visits. I went back only to attend weddings and funerals," he said. Although he never seriously considered the idea to permanently return to his war-torn homeland, he had no choice but to repatriate when the pressure created by Pakistani authorities became unbearable.

After the U.S.-led invasion of Afghanistan in late 2001, the Pakistani authorities, assisted by the UNHCR, initiated a plan for a phased repatriation of Afghan refugees. From 2002 to 2016, the UNHCR provided assistance in the repatriation of more than 4.2 million Afghan refugees residing in Pakistan (Ahmad 2015; OCHA 2017, 1). From the early days of the repatriation process, both the Pakistani authorities and the UNHCR argued that the repatriation was voluntary, based on a free and individual choice made by the refugees (Lumpp et al. 2004). In 2002, for example, the UNHCR contended that after the toppling of the Taliban regime "positive changes in the political, security and economic conditions" in Afghanistan were one of the main reasons for the mass voluntary repatriation. The returnees hoped the U.S.-led "international community" would usher in a new era of stability that would allow them the opportunity to return to reclaim their land, reunite with their family members and relatives, and resume former livelihoods (UNHCR 2002a, 10). The Karzai government, backed by the Bush administration, supported the return of refugees because it wanted them to take part in development projects in Afghanistan. Returnees were seen as a boost to the legitimacy of the new post-Taliban order (Margesson 2007; Turton and Marsden 2002, 35). In that period of time, however, UNHCR officials also indicated that negative changes in policies and public attitudes towards the presence of Afghans in the asylum countries were one of the factors driving the repatriation process (UNHCR 2002a, 10). Despite being aware of the fact that anti-refugee sentiment in host countries, including Pakistan, was a major factor behind the repatriation process, UNHCR officials continued to insist that returns were voluntary. Even in 2015 and 2016, when the anti-refugee campaign of intimidation and harassment initiated by the Pakistani authorities made it impossible to ignore that the vast majority of Afghan refugees were repatriating under duress, the UNHCR argued that coercive measures were just one of the factors driving refugees out of Pakistan. As hundreds of thousands of Afghan refugees repatriated in the second half of 2016, UNHCR officials tried to downplay the impact of coercive measures by indicating other factors behind the sudden surge in returns (e.g., the doubling of UNHCR cash grant from $200 to $400 per returnee, the introduction of a tighter

border management regime at Torkham border crossing that limited cross-border movements of persons with valid travel documents and visas, and the strong appeal by Afghan President Ashraf Ghani for refugees to return, combined with new initiatives by the Afghan government to help returnees to reintegrate in their home country).[1]

By insisting, throughout the post-9/11 era, that Afghan refugees were returning home of their own free will, the UNHCR hailed Pakistan's repatriation program, initiated in parallel with the repatriation of Afghan refugees from Iran, as the largest voluntary repatriation program in UNHCR's history (Khan 2015; Kronenfeld 2008, 43). Pakistan's repatriation process thus fitted neatly into UNHCR's long-held commitment to promote voluntary returns as the most desirable solution to refugee "problems" (Zimmerman 2012, 45; Chetail 2004, 2).

In contrast to UNHCR's narrative of voluntary returns, research evidence consistently revealed that significant numbers of Afghan refugees were forced to repatriate (AI 2003; HRW 2002, 2016, 2017; HRCP 2009). The objective of this chapter is to examine the anti-refugee measures used by the Pakistani authorities to force Afghan refugees to return to their country of origin. Drawing on UNHCR's guidelines on voluntary returns, the chapter shows how the Pakistani authorities, with tacit UNHCR support, breached key principles of voluntary returns and, in effect, carried out a coerced mass repatriation program. In order to achieve this objective, the chapter focuses on two themes. On the one hand, the chapter adopts UNHCR's principle that returns are not voluntary if the host country encourages anti-refugee sentiment among its citizens (UNHCR 1996, 30). In this context, the chapter shows how Pakistani government officials consistently portrayed Afghan refugees as an ever-present security risk in order to turn the public opinion against them.

On the other hand, the chapter adopts UNHCR's principle which states that all parties involved in voluntary repatriation programs must respect the need for repatriations to be carried out "under conditions of absolute safety" (UNHCR Executive Committee 1985).

[1]E-mail interview with Qaisar Khan Afridi from the UNHCR office in Islamabad in October 2016.

In other words, voluntary returns should always imply the absence of any pressure that could compromise the refugees' safety and ability to freely decide to repatriate (UNHCR 2002b, 3–6). Drawing on this definition of voluntary returns, the chapter examines the measures that compromised the physical, legal and material safety of Afghan refugees before and during the repatriation process from Pakistan.

2 Encouraging Anti-refugee Sentiment in the Post-9/11 Era

The UNHCR supports the argument that repatriations cannot be voluntary if the host country encourages anti-refugee sentiment on the part of its population (UNHCR 1996, 30). If influential figures in asylum countries—e.g., government officials, local political leaders, news media workers, and religious leaders—create circumstances in which refugees feel unsafe due to a strong anti-refugee sentiment, the decision to repatriate, taken under such pressure, cannot be voluntary.

Throughout the post-9/11 era, Pakistani government officials regularly encouraged anti-refugee sentiment by propagating negative stereotypes of Afghan refugees being involved in terrorism and other types of criminal activities. The post-9/11 approach to the refugee "problem" differed significantly to the approach used by the Pakistani authorities in the 1980s. During the Soviet occupation of Afghanistan, when Pakistan and its two key foreign partners, the U.S. and Saudi Arabia, needed Afghan refugees to recruit among them fighters to wage *jihad* against the Soviet army, the Pakistani authorities defined the Afghan refugees' common identity with two deeply religious concepts. First, Afghan refugees were seen as *mujahideen*, holy warriors who bravely fought for Islam against the army of the "Evil Empire" that occupied Afghanistan. Second, Afghan refugees were also identified as *muhajireen*, immigrants who went into exile for religious reasons because the Soviet-backed regime in their country of origin did not allow them the free practice of Islam. This Arabic-origin term, which refers to *hejira*, the Prophet Mohammad's escape from Mecca to Medina, was understood as a momentary tactical retreat preceding return to the homeland (Centlivres and Centlivres-Demont 1988, 145; Schöch

2008, 10). By using such religious terms to describe Afghan refugees, the Pakistani authorities managed to persuade the public at large to adopt a favorable view of the refugees.

After the withdrawal of the Soviet army from Afghanistan, Afghan refugees lost the crucial role they played in Cold War politics. As a result, the Pakistani authorities, eager to send the refugees back home, started to gradually transform the public perception of refugees from *muhajireen* and *mujahideen* to terrorists, criminals, environmental polluters, and people who steal jobs from the natives (Safri 2011, 587).

The campaign of negative stereotyping gained traction during the U.S.-led occupation of Afghanistan when Pakistani officials launched the repatriation program. First, the most common stereotype portrayed Afghan refugees as either terrorists or supporters of terrorist organizations (Safri 2011, 592–593). In a letter to the U.N. Security Council in January 2007, Munir Akram, then Pakistan's representative to the U.N., stated that "cross-border militancy is closely related to the presence of over 3 million Afghan refugees in Pakistan," with the Taliban being able to blend in with the refugees, thus making their detection more difficult (HRCP 2009, 20). In 2016, Sartaj Aziz, the Prime Minister's adviser on foreign affairs, reaffirmed the government's view of Afghan refugees being a security risk by claiming that Afghan refugee camps within Pakistan turned into safe havens for terrorists (Afghan Refugee Camps 2016). It was on the grounds of such assessments that Pakistan called for the closure of Afghan refugee camps and a swift repatriation of refugees to their country of origin. Following the Tehrik-i-Taliban Pakistan (TTP) attack on the Army Public School in Peshawar in December 2014, when anti-refugee sentiment reached boiling point, the line between refugees and insurgents became even more blurred. By unfairly blaming Afghan refugees of being responsible for the terrorist attack on the Army Public School, the Pakistani government included the repatriation program in its new national counter-terrorism plan, thus making its anti-refugee policy part of the counter-terrorism strategy. The new counter-terrorism plan, which consisted of measures such as the creation of secret military courts for speedy trials of alleged terrorists, the formation of a special anti-terrorism force, and the regularization of madrassas, promoted the repatriation process without distinguishing

between registered and unregistered Afghans, which led to a wave of indiscriminate coercive measures targeting both these groups (Roehrs 2015, 2–3; HRW 2016, 12–16).

Second, in addition to portraying Afghan refugees as members of terrorist organizations, Pakistani officials promoted the idea that Afghans were predominantly involved in a range of criminal activities (e.g., murders, kidnappings for ransom, smuggling, and selling of narcotics, stolen goods and arms) (Margesson 2007; Yusufzai 2015). In 2015, Mushtaq Ghani, the Information Minister in Khyber Pakhtunkhwa province, claimed, without providing any evidence, that about 80% of crimes in the province were committed by Afghans (Yusufzai 2015).

Third, another stereotype propagated by Pakistani authorities was that Afghan refugees spread diseases. In 2011, Pakistani Prime Minister, Yousuf Raza Gilani, called on the international community to help repatriate Afghan refugees, citing health risks as a major concern. In his statement, Gilani accused Afghan refugees of spreading polio in Pakistan (Brulliard 2011).

The relentless negative stereotyping of Afghan refugees paved the way for the repatriation program. Pakistani government officials used such stereotypes as a pretext to push forward with the repatriation process. When Pakistani public opinion turned against the refugees, particularly in 2016, even ordinary Pakistani citizens became hostile towards the presence of Afghans, thus influencing their decision to repatriate (AI 2003, 8; HRW 2017, 26; OCHA 2016, 5–6). In an inhospitable environment, where it became increasingly difficult for Afghans to live, the only option available was to "choose" repatriation.

3 The Three Core Elements of (In)Voluntary Returns

3.1 No Physical Safety

The physical safety of refugees is one of the most serious concerns in the repatriation process (UNHCR 2002b, 4). The authorities of the host country are expected to provide refugees a secure environment

before and during their return to the country of origin. If the repatriation process is carried out amid intimidation and violence, it cannot be voluntary.

In the post-9/11 era, the Pakistani security forces sporadically resorted to intimidation and violence to coerce Afghan refugees to repatriate. First, one of the tactics was to close refugee camps, located across the tribal areas near the Pakistan–Afghanistan border, during military operations. With the military deployed to push forward the repatriation process, the physical safety of refugees was compromised. The threat of the use of military force made it clear that refugees were in danger of being harmed if they refused to repatriate. During a military operation against alleged Al Qaeda militants in South Waziristan in July 2004, the Pakistani military, backed by the U.S. military, forced about 25,000 refugees to return to Afghanistan. The Pakistani military gave refugees only 72 hours to leave their makeshift homes in two refugee camps, Zarinoor 1 and Zarinoor 2, and move across the border into Afghanistan. Both refugee camps were later bulldozed. The Pakistani authorities, which decided to dismantle all refugee camps about three miles of the border, viewed the forced return of refugees as part of an "overall campaign against terrorism" in which refugees—men, women, children, and elders—were defined as "militant-saboteurs" who had no place for asylum (Gall 2004). In another operation that was part of an "anti-terrorism campaign," the Pakistani military forced about 50,000 Afghan refugees to relocate from Pakistan's Bajaur tribal district to Afghanistan's Kunar province in October 2008. During the operation, the Pakistani military gave refugees only three days to vacate their homes (HRCP 2009, 21).

Second, another tactic employed by Pakistan's security forces was to resort to unlawful use of force against refugees living in urban areas (HRW 2016, 18; 2017, 25). In 2015 and 2016, many Afghan refugees living in Peshawar told me how Pakistani police officers stopped them on the street and beat them. "We have many problems with the police. The policemen are very hostile and angry. They shouted at me. Once, they beat me. They told me to show them my PoR card. When I showed it to them, they said it was not valid, and they beat me. They said they didn't care about me because I am an Afghan," said 20-year-old Karkhan

(pers. comm.), an Afghan refugee who lived in Peshawar where he sold shoes at Notya bazar. Another refugee with legal status, 45-year-old Walam Dastaghir, a fruit street vendor in Peshawar, shared a similar experience. Although he was a PoR card holder, the police physically abused him. "They [the police] are very hostile. They've beaten me many times during search operations. In the aftermath of terrorist attacks, they conduct search operations and detain Afghans," he said (pers. comm.), referring to the police in Peshawar where he spent most of his adult life.

When resorting to the unlawful use of force, the police did not differentiate between registered refugees and undocumented migrants—both groups became victims of physical abuse. One of the undocumented Afghan migrants, 20-year-old Amjad, who worked as a scrap metal collector in Peshawar, confirmed that the police became very hostile towards Afghans in the summer of 2016. "Many times, I had problems with the police. They stopped me at checkpoints and other places. They stopped me only because I am an Afghan. They interrogated me. They were very harsh. Once they beat me at a checkpoint," he said (pers. comm.).

3.2 No Legal Safety

Legal safety is one of the core elements to be taken into consideration when evaluating the voluntariness of returns. If the country of asylum recognizes refugees and protects their rights, the decision to repatriate will likely be based on a free and voluntary choice (UNHCR 1993, 7). A settled legal status in the host country, which guarantees refugees the right to basic support and the opportunity to access income-generating activities, gives enough confidence to refugees to freely decide whether or not to repatriate (Webber 2011, 104). By contrast, when the refugees' rights are not recognized and protected by the host country, their decision to return, influenced by the lack of effective legal protection, will certainly not be free. If the consent to repatriate is influenced by the lack of legal protection, it cannot be classified as a voluntary repatriation (ECRE 2005, 30).

In order to undermine the Afghan refugees' legal safety, the Pakistani authorities employed two tactics. The first tactic was to give refugees

protection status for only a limited period of time and direct them to repatriate within that time period. This tactic included a warning that the refugees' PoR cards would expire after the designated time period, thus leaving the refugees without protection status. Over the past decade, the Pakistani authorities set a series of deadlines that constantly put pressure on Afghan refugees to repatriate. After the introduction of PoR cards in 2006–2007, Pakistan set the first deadline for all Afghan refugees to repatriate until December 2009. When the first deadline expired, hundreds of thousands of refugees remained in Pakistan, which forced the Pakistani government to extend the validity of the cards. The new deadline was December 2012 (HRW 2017, 20). In July 2013, seven months after the second deadline expired, the Pakistani government again extended the validity of the cards—until December 2015 (Ayub 2014). After 2015, when the Pakistani authorities significantly increased pressure on Afghans to repatriate, the extension periods became much shorter. In January 2016, Pakistan granted only a six-month extension of the deadline to June 2016, but without issuing new PoR cards (Ali 2016; HRW 2017, 20). In June 2016, Pakistani authorities again granted a new six-month extension of the deadline to December 2016 (Khan and Firdous 2016). After that deadline expired, a new one was set for March 2017. The shorter PoR cards extension periods, combined with police statements falsely claiming that the cards that expired in 2015 were invalid, further reduced the refugees' legal safety (HRW 2017, 21). The short-term extensions of refugee cards increased anxiety among refugees who thought they would soon lose their protection status (UNHCR 2016, 1).

By setting deadlines for returns to Afghanistan, and by warning refugees that their protection status will expire after the deadline, the Pakistani authorities created circumstances that compromised the refugees' legal safety and, consequently, undermined their right to exercise free choice when deciding whether or not to return to their homeland. As Zieck pointed out, free choice, one of the fundamental aspects of voluntary returns, requires that refugees are ensured that they will remain entitled to their protection status if they refuse to repatriate (Zieck 2004, 42). If protection status is arbitrarily withdrawn by the authorities of the host country, then refugees, fearful

of staying illegally in the host country, feel pressured to repatriate. Therefore, by giving Afghan refugees only a limited period of time to repatriate, the Pakistani government put them in a position in which they were unable to freely decide to return to their country of origin (Zieck 2008, 269).

Second, the Pakistani authorities denied Afghan refugees legal safety during widespread police abuses, especially in 2015 and 2016. When their human rights, including their economic rights, were systematically violated, there was no chance for Afghan refugees to find protection in a court of law. When refugees became subject to police abuses such as arbitrary detention, degrading treatment, discriminatory police checks, extortion, theft and unlawful use of force, it was evident they had no equal protection of the law, that is, they had no access to courts of law to seek justice for the wrongs they suffered. One of the most serious concerns for refugees were arbitrary detentions, especially after the Torkham incident in June 2016, when the Pakistani police increased arbitrary arrests of both registered refugees and unregistered migrants. "Over the past years, we never had problems with the police. The problems started in the last few months [in the summer of 2016]. Once, they detained me for three days. They detained me because I'm an Afghan. They didn't press charges against me. While in detention, they kept asking me what I was doing in Pakistan. They said I had to return to Afghanistan," said Mahboub from Laghman province (pers. comm.). Many refugees insisted that the only way to get released from detention was to bribe the police. "One day, the police came to our house. They took my two sons and jailed them for two nights. They detained them for no reason. We had to pay 15000 Rupees [about $ 150] for their release," said Hashim Gul from Logar province (pers. comm.). Another registered refugee, Walam Dastaghir from Kunar province, said he had to bribe the police with about $20 to get released from detention. "When I went to the vegetable market early in the morning, they [the police] stopped me and detained me. They detained me because I'm an Afghan. I had my PoR card with me [he reached into his pocket to show me his PoR card]. I was locked for one night. In the morning, I paid them 2000 Rupees, and they released me," he said (pers. comm.).

3.3 No Material Safety

The host country is expected to support measures that will ensure the material safety of refugees. Such measures may include non-discriminatory access to income-generating activities, access to humanitarian aid, and access to basic infrastructure and services, such as health services and education. If the host country creates conditions in which the refugees' material safety is endangered, it is not possible for refugees to exercise free choice in the repatriation process.

Throughout the post-9/11 era, the Pakistani authorities implemented a range of measures that reduced the Afghan refugees' material safety. These measures had three main objectives: to prevent refugees from having access to income-generating activities; to prevent refugees from having access to basic services, and to put additional strain on refugees by extorting them and destroying their property.

First, one of the measures was to give Afghan refugees a "choice" to either return to Afghanistan or relocate to remote areas in Pakistan where they would have limited possibilities for livelihoods. This "choice" was given to refugees when Pakistani officials decided to shut down some of the refugee camps near the border with Afghanistan. In July 2007, for example, Pakistan closed Kacha Garhi camp, located on the outskirts of Peshawar. The residents of the camp were given a "choice" to either repatriate with UNHCR cash assistance or relocate to new government-designated camps in the districts of Chitral and Dir, two remote districts in the north-west of the country. Not even one of the roughly 64,000 refugees at Kacha Garhi opted for relocation to the new camps in Dir and Chitral. The refugees, who did not want to be evicted from Kacha Garhi, a lively trading and transport hub, argued that the new camps, which were located in remote mountainous areas, lacked basic infrastructure and provided very limited possibilities for livelihoods (Ali 2007). By giving refugees the "choice" to either repatriate or relocate from urban areas, where they were able to find work, to remote refugee camps, where access to basic services and income-generating activities was extremely limited, the Pakistani authorities compromised the refugees' material safety, thus in practice leaving the refugees with only one option—to "choose" repatriation.

Second, another tactic used by Pakistani authorities was to curtail the refugees' freedom of movement in order to prevent them from carrying out their daily activities, including going to work. On the one hand, Pakistan's security forces sporadically issued orders temporarily prohibiting Afghan refugees from moving outside refugee camps and neighborhoods with a predominantly refugee population. In Peshawar, the Pakistani city with the largest Afghan community, the security forces many times prevented refugees from moving in/out of their camps, located on the outskirts of the city (Mosel and Jackson 2013, 17; Afghans Banned 2014). Such orders were usually issued in the aftermath of terrorist attacks, when refugees were seen as potential terrorist suspects who had to stay at home during search operations, and on public holidays when refugees were treated as a potential threat to public safety and security (ibid.). On the other hand, members of the security forces constantly harassed individuals among the refugee population by telling them they were not allowed to move in the cities, thus limiting the refugees' access to income-generating activities. "The police caused many problems for us. I could not leave my house to go to work or visit someone. They were harassing us all the time. The police and army were in our neighborhood. When I went out, they stopped me and said that I had to stop working. I had to hide while I was working in construction" recounted 38-year-old Fida Mohammed (pers. comm.), an Afghan refugee who lived in Peshawar. Due to constant police harassment, he and his family had to repatriate in early October 2016. Another Afghan refugee in Peshawar, 25-year-old Bakhyar, worked as a moto-rickshaw driver. "I used to drive my rickshaw in the center of the city. Last year [in 2015], the police stopped me and asked for my documents. I didn't have the documents. They told me to park my rickshaw at home and not to go anywhere. Now I don't drive in the city center. I only drive on the outskirts of the city, in the rural areas, where there are no police," he said (pers. comm.).

Third, Pakistani security forces carried out operations in which they looted Afghan refugees' shops and destroyed their property. In September 2015, for example, the Pakistani police destroyed small Afghan shops—e.g., vegetable and fruit shops, a chicken shop—in the Board area in Peshawar (HRW 2016, 20–22). Prior to demolishing the

shops, the police looted them and took away with them the products sold by the Afghans (ibid.). The Pakistani authorities argued that they dismantled the shops because they were built on government land that was needed to widen a road (ibid.). In some cases, Pakistan's security forces also destroyed the refugees' homes. In Sialkot, an industrial hub in the eastern part of the country, the police destroyed around 1300 Afghan homes (Bezhan 2015). The police beat up and detained some of the refugees, and later bulldozed their homes. Many of those who were evicted from their homes decided to return to Afghanistan (ibid.).

Fourth, members of Pakistan's security forces regularly extorted money from Afghan refugees. Following the terrorist attack on the Army Public School in Peshawar in December 2014, police harassment, which included extorting money from both registered refugees and undocumented migrants, increased significantly. The majority of refugees I interviewed in 2015 and 2016 confirmed they had to bribe policemen to avoid harassment and serious abuses (e.g., arbitrary detention, ill-treatment). Most of the bribes were just a few US dollars' worth, but even such paltry sums put a significant strain on refugees who usually earned from $100 to $150 a month. "I had to bribe police officers many times. I usually gave them 200 or 300 Rupees [about $ 2 to $ 3]. They took whatever I had with me. They demand money from us because we are Afghans," said 45-year-old Sad Nawab (pers. comm.), father of ten, who lived with his family in Peshawar. Another registered refugee, 25-year-old Laiq, a vegetable street vendor in Peshawar, said he had to regularly bribe the police to be allowed to work. "I had many problems with the police. When I was going in the morning to the main market to buy vegetables, the police stopped me many times. The main market is in Pandu on Ring road. Many times, I had to bribe the police to let me go. Sometimes I had to pay them three or four times a week. I gave them from 500 to 1000 Rupees [from $ 5 to $ 10]," he said (pers. comm.). Some refugees paid bribes when they were threatened with arbitrary detention. "Over the past two months [in the summer of 2016], the police carried out a lot of raids. The police stopped me many times on the street. I bribed them many times. I gave them from 100 to 1000 Rupees [from $ 1 to $ 10]. They didn't accept my PoR card. They wanted to arrest me. I didn't want

to have any problems with them, so I bribed them," said 38-year-old Ibrahim (pers. comm.), an Afghan refugee living in Peshawar.

Fifth, the Pakistani authorities denied Afghan refugee children access to education. In 2016, Pakistan decided to shut down Afghan refugee schools, located in refugee camps and neighborhoods with a predominantly Afghan refugee population (HRW 2017, 24–25). In addition, Pakistani authorities prohibited Afghan refugee children from attending Pakistani schools (ibid.).

Sixth, Pakistan limited humanitarian and development assistance provided to Afghan refugees by preventing international non-governmental organizations from carrying out infrastructure projects and providing services for refugees. In Peshawar, where international non-governmental organizations tried to work with the refugee community on improving infrastructure and services, the Pakistani authorities thwarted all infrastructure projects targeting Afghans (Mosel and Jackson 2013, 33–34). Also, Pakistan refused to allow some international non-governmental organizations to operate in Pakistan. In November 2014, Pakistani officials refused to extend the memorandum of understanding with the Norwegian Refugee Council (NRC), a Norway-based international agency operating in the country since 2001 (Unusual Move 2014). Without providing any details, Pakistani officials claimed they halted NRC's operations because the organization carried out activities not permitted by the government (ibid.). Consequently, NRC was forced to shut down its activities, including providing education, shelter and food to Afghan refugees (ibid.).

4 The Politics of Imposed Returns

If we examine the two reasons cited by Pakistani government officials to justify their push for the repatriation of Afghan refugees, we notice that both reasons contradicted the voluntariness of returns. First, one of the reasons was "donor fatigue." After the withdrawal of the Soviet army from Afghanistan, the U.S.-led "international community" gradually lost its interest in Afghan refugees, which led to a decline in humanitarian and development assistance provided to the refugees. Pakistani

officials argued it was unfair to leave the burden of dealing with refugees solely on Pakistani shoulders, so they started to implement coercive measures to push the refugees back into Afghanistan. As one Pakistani official explained in 2001: "If donors have donor fatigue … then we have asylum fatigue … If donors' patience with the Afghan situation has run out, then so has ours" (Turton and Marsden 2002, 15). The political discourse that linked the repatriation program to 'burden relieving' compromised the voluntary nature of the repatriation program. It was clear that the decision to repatriate was not made by the refugees, but it was imposed on them by the Pakistani authorities.

Second, another factor that influenced Pakistan's decision to launch the forced repatriation program was the often-frayed relations between Pakistan and Afghanistan. After the fall of the Taliban regime, a close ally of Pakistan, the relations between the two countries became strained, in particular after Pakistan witnessed how its arch-enemy India, a supporter of the post-Taliban regime, gained a foothold in Afghanistan. As relations between Pakistan and Afghanistan deteriorated, Pakistan responded by sending back the refugees, thus using them as pawns in its attempts to "punish" Afghanistan. Sometimes Pakistan reacted to particular cross-border incidents by increasing its pressure on refugees. For example, after the incident at Torkham border crossing in June 2016, and the killing of the Afghan Taliban leader, Mullah Akhtar Mansour, in a U.S.-drone strike on Pakistani soil in May 2016, the Pakistani government reacted by announcing changes in its policy on Afghan refugees. "New tougher policy is ahead with new border management laws," said Lieutenant General (R) Abdul Qadir Baloch, Minister for States and Frontier Regions, in June 2016 (Gishkori 2016). The tougher policy included a new wave of police harassment and intimidation of Afghan refugees that resulted in the forced repatriation of hundreds of thousands of refugees by the end of 2016.

In the post-9/11 era, successive Pakistani governments pursued a two-pronged strategy to achieve their objective of forcing Afghan refugees to repatriate. The first part of the strategy was to stop providing potential Afghan asylum seekers with access to legal status in Pakistan. After the 2006–2007 registration process, the Pakistani authorities refused to initiate a new registration process for people who continued to flee from

Afghanistan. With the UNHCR, which was supposed to take over the role of adjudicating all asylum claims, unable to deal with the large numbers of Afghans seeking asylum in Pakistan, it was evident that it was not possible for all potential asylum seekers to obtain protection status. With an extremely limited chance of obtaining a legal status, many Afghans remained without protection, thus always in danger of being deported (HRW 2017, 30–35).

The second part of the strategy, as we have seen above, was to coerce Afghan refugees and undocumented migrants to repatriate. Although every repatriation process should only take place at the refugees' freely expressed wish (UNHCR Executive Committee 1985), Pakistan's systematic anti-refugee campaign created conditions in which many refugees remained without the possibility to exercise free choice. The measures that compromised the refugees' physical, legal and material safety deprived refugees of any real freedom of choice in the repatriation process.

By consistently supporting policies that resulted in involuntary returns, the Pakistani authorities, with UNHCR's complicity, violated the principle of *non-refoulement*, a norm of customary international law.[2] Under the principle of *non-refoulement*, Pakistan was bound not to coerce any individual to repatriate to a territory where he/she would face a real risk of being subjected to torture, cruel, inhuman or degrading treatment or punishment; or where he/she would face a threat of persecution; or where he/she would face a threat to life, physical integrity or liberty (Lauterpacht and Bethlehem 2001, 71). Although the security situation in Afghanistan continued to gradually deteriorate throughout the post-Taliban era, Pakistan insisted on carrying out the repatriation process, thus forcing hundreds of thousands of people to return to a war zone where they were likely to come into harm's way.

[2]The UNHCR contends that involuntary returns in practice amount to *refoulement* (UNHCR 1996, 10).

References

"Afghan Refugee Camps 'Safe Havens' for Terrorist: Aziz." 2016. *Dawn*, June 21. http://www.dawn.com/news/1266141. Accessed on 14 July 2016.

"Afghans Banned from Living in Haripur City." 2014. *Dawn*, December 28. http://www.dawn.com/news/1153638. Accessed on 8 July 2016.

Ahmad, Riaz. 2015. "Crossing the Border: Over 57,000 Afghan Refugees Repatriated." *The Express Tribune*, November 17. http://tribune.com.pk/story/992823/crossing-the-border-over-57000-afghan-refugees-repatriated/. Accessed on 8 July 2016.

AI (Amnesty International). 2003. *Out of Sight, Out of Mind: The Fate of the Afghan Returnees*. http://www.refworld.org/docid/3f12f8a92.html. Accessed on 8 July 2016.

Ali, Rabia. 2007. "Kacha Garhi Refugee Camp Closes in Pakistan After 27 Years." *UNHCR*, July 2007. http://www.unhcr.org/news/latest/2007/7/46a9f1324/kacha-garhi-refugee-camp-closes-pakistan-27-years.html. Accessed on 8 July 2016.

Ali, Zulfiqar. 2016. "PM Grants Six-Month Extension to Afghan Refugees." *Dawn*, January 14. http://www.dawn.com/news/1232892. Accessed on 8 July 2016.

Ayub, Imran. 2014. "Renewal of Afghan Refugee' Registration Cards Begins." *Dawn*, February 27. http://www.dawn.com/news/1089683. Accessed on 11 July 2016.

Bezhan, Frud. 2015. "Afghan Refugees Again on the Run—This Time from Pakistan." *Radio Free Europe/Radio Liberty*, August 30. http://www.rferl.org/content/afghanistan-pakistan-refugees-again-on-the-run/27216943.html. Accessed on 8 July 2016.

Brulliard, Karin. 2011. "Spotlight on Afghan Refugees in Pakistan." *The Washington Post*, November 18. https://www.washingtonpost.com/world/asia_pacific/spotlight-on-afghan-refugees-in-pakistan/2011/11/15/gIQAfB1BYN_story.html. Accessed on 24 July 2016.

Centlivres, Pierre, and Micheline Centlivres-Demont. 1988. "The Afghan Refugee in Pakistan: An Ambiguous Identity." *Journal of Refugee Studies* 1 (2): 141–152. https://doi.org/10.1093/jrs/1.2.141.

Chetail, Vincent. 2004. "Voluntary Repatriation and Public International Law: Concepts and Contents." *Refugee Survey Quarterly* 23 (3): 1–32. https://doi.org/10.1093/rsq/23.3.1.

ECRE (European Council on Refugees and Exiles). 2005. "Increasing Refugee Participation in the Field of Voluntary Return." http://www.refworld.org/docid/465416e92.html. Accessed on 8 July 2016.

Gall, Carlotta. 2004. "Pakistan Army Ousts Afghan Refugees in Militants' Area." *The New York Times*, July 21. http://www.nytimes.com/2004/07/21/world/pakistan-army-ousts-afghan-refugees-in-militants-area.html. Accessed on 8 July 2016.

Gishkori, Zahid. 2016. "Policy for Repatriation of Afghan Refugees Gets Tougher." *The News*, June 27. https://www.thenews.com.pk/print/130952-Policy-for-repatriation-of-Afghan-refugees-gets-tougher. Accessed on 8 July 2016.

HRCP (Human Rights Commission of Pakistan). 2009. *Afghan Refugees in Pakistan: Push Comes to Shove*. Lahore: HRCP.

HRW (Human Rights Watch). 2002. *Closed Door Policy: Afghan Refugees in Pakistan and Iran*. New York: HRW. https://www.hrw.org/reports/2002/pakistan/pakistan0202.pdf. Accessed on 8 July 2016.

———. 2016. *"What Are You Doing Here?" Police Abuses Against Afghans in Pakistan.* New York: HRW. https://www.hrw.org/sites/default/files/report_pdf/pakistan1115_4up.pdf. Accessed on 8 July 2016.

———. 2017. *Pakistan Coercion, UN Complicity: The Mass Forced Return of Afghan Refugees.* New York: HRW. https://www.hrw.org/sites/default/files/report_pdf/pakistan0217_web.pdf. Accessed on 10 March 2017.

Joshi, Rohan. 2016. "The Torkham Incident: Why Afghanistan and Pakistan Exchanged Fire." *The Diplomat*, June 21. http://thediplomat.com/2016/06/the-torkham-incident-why-afghanistan-and-pakistan-exchanged-fire/. Accessed on 10 March 2017.

Khan, Duniya Aslam. 2015. "UNHCR Calls for International Push to End Afghan Refugee Situation." *UNHCR*, June 25. http://www.unhcr.org/news/latest/2015/6/558bff086/unhcr-calls-international-push-end-afghanistan-refugee-situation.html. Accessed on 12 July 2016.

Khan, Tahir, and Iftikhar Firdous. 2016. "Pakistan Extends Afghan Refugees Stay Until End of 2016." *The Express Tribune*, June 29. http://tribune.com.pk/story/1132923/pakistan-extends-afghan-refugees-stay-says-ambassador/. Accessed on 8 July 2016.

Kronenfeld, Daniel A. 2008. "Afghan Refugees in Pakistan: Not All Refugees, Not Always in Pakistan, Not Necessarily Afghan?" *Journal of Refugee Studies* 21 (1): 43–63. https://doi.org/10.1093/jrs/fem048.

Lauterpacht, Elihu, and Daniel Bethlehem. 2001. "The Scope and Content of the Principle of *Non-refoulement*: Opinion." Geneva: UNHCR, http://www.unhcr.org/protect/PROTECTION/3b33574d1.pdf. Accessed on 31 March 2017.

Lumpp, Katharina, Shoko Shimozawa, and Paul Stromberg. 2004. "Voluntary Repatriation to Afghanistan: Key Features." *Refugee Survey Quarterly* 23 (3): 149–173. https://doi.org/10.1093/rsq/23.3.149.

Margesson, Rhoda. 2007. *Afghan Refugees: Current Status and Future Prospects*. Washington, DC: Congressional Research Service. https://www.fas.org/sgp/crs/row/RL33851.pdf. Accessed on 8 July 2016.

Mosel, Irina, and Ashley Jackson. 2013. *Sanctuary in the City? Urban Displacement and Vulnerability in Peshawar, Pakistan.* London: Humanitarian Policy Group. https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/8389.pdf. Accessed on 8 July 2016.

OCHA (Office for the Coordination of Humanitarian Affairs). 2016. "Afghanistan Humanitarian Bulletin: Issue 56." OCHA, September 1–30. http://reliefweb.int/sites/reliefweb.int/files/resources/ocha_afghanistan_mhb_september_2016.pdf. Accessed on 26 March 2017.

———. 2017. "Afghanistan: Returnee Crisis Situation Report No. 5 (as of 12 January 2017)." https://www.humanitarianresponse.info/system/files/documents/files/afghanistan_returnee_crisis_situation_report_no_5_12jan2017.pdf. Accessed on 27 January 2017.

Roehrs, Christine. 2015. *The Refugee Dilemma: Afghans in Pakistan Between Expulsion and Failing Aid Schemes*. Kabul: Afghanistan Analyst Network. https://www.afghanistan-analysts.org/the-refugee-dilemma-afghans-in-pakistan-between-expulsion-and-failing-aid-schemes/. Accessed on 25 March 2017.

Safri, Maliha. 2011. "The Transformation of the Afghan Refugee 1979–2009." *Middle East Journal* 65 (2): 587–601.

Schöch, Rüdiger. 2008. "Afghan Refugees in Pakistan During the 1980s." Geneva: UNHCR. http://www.unhcr.org/research/RESEARCH/4868daad2.pdf. Accessed on 25 March 2017.

Turton, David, and Peter Marsden. 2002. *Taking Refugees for a Ride? The Politics of Refugee Return to Afghanistan*. Kabul: Afghanistan Research and Evaluation Unit. http://www.refworld.org/pdfid/47c3f3cb1a.pdf. Accessed on 8 July 2016.

UNHCR Executive Committee (United Nations High Commissioner for Refugees' Executive Committee). 1985. "Voluntary Repatriation: Conclusion No. 40 (XXXVI)." http://www.refworld.org/docid/3ae68c9518.html. Accessed on 8 July 2016.

UNHCR (United Nations High Commissioner for Refugees). 1993. "Voluntary Repatriation: Training Module RP1." http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=3ae6b3580. Accessed on 12 July 2016.

———. 1996. *Voluntary Repatriation: International Protection*. Geneva: UNHCR. http://www.unhcr.org/publications/legal/3bfe68d32/handbook-voluntary-repatriation-international-protection.html. Accessed on 8 July 2016.
———. 2002a. "Afghanistan: Challenges to Return." http://www.refworld.org/docid/4231bc0d4.html. Accessed on 8 July 2016.
———. 2002b. "Global Consultations on International Protection/Third Track: Voluntary Repatriation, EC/GC/02/5." http://www.refworld.org/docid/3d62695d4.html. Accessed on 8 July 2016.
———. 2004. "Conclusion on Legal Safety Issues in the Context of Voluntary Repatriation of Refugees, No. 101 (LV)." http://www.refworld.org/docid/417527674.html. Accessed on 14 July 2016.
———. 2016. "Pakistan: Voluntary Repatriation Update—September 2016." http://unhcrpk.org/wp-content/uploads/2013/12/VolRep_Summary_20161001_v1.pdf. Accessed on 25 March 2017.
"Unusual Move: Govt Order Norwegian Charity to Halt Operations." 2014. *The Express Tribune*, November 26. http://tribune.com.pk/story/797297/unusual-move-govt-orders-norwegian-charity-to-halt-operations/. Accessed on 27 January 2017.
Webber, Frances. 2011. "How Voluntary Are Voluntary Returns?" *Race & Class* 52 (4): 98–107.
Yusufzai, Ashfaq. 2015. "Pakistan's Tribal Areas Demand Repatriation of Afghan Refugees." *IPS*, January 1. http://www.ipsnews.net/2015/01/pakistans-tribal-areas-demand-repatriation-of-afghan-refugees/. Accessed on 12 July 2016.
Zieck, Marjoleine. 2004. "Voluntary Repatriation: Paradigm, Pitfalls, Progress." *Refugee Survey Quarterly* 23 (3): 33–54. https://doi.org/10.1093/rsq/23.3.33.
———. 2008. "The Legal Status of Afghan Refugees in Pakistan, a Story of Eight Agreements and Two Suppressed Premises." *International Journal of Refugee Law* 20 (2): 253–272. https://doi.org/10.1093/ijrl/een014.
Zimmerman, Susan. 2012. "Understanding Repatriation: Refugee Perspectives on the Importance of Safety, Reintegration and Hope." *Population, Space and Place* 18 (1): 45–57. https://doi.org/10.1002/psp.647.

Part III

The Afghan Taliban

11

Eliminating "Pernicious Individuals": Civilian Victims of the Afghan Taliban's Targeted Killing Program

1 Introduction

Fazl ur-Rehman, 38, was a truck driver working for a company transporting supplies for ISAF military bases in Afghanistan. When the Taliban found out what he was doing for a living, they warned him three times to stop working. "They sent me their messages through intermediaries. The threat was real, but I could not leave my job. I was not able to find any other work. I had to feed my children, so I continued working for the transport company," said ur-Rehman (pers. comm.), father of seven, who put his life at risk for a monthly salary of about $300. After refusing to heed the Taliban's warning, unidentified assailants shot at him one evening while he was walking towards his house, returning from work. "A bullet hit me. I started bleeding, but I somehow managed to escape. I ran to the main road where I flagged down a car that drove me to the city. The driver took me to a hospital," recalled ur-Rehman. While he was describing the failed assassination attempt, he pulled up his shirt to show me a healed bullet injury above his right hip. The bullet pierced through his body, leaving no permanent damage to any internal organ. He had fully recovered. After he was discharged from the hospital,

V. Badalič, *The War Against Civilians*, Palgrave Studies in Victims and Victimology,
https://doi.org/10.1007/978-3-030-12406-9_11

Fazl ur-Rehman fled with his family from his village in Wardak province and sought shelter in a camp for internally displaced people in Kabul. With the Taliban growing stronger in the area where his village was located, he was afraid to return home.

The assassination attempt against Fazl ur-Rehman was one of the thousands of such attacks against civilians carried out by the Taliban movement during the uprising against the U.S.-led occupying powers. Although all parties to the conflict relied on the tactic of targeted killings to eliminate civilians working for, or suspected of working for, the opposite side, the Taliban conducted probably the largest targeted killing campaign. The Taliban assassination program, carried out through the use of improvised explosive devices, suicide bombers or drive-by shootings, aimed at eliminating all civilians identified as members, or supporters, of the Afghan regime and the U.S.-led occupying forces. The victims included government officials (e.g. provincial and district governors, provincial council members, district *shura* members), public employees (e.g. teachers, doctors, election workers, peace council members), judicial officials (e.g. judges, prosecutors, lawyers), pro-government tribal elders, pro-government religious leaders, employees of Afghan state-run companies, civilian contractors working for U.S./ISAF forces and international companies, employees of local and international non-governmental humanitarian organizations, off-duty policemen, retired members of the Afghan National Police (ANP) and army, and former insurgents who tried to reintegrate into society by joining a government-run reintegration program (HRW 2007, 5; Gopal 2010, 37; Clark 2011a, 21; UNAMA 2011a, 12; 2011b, 19; 2014, 24–25; 2016, 43). In some cases, the Taliban went even further by targeting family members and relatives of people they identified as supporters of the Afghan regime and their foreign backers (UNAMA 2014, 25–26).

By conducting targeted killings of civilian supporters of U.S./ISAF forces and the Afghan regime, the Taliban tried to achieve two key objectives. The first objective was to undermine the Afghan people's confidence in the strength of the post-Taliban regime (Johnson 2013, 13–14). By eliminating public officials and, consequently, intimidating potential candidates who could replace them, the Taliban wanted to weaken the authority of the regime, its ability to rule (UNAMA

2011a, 12). The intimidation campaign also included issuing threats to civilians who were on the Taliban's "kill list." Before carrying out the killings, the Taliban usually sent to their targets written and/or verbal warnings—often several times—to put pressure on them to stop working for the Afghan regime and their foreign backers (UNAMA 2009, 29). After eliminating those who refused to heed the warnings, the Taliban sometimes attached letters to the bodies of those killed in order to warn the other members of the community (UNAMA 2010, 12). As they eliminated or intimidated their competition, the Taliban were able to introduce their own system of governance, which consisted of a shadow administration and a Sharia-based judicial system. The second objective of the targeted killing campaign was to retake control over areas governed by the Afghan regime and their foreign allies. The Taliban challenged the Afghan regime's attempts to obtain the monopoly on the use of force, a key characteristic of any sovereign state, in order to improve the insurgents' freedom of movement and regain control over the territory they lost after the US-led invasion (Johnson 2013, 13–14).

Due to the limited access of independent researchers to areas where killings were carried out, it was not possible to determine the exact extent of the Taliban targeted killing campaign. With many anti-government armed groups operating across the country (e.g., the Taliban, Islamic State—Khorasan, Hizb-i-Islami—Gulbuddin, Islamic Movement of Uzbekistan), it many times remained unclear which group was responsible for a specific targeted killing. The only organization systematically collecting data on such killings, UNAMA, included in its reports civilian fatalities of targeted killings carried out by the Taliban, by far the largest anti-government group, as well as the killings carried out by other anti-government elements. From 2009 to 2016, UNAMA documented 4573 civilian deaths, and 2330 injuries, in deliberate targeted attacks carried out by all anti-government armed groups (UNAMA 2017, 65). In their statements, the Taliban claimed responsibility for only a fraction of those killings. For example, in 2016, when UNAMA documented 1118 civilian casualties (574 deaths and 544 injuries) from targeted killings, the Taliban claimed responsibility for only 149 civilian casualties (73 deaths and 76 injuries) (UNAMA 2017, 64).

This chapter focuses exclusively on the Afghan Taliban targeted killing program. The main objective of the chapter is to critically analyze the deadly impact of the Taliban assassination program on the civilian population in Afghanistan. The central part of the chapter is divided into two section. The first section examines the criteria used by the Taliban for determining what they believed were legitimate military targets in their assassination campaign. The Taliban broadly defined its targets as "the enemies of Islam and their helpers and supporters," (Clark 2011b, 2), but they also issued more detailed descriptions of the targets and the reasons for carrying out assassination attempts against them. The first section examines five categories of civilian targets (e.g., contractors working for U.S./ISAF forces and the Afghan regime, pro-government religious leaders, judicial officials, teachers, and employees of local and international aid organizations) and the arguments provided by the Taliban to justify targeting them. The second section of the chapter shows how the too-broad criteria for determining targets, which necessarily caused indiscriminate attacks against civilians, ignored the standard definitions of legitimate military targets (e.g., members of the armed forces, members of pro-government paramilitary groups, and civilians directly participating in hostilities) and, consequently, led to systemic violations of the principle of distinction between civilians and combatants.

2 Defining Civilians as "Legitimate Military Targets"

2.1 Targeting Civilian Contractors

During the war, Aminullah, a 30-year-old farmer from Panjwayi District in Kandahar Province, lost six members of his extended family—five of them were assassinated by the Taliban, while one was killed by the occupying forces. The Taliban killed his relatives because they were working for the U.S. military. "We all worked for the Americans. We were digging trenches at a U.S. military outpost. One day my relatives drove in a moto-rickshaw to work and the Taliban ambushed them. They shot at them and killed them. They later stopped another group of people going

to work. They cut off the ears of 13 workers," recalled Aminullah (pers. comm.). He said he was alive only because he did not go to work on the day of the ambush. Fearing for his life, he decided after the incident to flee with his family from their village. They found a temporary shelter in a camp for internally displaced people in Kabul.

Civilians working as contractors for either the U.S.-led occupying forces or the Afghan regime were one of the main targets of the Taliban targeted killing campaign. The primary source material that provided a glimpse into how the Taliban defined such targets was the *Layha*, the Taliban's code of conduct, in which the Taliban leadership outlined the movement's organizational structure, its key objectives and tactics. After the U.S.-led invasion of Afghanistan, the Taliban issued three editions of their code of conduct—in 2006, 2009 and 2010 (Johnson and DuPee 2012, 78). It was in the 2009 *Layha* that the Taliban first included a clause that defined civilian contractors working for the Afghan regime and the U.S.-led forces as legitimate military targets (Clark 2011b). The 2010 *Layha*, which was complemented by statements explaining the targeting process in ways that went beyond that described in the *Layha,* reaffirmed the Taliban's commitment to targeting civilian contractors (ibid.).

The Taliban leadership identified four categories of "targetable" civilians who worked for the U.S./ISAF forces and the Afghan regime: truck drivers who transported fuel or other materials for the "infidels and their enslaved administration" (Clark 2011b, 6–7); construction workers who built military bases for the U.S.-led occupying forces or the Afghan "puppet regime" (Clark 2011b, 7, 18); contractors who provided the workforce and supervised the work carried out for the U.S.-led occupying forces and the Afghan regime (Clark 2011b, 7); translators and administrators working for the U.S.-led forces (Ambach et al. 2015, 147; Islamic Emirate of Afghanistan 2014).

The Taliban provided one reason for targeting civilian contractors. The Taliban leadership viewed contractors financed by the U.S. administration as "part of a process of un-armed [i.e., non-military] occupation of the country," and whoever was working under the name of "reconstruction" was contributing to the infidels' goal of weakening the "nation's feelings of freedom" (Clark 2011a, 25). In addition, it seemed

that the Taliban automatically defined as legitimate military targets all contractors who were, while working, guarded by pro-government armed groups. Employees of any company that had an armed group protecting them were considered to be fighting soldiers and could be killed (Clark 2011a, 25).

2.2 Targeting Pro-government Religious Leaders

Among the main targets of the Taliban assassination campaign were religious scholars who publicly opposed the Taliban ideology and military tactics (AIHRC 2008, 22). Eliminating pro-government mullahs was part of the Taliban official assassination program until 2009. The 2006 *Layha* had a clause that instructed Taliban fighters to first issue warnings, usually in the form of "night letters," to mullahs working for the government (Clark 2011b, 26). If a mullah, after receiving a warning, continued to work for the government, he had to be beaten (ibid.). If he, after being beaten, still refused to give up his job, the Taliban district commander or group leader was permitted to issue an order to kill him (ibid.). Although the Taliban leadership dropped that clause in the updated editions of the *Layha*, Taliban fighters continued to regularly carry out assassinations of pro-government clerics.

From 2002 to 2013, more than 800 pro-government religious leaders had been killed across the country (Azami 2013). The deadliest province was probably Kandahar, a Taliban stronghold, where about 300 pro-government clerics were killed between 2004 and mid-2017 (Mashal and Sukhanyar 2017). In Badakhshan province, in the north of the country, 110 clerics were killed between 2002 and mid-2017 (ibid.). The Afghan authorities rarely investigated the killings, so it remained unclear exactly how many of them were carried out by the Taliban (ibid.).

The Taliban leadership provided three reasons for targeting pro-government clerics. First, pro-government religious leaders were targeted because they embraced the foreign occupation by providing political support for the U.S.-led occupying forces and their local collaborators (AIHRC 2008, 22). The pro-government association of religious scholars, the National Council of Ulama (NCU), which was set up by the

Karzai government in 2002, consisted of about 3000 government-paid clerics who regularly issued religious edicts, or *fatwas*, in which they lent their support to the Afghan regime and justified the presence of U.S.-led forces (Azami 2013). The NCU also issued edicts in which they dismissed the Taliban's call for jihad against the government by arguing that the government, which consisted exclusively of Muslims, had been elected by the Afghan people (ibid.).

Second, pro-government clerics were targeted because they performed religious work for members of the Afghan security forces. Religious work for the Afghan army and police was interpreted by the Taliban as a serious offense punishable by death. One example was killings of clerics who offered prayers at funerals of members of the Afghan forces. In May 2013, insurgents killed a local mullah in Kunar province and left a brief note on his dead body that read: "This will be the punishment of those who offer prayers for [dead] apostates" (Azami 2013). Another example was killings of mullahs who served on bases of the Afghan forces. In August 2014, insurgents shot dead a cleric from Tarin Kot district, Oruzgan province, as he was leaving an ANP base where he served as the base's mullah (UNAMA 2015, 59).

Third, the Taliban targeted pro-government religious leaders because they viewed them as a threat that challenged the Taliban's legitimacy as the main religious movement in the country. The NCU, for example, tried to undermine the Taliban movement's religious credentials by denouncing its military tactics as un-Islamic (e.g., suicide attacks, targeted killings of civilians, random killings of civilians, destruction of mosques and schools) (Azami 2013; UNAMA 2015, 59). The Taliban feared that such statements could weaken the morale of members of the insurgency and turn the public opinion against them (Azami 2013).

2.3 Targeting Judicial Officials

Although none of the three editions of the *Layha* contained a clause defining judicial officials as legitimate military targets, the frequent Taliban attacks on courts of law, and the subsequent statements in which Taliban spokespersons justified such attacks, showed that the Taliban leadership

believed judicial officials were fair game for their targeted killing program. In a statement, issued after a deadly suicide attack on the Ministry of Justice in Kabul on 19 May 2015, the Taliban confirmed that they would continue to target "judges, prosecutors, the personal of Ministry of Justice [sic]" (UNAMA 2016, 44).

The Taliban leadership provided three reasons for targeting judicial officials. First, the Taliban argued that members of the judicial system provided support for the U.S.-led occupation by portraying the occupation as lawful. In a statement, issued after a car bomb attack outside the Supreme Court complex in Kabul on 11 June 2013, which targeted three buses taking court employees home from work, the Taliban explained that the court's employees had been "sentenced to death" because of, among other things, their role in "legalizing the infidels" (Nordland 2013; Harooni 2013).

Second, the Taliban wanted to eliminate judicial officials because they were involved in prosecuting and sentencing Taliban fighters (Islamic Emirate of Afghanistan 2014). The Taliban viewed the judicial system as part of a broader system of oppression created by the U.S.-led occupying powers and their local stooges. In this system of oppression, courts of law were perceived as tools of the occupying powers used for issuing harsh sentences to detained insurgents. According to the Taliban, judicial officials had an "important role in cruelty, bad behavior with our countrymen," in particular those found guilty of being members of the insurgency (Nordland 2013). Consequently, some targeted killings were justified as punishments for the harsh sentencing of Taliban fighters. For example, in a statement in which they claimed responsibility for killing, in August 2014, a judge working at the Appeals Court in Farah city, the Taliban noted that they targeted the judge because he imposed harsh sentences on Taliban members (UNAMA 2015, 58). On at least one occasion the Taliban also attacked judicial officials to avenge an execution of Taliban fighters. The revenge attack was carried out following the hanging on 8 May 2016 of six Taliban prisoners convicted of terrorism offenses (Taliban Storm Afghan Court 2016). After vowing to seek revenge for the execution, a group of insurgents stormed a court in Ghazni city. The ensuing clash with the police resulted in 10 people killed, including all five of the militants (ibid.).

Third, the Taliban sometimes targeted courthouses because they wanted to free their fighters who had been put on trial. In one of the deadliest attacks on a court of law, carried out on 3 April 2013, a group of Taliban insurgents, strapped with explosives, stormed the governor's compound in Farah city where a trial of ten alleged insurgents was taking place (Stanekzai 2013; RFE/RL 2013). The assailants entered the governor's compound using an Afghan National Army truck and wearing Afghan National Army uniforms (RFE/RL 2013). In the attack, which consisted of a series of explosions and a seven-hour gun battle, the suicide bombers killed themselves and 44 people, including 34 civilians, six soldiers, and four policemen (ibid.). "We sent several warnings to those in the Farah government, telling them not to work there," said Qari Yusuf Ahmadi, a Taliban spokesperson (Stanekzai 2013). After the attack, the Taliban claimed they freed all of their fighters who were on trial, while the Afghan authorities claimed that none of them was freed (RFE/RL 2013).

The Taliban movement, therefore, tried to achieve long- and short-term objectives when targeting judicial officials. The key long-term objective was to cripple the judicial system in order to replace it with a Sharia-based judiciary, while the two short-term objectives were to avenge insurgents sentenced with severe penalties and free insurgents put on trial.

2.4 Targeting Teachers

Throughout the conflict, the Taliban adopted two tactics when dealing with teachers providing education at public schools. The first tactic, outlined in the 2006 *Layha*, was to eliminate or intimidate teachers because they were perceived as "tools of the infidels." The key objective of this tactic was to force government-established schools to close down. The Taliban leadership argued that public schools, built during the post-Taliban era, strengthened "the system of the infidels" by providing education "contrary to the principles of Islam" (Clark 2011b, 26). With the new schools perceived as un-Islamic, the Taliban instructed parents to send their children to madrasas where they would study under the

guidance of religiously trained teachers who used textbooks published during the time of the Islamic Emirate. The 2006 *Layha* also included a clause describing the procedure to follow when dealing with teachers at government-established schools (Clark 2011b, 26). The procedure, which was similar to the procedure set up for targeting pro-government religious leaders, consisted of three steps. First, when the Taliban identified individuals working as teachers, they first had to issue them a warning. Second, if a teacher, despite being warned, decided not to quit his job, he had to be beaten. And third, if, after being beaten, the teacher continued to work, the Taliban district commander or group leader was allowed to give an order to kill him (ibid.).

When the Taliban started gaining control over large parts of the country, in particular in the southern and eastern provinces, they changed their tactic. They stopped accusing government-established schools of being "tools of the infidels" because they wanted these schools to continue providing education for the population living in Taliban-controlled areas. The Taliban decided to allow schools to operate in areas under their control if teachers and staff complied with the Taliban rules on how to run schools (e.g., no education for girls) (Giustozzi and Reuter 2011, 2–3). The shift in tactic became visible when new, updated versions of the *Layha* were published in 2009 and 2010. In both versions, the Taliban removed the clause stipulating that it was permissible, in specific circumstances, to assassinate teachers. In addition, in March 2011, the Taliban leader, Mullah Mohammed Omar, issued a decree instructing insurgents to stop attacks on schools (IRIN 2011).

Despite revising their policy on government schools, the Taliban did not completely stop to intimidate and kill teachers. They continued to target teachers who refused to run schools in accordance with the Taliban rules, in particular the order to stop providing education for young girls. One of the teachers who became a victim of a Taliban assassination attempt was 32-year-old Mudir Said Mohammed, the principal of a school for boys and girls located in the district of Musa Khel, Khost Province. "At the beginning of this year [in 2017], the Taliban sent me their first warning to stop teaching girls at my school. They said it was acceptable to provide education only for boys. I told them that boys and

girls are equal, and all of them should be allowed to go to school. They all represent the future of our country," said Mudir Said Mohammed (pers. comm.). In total, he received three warnings—one verbal and two written messages—from the Taliban, but he refused to listen to them. The decision to stick to his principles almost cost him his life. In August 2017, he was driving alone in his car when a bomb, placed under the car by unidentified men, exploded. Severely injured, he was quickly transferred to the operating theater at the Emergency Hospital in Kabul. During the operation, surgeons could not save his left leg which had to be amputated above the knee. His right leg was badly burned. While he was recovering at the hospital, the Taliban found out that he survived the explosion. "They sent me a message. They say they will kill me if I return to my village," said Mudir Said Mohammed, sitting on a wheelchair in the garden of the Emergency Hospital.

2.5 Targeting Employees of Aid Organizations

When dealing with local and foreign employees of humanitarian and development non-governmental organizations, the Taliban used two tactics. The first tactic, outlined in the 2006 *Layha*, was to accuse non-governmental organizations of being "tools of the infidels" intent on "destroying Islam," and, consequently, to call for a ban on their operations (Clark 2011b, 26). Although the 2006 *Layha* did not directly state that aid workers had to be eliminated, it was clear that, by being defined as "tools of the infidels" working against Islam, they were perceived as legitimate military targets.

The second tactic, introduced by the Taliban after they tightened their grip over large parts of the country, was to allow aid agencies to operate in Taliban-controlled areas if they followed the rules set up by the Taliban leadership. With the objective to co-opt aid organizations in order to use them as service providers for the civilian population living in Taliban-controlled areas, the Taliban leadership issued specific guidelines to regulate the work of such organizations. All aid agencies, which first had to register with the Taliban at senior leadership level in order to be allowed to continue working in areas under Taliban control,

were asked to meet several conditions, including observing the principle of neutrality, respecting Taliban concepts of 'Afghan culture' and, in certain circumstances, paying taxes (Jackson and Giustozzi 2012, 2). In line with the new policy on aid organizations, the updated editions of the *Layha*, published in 2009 and 2010, dropped the clause describing employees of non-governmental organizations as "tools of the infidels" (Jackson and Giustozzi 2012, 10). Instead of defining aid agencies as legitimate military targets, the Taliban opted for relying on them—as "tools of the Taliban"—to assist local communities.

Despite the revised policy on aid organizations, the frequent Taliban attacks on humanitarian workers, and the statements they issued after such attacks, showed that the Taliban continued to view such attacks as legitimate in specific circumstances. First, the Taliban leadership approved attacks on aid workers identified as spies providing intelligence to the Afghan regime and their foreign backers. In a statement, released on 6 August 2013, the Taliban argued that workers of humanitarian organizations could be targeted if they were "established by the invaders for the purpose of collecting intelligence" (UNAMA 2014, 37). The problem was that after carrying out deadly attacks on aid workers, the Taliban never provided convincing evidence to prove that the victims were actually spies directly participating in hostilities. For example, in Badakhshan province in early August 2010, the Taliban claimed responsibility for killing ten unarmed medics—six Americans, one German, one Briton and two Afghans—of the International Assistance Mission (IAM), a Switzerland-based non-profit Christian organization operating in Afghanistan since 1966 (Huma 2010; Partlow 2010). After gunning down the medical workers, the Taliban issued a statement claiming that the Christian group's volunteers were proselytizing and spying for the U.S.-led occupying forces (Huma 2010). Representatives of the targeted group denied the accusation, while the Taliban failed to provide evidence to substantiate their claims (ibid.).

Second, the Taliban targeted aid workers believed to be "inviting people to non-Islamic ways" (UNAMA 2014, 37), in particular workers from Christian aid agencies believed to be turning Afghans away from Islam. In late November 2014, for example, the Taliban claimed responsibility for killing a South African preacher/aid worker, his two

teenage children and an Afghan citizen in an attack on the compound of the Partnership in Academics and Development (PAD), a U.S.-based aid agency providing educational resources for Afghans (Johnson and Donati 2014; Pillay 2014). In a statement issued after the deadly attack, Zabiullah Mujahid, the Taliban spokesperson, claimed that the compound housed a "secret Christian missionary group" (Pillay 2014).

Third, the Taliban argued that aid workers were considered legitimate targets when they were guarded by Afghan security forces or pro-government militias. Any non-governmental organization "which has an armed group with it and the armed group might have attacked the mujahedin several times; *they* are considered to be fighting soldiers and can be killed" (Clark 2011a, 25).

2.6 Targeting "Pernicious Individuals" and "the Likes"

In addition to listing the above-mentioned categories of civilians as legitimate military targets, the Taliban leadership sometimes provided vague descriptions of targets that further increased the scope of the targeted killing program. On the one hand, the Taliban leadership used vague descriptions of the institutions they believed were legitimate military objectives. In 2013, for example, the Taliban announced that officials of the "Kabul administration" and "*employees of other sensitive and detrimental organs* [emphasis added]" were legitimate targets (Islamic Emirate of Afghanistan 2013a). On the other hand, Taliban leaders also introduced obfuscatory descriptions of individuals perceived as legitimate targets. In 2015, for example, the Taliban declared, in a statement issued to announce the launch of the *Azm* (Resolve) Spring Offensive, that "officials of the stooge regime and *other pernicious individuals* [emphasis added]" would be targeted during the fighting season (Islamic Emirate of Afghanistan 2015). In 2015, the Taliban also declared, in a statement where they claimed responsibility for the 19 May suicide attack on the Ministry of Justice, that they would continue to target "judges, prosecutors, the personal [sic] of Ministry of Justice *and the likes* [emphasis added]" (UNAMA 2016, 44). In an open letter to UNAMA, issued in early March 2013, the Taliban included another

vague description of targets—"those people who move forward the surrender process for Americans in the name of peace"—into their list of legitimate military targets (Islamic Emirate of Afghanistan 2013b).

By employing vague wording for determining targets (e.g., "sensitive and detrimental organs," "pernicious individuals," "and the likes"), the Taliban leadership provided to field commanders and rank-and-file insurgents ample room for maneuver on decisions about who could be threatened and eliminated. The unclear wording further blurred the line dividing civilians and legitimate military targets, thus allowing insurgents to increase the number of civilian targets and justify the killings by relying on the vague descriptions of targets.

3 Deliberate Indiscriminate Attacks Against Civilians

This chapter adopts the view that the Afghan Taliban, a non-state armed group involved in a non-international armed conflict with the Afghan regime and their foreign backers, were bound to observe the norms of customary international law. It is not contested that customary international law is applicable to non-state armed groups that meet the needed criteria (i.e., responsible command, control over territory, ability to conduct sustained military operations against government forces, and the ability to implement Additional Protocol II) (Bellal et al. 2011). The Afghan Taliban met the needed criteria for a non-state armed group and, therefore, had to observe the principle of distinction between combatants and civilians, a key principle in customary international law, to minimize the killing and maiming of civilians (Henckaerts and Doswald-Beck 2005a, 3–8). As a non-state armed group participating in a non-international conflict, the Taliban were permitted to target in military operations only persons actively participating in hostilities, that is, regular members of one of the belligerent parties fighting against the Taliban (e.g., members of the Afghan army, the U.S.-led international military forces, and pro-government paramilitary groups) and civilians directly participating in hostilities (Protocol Additional II 1977; Melzer 2009a, 27).

While carrying out targeted killings, the Taliban movement chose to ignore the principle of distinction and the standard definitions of legitimate military targets by introducing extremely broad criteria for determining targets. The civilians perceived by the Taliban as military targets were neither regular members of one of the anti-Taliban armed groups nor civilians directly participating in hostilities. If we focus on the latter group of legitimate military targets, we notice that the civilians targeted by the Taliban did not fall into the definition of civilians directly participating in hostilities. Under international humanitarian law, civilians directly participating in hostilities are defined as individuals who temporarily join an armed group, and, while in battle, directly cause adverse military affects such as death, injury, or property destruction (Melzer 2009b, 328–334). If civilians provide only indirect assistance to one of the belligerent sides by, for example, supplying labor and food, working as messengers, taking care of financial activities or disseminating propaganda, they are not directly participating in hostilities, and, as a result, cannot be lawfully targeted in military operations (Alston 2010, 19; Goldman 1993, 84; Melzer 2009b, 322). Therefore, under international humanitarian law, the civilians targeted by the Taliban were clearly not legitimate military targets. The civilians on the Taliban "kill list" were not individuals who temporarily joined an armed group in order to actively participate in hostilities and cause adverse military affects. Some of the targeted civilians (e.g. construction workers, interpreters, and administrators) provided indirect assistance for the Afghan regime and their foreign backers, but they were not legitimate military objectives.

The Taliban targeted killing campaign was based on a definition of civilians that significantly differed from the definition used in international humanitarian law. The Taliban leadership used, in the 2010 *Layha*, the term "common people" to describe "non-targetable" Afghan civilians. The "common people" encompassed people who were neither regular members of the Afghan security forces, the US-led occupying forces and pro-government militias nor civilians in any way linked to the Afghan regime and their foreign backers. Under the Taliban rules, the "common people" enjoyed protected civilian status, and it was one of the main responsibilities of Taliban fighters to take care in protecting their lives (Clark 2011b, 11, 14). The term "common people," however, did

not include civilians who were working for, or in any way supported, the Afghan regime and their foreign allies. It was precisely the exclusion of civilians working for, or supporting, the Afghan regime and their foreign backers that made the term "common people" different from the term "civilians" used in international humanitarian law. Under international humanitarian law, civilians who enjoy protected status in non-international armed conflicts are defined as individuals not actively taking part in hostilities, which includes individuals working for, or supporting, one of the belligerent parties (Protocol Additional II 1977). The difference between the two definitions was the result of the Taliban decision to draw the line between legitimate military targets and civilians based on the line dividing those who opposed them and those who supported them or, at least, remained neutral (Clark 2011a, 21). Anyone who opposed the Taliban—a civilian or a member of the military—was defined as a legitimate military target, while anyone who supported them, or stayed neutral, was defined as a "common person" with protected status.

By relying on the too-broad criteria for determining targets that were clearly inconsistent with international humanitarian law, the Taliban erased, to a significant extent, the dividing line between combatants and civilians, and, as a result, created circumstances for deliberate indiscriminate attacks against civilians—i.e. attacks targeting military objectives and civilians without distinction (Melzer 2009b, 355; Henckaerts and Doswald-Beck 2005a, 40; 2005b, 247–291). First, the Taliban targeted killings were indiscriminate because they were not directed at specific military objectives. Second, the killings were indiscriminate because they relied on a method of combat that necessarily led to attacks that could not be directed at specific military objectives. And third, the killings were indiscriminate because they used a method of combat the effects of which could not be limited as required by international humanitarian law. For example, the effects of the method used by the Taliban could not be limited as required by the principle of distinction between civilians and combatants.

By refusing to observe the prohibition of indiscriminate attacks, which is recognized as part of customary law and applicable in non-international armed conflicts (Henckaerts and Doswald-Beck 2005a, 38–39), the Taliban carried out attacks that systemically violated the laws of armed conflicts.

References

AIHRC (Afghanistan Independent Human Rights Commission). 2008. *Insurgent Abuses Against Afghan Civilians*. Kabul: AIHRC. http://www.refworld.org/docid/4a03f7a82.html. Accessed on 12 December 2017.

Alston, Philip. 2010. *Report of the Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions: Study on Targeted Killings*. Geneva: UN Human Rights Council. http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf. Accessed on 12 September 2017.

Ambach, Phillip, Frédéric Bostedt, Grant Dawson, and Steve Kostas, eds. 2015. *The Protection of Non-combatants During Armed Conflict and Safeguarding the Rights of Victims in Post-conflict Society*. Leiden: Martinus Nijhoff.

Azami, Dawood. 2013. "The 'Dissenting' Clerics Killed in Afghanistan." *BBC*, November 19. http://www.bbc.com/news/world-asia-22885170. Accessed on 1 October 2017.

Bellal, Annyssa, Gilles Giacca, and Stuart Casey-Maslen. 2011. "International Law and Armed Non-State Actors in Afghanistan." *International Review of the Red Cross* 93 (881): 47–79. https://doi.org/10.1017/s1816383111000051.

Clark, Kate. 2011a. *The Layha: Calling the Taleban to Account*. Kabul: Afghanistan Analyst Network. http://www.afghanistan-analysts.org/wp-content/uploads/downloads/2012/10/20110704_CKlark_The_Layha.pdf. Accessed on 1 October 2017.

———. 2011b. *The Layha: Calling the Taleban to Account: Appendix 1*. The Taleban Codes of Conduct in English. Kabul: Afghanistan Analyst Network. http://www.afghanistan-analysts.org/wp-content/uploads/downloads/2012/10/Appendix_1_Code_in_English.pdf. Accessed on 1 October 2017.

Giustozzi, Antonio, and Christoph Reuter. 2011. *The Insurgents of the Afghan North*. Kabul: Afghanistan Analyst Network. http://www.afghanistan-analysts.org/wp-content/uploads/downloads/2012/10/AAN-2011-Northern-Insurgents.pdf. Accessed on 18 December 2017.

Goldman, Robert Kogod. 1993. "Americas Watch's Experience in Monitoring Internal Armed Conflicts." *American University Journal of International Law and Policy* 9: 49–94.

Gopal, Anand. 2010. *The Battle for Afghanistan: Militancy and Conflict in Kandahar*. Washington, DC: New America Foundation. http://www.operationspaix.net/DATA/DOCUMENT/4473~v~The_Battle_for_Afghanistan__Militancy_and_Conflict_in_Kandahar.pdf. Accessed on 18 December 2017.

Harooni, Mirwais. 2013. "Suspected Taliban Bomber Targets Afghan Court, Kills 17." *Reuters*, June 11. http://www.reuters.com/article/us-afghanistan-attack-idUSBRE95A0I320130611. Accessed on 1 October 2017.

Henckaerts, Jean-Marie, and Louise Doswald-Beck. 2005a. *Customary International Humanitarian Law. Volume 1: Rules*. Cambridge: Cambridge University Press.

———. 2005b. *Customary International Humanitarian Law: Volume 2: Practice—Part I*. Cambridge: Cambridge University Press.

Huma, Yusuf. 2010. "Christian NGO Identifies Killed Aid Workers, Vows to Stay in Afghanistan." *The Christian Science Monitor*, August 9. https://www.csmonitor.com/World/terrorism-security/2010/0809/Christian-NGO-identifies-killed-aid-workers-vows-to-stay-in-Afghanistan. Accessed on 24 December 2017.

Human Rights Watch (HRW). 2007. *The Human Cost: The Consequences of Insurgent Attacks in Afghanistan*. New York: HRW. https://www.hrw.org/reports/2007/afghanistan0407/afghanistan0407webwcover.pdf. Accessed on 24 December 2017.

IRIN (Integrated Regional Information Networks). 2011. "Afghanistan: Government Hails Taliban Decree on Schools," March 28. http://peacenews.org/2011/03/29/afghanistan-government-hails-taliban-decree-on-schools-irin-asia/. Accessed on 21 December 2017.

Islamic Emirate of Afghanistan. 2013a. "Rejoinder About the Recent Report of the UNAMA Regarding the Civilian Casualties." July. http://jihadology.net/2013/07/31/new-statement-from-the-islamic-emirate-of-afghanistan-rejoinder-about-the-recent-report-of-the-unama-regarding-the-civilian-casualties/. Accessed on 8 January 2017.

———. 2013b. "An Open Letter to the UNAMA About the Biased Behavior of This Organization." February 25. https://blogs.mediapart.fr/lynx/blog/010313/open-letter-unama-about-biased-behavior-organization. Accessed on 8 January 2017.

———. 2014. "Regarding the Commencement of the Annual Spring Operation Named 'Khaybar'." May 8. http://jihadology.net/2014/05/08/new-statement-from-the-islamic-emirate-of-afghanistan-regarding-the-commencement-of-the-annual-spring-operation-named-khaybar/. Accessed on 14 December 2017.

———. 2015. "Statement by the Leading Council of the Islamic Emirate Regarding the Inauguration of Spring Operations Called 'Azm' (Resolve)." http://jihadology.net/2015/04/22/new-statement-from-the-islamic-emirate-of-afghanistan-regarding-the-inauguration-of-spring-operations-called-azm-resolve/. Accessed on 12 December 2017.

Jackson, Ashley, and Antonio Giustozzi. 2012. *Talking to the Other Side: Humanitarian Engagement with the Taliban in Afghanistan.* London: Humanitarian Policy Group. https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7968.pdf. Accessed on 24 December 2017.

Johnson, Thomas H. 2013. "Taliban Adaptations and Innovations." *Small Wars and Insurgencies* 24 (1): 3–27.

Johnson, Kay, and Jessica Donati. 2014. "Kabul Police Chief Quits After South African Family Dies in Taliban Attack." *Reuters*, November 30. https://www.reuters.com/article/us-afghanistan-attacks/kabul-police-chief-quits-after-south-african-family-dies-in-taliban-attack-idUSKCN-0JE09L20141130. Accessed on 1 October 2017.

Johnson, Thomas H., and Matthew C. DuPee. 2012 "Analysing the New Taliban Code of Conduct (Layeha): An Assessment of Changing Perspectives and Strategies of the Afghan Taliban." *Central Asian Survey* 31 (1): 77–91.

Mashal, Mujib, and Jawad Sukhanyar. 2017. "Taliban Target: Scholars of Islam." *The New York Times*, May 28. https://www.nytimes.com/2017/05/28/world/asia/uptick-in-killing-of-religious-scholars-as-taliban-look-to-curtail-their-influence.html?mcubz=3. Accessed on 1 October 2017.

Melzer, Nils. 2009a. *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*. Geneva: International Committee of the Red Cross.

———. 2009b. *Targeted Killing and International Law*. Oxford: Oxford University Press.

Nordland, Rod. 2013. "Taliban Bomb Attack Kills Court Workers in Kabul." *The New York Times*, June 11. http://www.nytimes.com/2013/06/12/world/asia/afghanistan.html. Accessed on 10 October 2017.

Partlow, Joshua. 2010. "Devastated Christian Aid Group Pledges to Continue Work in Afghanistan." *The Washington Post*, August 9. http://www.washingtonpost.com/wp-dyn/content/article/2010/08/08/AR2010080801338.html?sid=ST2010080801343. Accessed on 24 December 2017.

Pillay, Verashni. 2014. "South African Pastor Killed in Afghanistan Suicide Bombing." *Mail & Guardian*, November 30. https://mg.co.za/article/2014-11-30-south-african-pastor-killed-in-afghanistan-suicide-bombing. Accessed on 31 December 2014.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977. https://ihl-databases.icrc.org/ihl/INTRO/475. Accessed on 31 August 2018.

RFE/RL (Radio Free Europe/Radio Liberty). 2013. "Taliban Attacks Western Afghan Courthouse, Killing at Least 53." April 3. http://www.ecoi.net/local_link/243561/366933_de.html. Accessed on 10 October 2017.

Stanekzai, Sharaf. 2013. "Afghan Taliban Kill 44 in Suicide Attack on Courtroom." *Reuters*, April 3. http://www.reuters.com/article/us-afghanistan-blast-idUSBRE9320OE20130403. Accessed on 10 October 2017.

"Taliban Storm Afghan Court, Kill Five, After Vowing Revenge for Executions." 2016. *Reuters*, June 1. https://www.reuters.com/article/us-afghanistan-attacks/taliban-storm-afghan-court-kill-five-after-vowing-revenge-for-executions-idUSKCN0YN3TA. Accessed on 14 December 2017.

UNAMA (United Nations Assistance Mission in Afghanistan). 2009. *Afghanistan: Annual Report on Protection of Civilians in Armed Conflict, 2008.* Kabul: UNAMA. https://unama.unmissions.org/sites/default/files/unama_09february-annual20report_poc202008_final_11feb09.pdf. Accessed on 19 December 2017.

———. 2010. *Afghanistan: Annual Report on Protection of Civilians in Armed Conflict, 2009.* Kabul: UNAMA. https://unama.unmissions.org/sites/default/files/engi_version_of_poc_annual_report_2011.pdf. Accessed on 30 December 2017.

———. 2011a. *Afghanistan Annual Report 2010: Protection of Civilians in Armed Conflict.* Kabul: UNAMA. https://unama.unmissions.org/sites/default/files/engi_version_of_poc_annual_report_2011.pdf. Accessed on 30 November 2017.

———. 2011b. *Afghanistan Midyear Report 2011: Protection of Civilians in Armed Conflict.* Kabul: UNAMA. https://unama.unmissions.org/sites/default/files/2011_midyear_poc.pdf. Accessed on 12 December 2017.

———. 2014. *Afghanistan Annual Report 2013: Protection of Civilians in Armed Conflict.* Kabul: UNAMA. https://unama.unmissions.org/sites/default/files/feb_8_2014_poc-report_2013-full-report-eng.pdf. Accessed on 28 September 2017.

———. 2015. *Afghanistan Annual Report 2014: Protection of Civilians in Armed Conflict.* Kabul: UNAMA. https://unama.unmissions.org/sites/default/files/2014-annual-report-on-protection-of-civilians-final.pdf. Accessed on 28 September 2017.

———. 2016. *Afghanistan Annual Report 2015: Protection of Civilians in Armed Conflict*. Kabul: UNAMA. https://unama.unmissions.org/sites/default/files/poc_annual_report_2015_final_14_feb_2016.pdf. Accessed on 1 October 2017.

———. 2017. *Afghanistan Annual Report 2016: Protection of Civilians in Armed Conflict*. Kabul: UNAMA. https://unama.unmissions.org/sites/default/files/protection_of_civilians_in_armed_conflict_annual_report_2016_final280317.pdf. Accessed on 1 October 2017.

12

Executions, Amputations, and Lashings: Civilian Victims of the Afghan Taliban's Parallel Justice System

1 Introduction

Ghulam Farooq, a 15-year-old boy from the city of Herat, was captured by the Taliban after allegedly participating in a motorcycle theft (Saifullah 2017).[1] Although he was with the group of men who carried out the theft, Farooq insisted he was innocent. He said he wanted to convince his friends to abandon the idea to steal motorcycles from people passing through their area. He also said he stayed behind when his friends went to the road and stopped three people traveling on motorcycles, tied their hands, covered their eyes, and stole the motorcycles. It was after the theft, Farooq insisted, that he approached the victims to untie them and provide them help.

As many Afghans living in areas with limited presence of the Afghan security forces, the victims decided to request the Taliban to bring to justice the perpetrators of the theft. The Taliban were able to arrest only Farooq because his friends already fled that area. After keeping Farooq in captivity for more than two months, a Taliban court held a hearing

[1]The entire account of Farooq's arrest and trial is based on the report by Masood Saifullah (2017).

V. Badalič, *The War Against Civilians*, Palgrave Studies in Victims and Victimology,
https://doi.org/10.1007/978-3-030-12406-9_12

and found Farooq guilty of stealing the motorcycles. The court, which ruled based on Shari'a law, ordered that Farooq's hand and foot be cut off. The amputations had to be carried out in public, in front of Farooq's brother, to convey a message of severity and moral order to the local population.

The establishment of an effective shadow judiciary was one of the primary objectives of the Afghan Taliban after they were toppled from power in late 2001 (Giustozzi and Baczko 2014, 199–200). When they reorganized their forces to launch the rebellion against the U.S.-led occupying forces, the Taliban simultaneously started to re-establish their justice system (Giustozzi et al. 2012, 12). Throughout the conflict, they continued to build, and maintain, an extensive network of Shari'a-based courts across the country, particularly in the southern and eastern provinces (Giustozzi and Baczko 2014, 202).

Due to the numerous problems affecting the judiciary established by the Afghan regime and their foreign backers (e.g., high degree of corruption among judicial officials, chronic understaffing, limited reach of the courts in the rural areas, too expensive fees for people with limited resources, long wait for a verdict …), many Afghans decided to seek justice at Taliban courts (Giustozzi et al. 2012, 12; UNAMA 2015, 63; Ahmed 2015; Saifullah 2017). The Afghans who chose to rely on Taliban courts cited accessibility, low cost, transparency, swiftness in reaching a verdict, and effective enforcement of judicial decisions as the main advantages over the justice system set up by the Afghan regime (Giustozzi et al. 2012, 27; Forbes 2013, 14–15; Giustozzi and Baczko 2014, 207). Another significant factor that led to the use of Taliban courts was coercion. The Taliban banned people from solving their disputes at official government courts and instructed them to seek justice only at Taliban courts (Giustozzi and Baczko 2014, 215).

The majority of cases—about 80%—handled by Taliban judges were civil cases (e.g., land and property disputes, water disputes, family issues), while the remaining cases—roughly 20%—were criminal cases (Giustozzi et al. 2012, 20). This chapter focuses exclusively on criminal cases, or, to be more precise, on cases that resulted in punishments that amounted to human rights abuses. From 2012 to 2017, the United Nations Assistance Mission in Afghanistan (UNAMA)

collected information on hundreds of incidents of parallel justice system punishments that amounted to human rights violations—such punishments resulted, in total, in 252 deaths (e.g., public summary executions by stoning, beheading, hanging or shooting) and 59 injuries (e.g., amputations of limbs and lashings) (UNAMA 2012, 24; 2014, 27; 2015, 61; 2016, 50; 2017a, 68; 2018, 36). Due to the limited access to areas under control of insurgent groups, such incidents probably remained significantly under-reported (UNAMA 2018, 36). In 2012, for example, UNAMA documented only 33 executions ordered by Taliban courts, but the Taliban reported that they sentenced to death 340 people in that year (Giustozzi and Baczko 2014, 221).

In order to shed light on how the Taliban courts affected the civilian population in Afghanistan, the central part of the chapter explores the following themes. The first section of the chapter provides a brief overview of both conflict-related and non-conflict-related criminal offenses as defined by the Afghan Taliban. That section also provides an insight into the harsh punishments meted out by Taliban courts. The second section explores how the Taliban courts failed to provide some of the essential judicial guarantees needed to ensure a fair trial. The rule that no one may be convicted or sentenced except after a fair trial that affords all judicial guarantees is recognized as a norm of customary international law applicable in both non-international and international armed conflicts (Henckaerts and Doswald-Beck 2005, 352; OHCHR 2003, 117–118). In non-international armed conflicts, the passing of a sentence and ordering an execution without a previous reasoned judgment pronounced by a court of law that affords all essential judicial guarantees is prohibited at any time and in any place with respect to people not actively participating in hostilities (Geneva Convention III). Both international humanitarian law and human rights law provide numerous judicial guarantees aimed at ensuring a fair trial for the accused persons, for example, access to information on the nature and cause of the accusation, the necessary rights and means of defense, the right to a trial without undue delay, the right to examine witnesses, the right to public proceedings, the right to appeal … etc. (Henckaerts and Doswald-Beck 2005, 354–371). Due to the limited information on how the Taliban judiciary worked, it was not possible to exactly

determine which judicial guarantees were provided and which ones were ignored by the Taliban. Based on available data, however, it was possible to determine whether the Taliban included into their judicial system the following guarantees: the right to a hearing by an independent tribunal, the right to be represented by a defense lawyer, the right to have sufficient time to prepare a defense, and the right to appeal.[2]

The last, third section of the chapter shows how many punishments carried out by the Afghan Taliban amounted to human rights violations, that is, violations of the right to life and the right not to be subjected to torture or any other form of similar treatment.

2 Crimes and Punishments

2.1 Conflict-Related Crimes

The Taliban courts had the authority to hear and decide both cases involving individuals accused of committing conflict-related crimes and cases involving individuals suspected of committing other, non-conflict-related criminal acts as defined by the Taliban leadership. The category of conflict-related crimes included spying for the Afghan regime and the U.S.-led occupying forces, working as a contractor for the Afghan regime and the U.S.-led forces, and having family links to members of the Afghan security forces (UNAMA 2017a, 69). The first two crimes were defined in the *Layha*, the Taliban's code of conduct, which provided the legal basis for Taliban judicial officials to prosecute people

[2]This chapter adopts the view that the Afghan Taliban, a non-state armed group involved in a non-international armed conflict with the Afghan regime and their foreign backers, were bound to observe the norms of customary international law. According to Bellal et al. (2011), it is not contested that customary international law is applicable to non-state armed groups that meet the needed criteria (i.e., responsible command, control over territory, ability to conduct sustained military operations against government forces, and the ability to implement Additional Protocol II). This chapter argues that the Afghan Taliban met the criteria for a non-state armed group, and, therefore, had to observe the norms of customary international law, including the rule that no one may be convicted or sentenced, except pursuant to a fair trial providing all essential judicial guarantees (Henckaerts and Doswald-Beck 2005, 352–371).

involved in such crimes (Clark 2011, 5–7). The third "crime," however, was not defined in the *Layha*, which indicated that the Taliban rank-and-file sometimes arbitrarily punished people for actions that did not constitute a criminal offense according to the Taliban leadership.

First, individuals who spied for the Afghan government and their foreign backers were usually sentenced to death. In October 2013, for example, the Taliban executed a 19-year-old farmer in the district of Jurm, Badakhshan province, after finding him guilty of being a spy for the Afghan security forces (UNAMA 2014, 28). After executing him, the Taliban placed a note on the victim's body warning of similar consequences for pro-government informers (ibid.). In some cases, however, Taliban courts spared the life of those convicted on charges of spying. In February 2012, for example, Taliban judges ordered to cut off the ear of a teenager from Badghis province found guilty of spying for the Afghan forces (UNAMA 2012, 24).

The 2010 *Layha*, which defined spies as those "who strive to disseminate evil," placed the authority to issue a verdict in such cases with the Taliban provincial or district judge, or, if a judge was not available, with the provincial official (Clark 2011, 5). The authority to order the execution of a spy lied with the Taliban supreme leader, his deputy, the provincial judges and the provincial governors (ibid.). In cases in which it was not possible to prove "beyond reasonable doubt" that someone was spying for the government, the Taliban district governor, after consulting with experts, had the authority to expel the suspected spy to a territory where he or she no longer represented a threat (Clark 2011, 6). This kind of punishment was used when Taliban fighters were unable to find conclusive evidence proving that the accused individual was a spy, but they nevertheless continued to remain suspicious of the accused individual (ibid.). Besides banishing the suspected spy from the community, there was another punishment for such individuals. Taliban judges were authorized to demand from relatives of the suspected spy and reliable individuals from the local community to provide a surety or non-transportable properties as a guarantee that the suspected spy will not commit any crime in the future (ibid.). If the suspected person was later caught spying or he escaped from the region, the Taliban seized his property (ibid.).

Second, the punishment for working for, or providing any kind of support to, the Afghan government and their foreign backers was the death penalty (UNAMA 2012, 25). The 2010 *Layha* stated that when Taliban fighters captured and brought to trial contractors who built military bases and transported fuel or any other material for the "infidels and their puppet administration," the judge had the authority to sentence them to death (Clark 2011, 6–7). If there was no Taliban judge in the province, then the provincial shadow governor had the authority take over the case and issue a verdict (ibid.). In September 2011, for example, members of the insurgency sentenced to death a man found guilty of supplying fuel to pro-government forces (UNAMA 2012, 25). According to reports, the victim's eyes had been removed post-mortem (ibid.). In another incident, which occurred in July 2017, the Taliban shot to death a woman found guilty of supporting the Afghan government by providing water to a member of the Afghan security forces in Nawa-e-Barakzai district, Helmand province (UNAMA 2018, 9).

Third, the Taliban sometimes punished people who had family links with a person working for the Afghan security forces. In early 2012, for example, the Taliban abducted a man and amputated his right hand because they suspected that members of his family worked for the Afghan forces (UNAMA 2012, 24). It remained unclear, however, whether a trial took place. The victim said that no court process took place before the punishment, while other sources insisted that a Taliban court had ordered the amputation (ibid.).

2.2 Non-conflict-related Crimes

Based on cases tried in Taliban courts, the category of criminal offenses not related to the armed conflict included murder, kidnapping, crimes against property and "moral crimes."

First, individuals convicted of murder received the death penalty (UNAMA 2017a, 69). In June 2016, for example, a Taliban court ordered the execution of a man in the district of Shah Joy, Zabul province, after determining he was guilty of murdering a local shopkeeper. The convict was beheaded in public (ibid.). In December 2016,

the Taliban hanged in public a university student in Wardak province, after finding him guilty of killing two Taliban commanders (ibid.). An individual found guilty of murder was not executed only if the victim's family agreed to forgive him, usually in exchange for blood money (Giustozzi et al. 2012, 24).

Second, the punishment for kidnapping was the death penalty (UNAMA 2015, 65; 2017b, 44). In September 2014, for example, a Taliban court sentenced to death three men found guilty of kidnapping and murdering a 7-year-old child (UNAMA 2015, 65). The three kidnappers demanded a ransom of 5 million Pakistani Rupees from the child's father. When they realized that the father was unable to pay, they killed the child and delivered his dead body to his family. After being found guilty of kidnapping and murder, the three men were shot to death in a public execution in front of a crowd of about 1000 people in Zurmat district, Paktia province. The Taliban had their dead bodies hung and ordered that no one was allowed to remove them for three days.[3]

Third, the punishments for crimes against property (e.g., robbery, burglary) included amputations of limbs, imprisonment, lashings and—rarely—the death penalty (UNAMA 2017a, 69; 2017b, 44). Due to the lack of information on how Taliban judges justified their judgments, it was not possible to find out exactly which elements did the judges take into consideration when making a decision. The fact that many times the punishments for the same crime significantly differed in their degree of severity indicated that judges had ample room for discretion in deciding on the type of punishment. For example, in August 2016 in Helmand province, the Taliban cut off the hand of a man after finding him guilty of stealing from houses abandoned by civilians displaced from the area due to ground fighting (UNAMA 2017a, 69). In February 2012 in Ghor province, the Taliban sentenced a man convicted of robbery to only 15 days imprisonment (UNAMA 2012, 24). In another incident, in early March 2015, the Taliban arrested four men in Nangarhar province, accusing them of robbery (UNAMA 2016, 51).

[3]The brief description of this case is based on a report by UNAMA (2015, 65).

After a trial in a Taliban court, the four men were sentenced to 28 lashes each (ibid.). Rarely individuals found guilty of a robbery were sentenced to death. In November 2014, for example, the Taliban claimed responsibility for shooting to death two men found guilty of extorting money from passengers of passing vehicles in the district of Aqcha, Jowzjan province (UNAMA 2015, 64). After killing the two men, Taliban fighters put a written warning into their pockets stating that whoever will commit robbery will face similar consequences (ibid.).

Fourth, "moral crimes" (e.g., homosexuality, extra-marital relationship, pre-marital relationship) incurred severe punishments, usually for the women but sometimes also for the men, with the penalties including lashings and the death penalty (UNAMA 2017a, 70). The punishment for individuals found guilty of homosexuality was the death penalty. In August 2015, for example, a Taliban court in Taywarah district, Ghor province, convicted a 17-year-old boy and two men of homosexuality and ordered execution by wall toppling (UNAMA 2016, 51). After the wall fell on the convicts, the two men died, while the boy was injured. The Taliban allowed him to live (ibid.).

The punishments for an extra-marital relationship were lashings and the death penalty (Giustozzi et al. 2012, 24–26). In February 2012 in Ghor province, for example, the Taliban ordered the public lashings of a man and a woman found guilty of adultery (UNAMA 2012, 24). In another case of adultery, the Taliban sentenced, in August 2013, to death a 32-year-old man in Jurm district, Badakhshan province (UNAMA 2014, 28). The Taliban tied the convict with ropes and hung him between two trees for eight hours. After he was removed from the trees, he was shot dead (ibid.).

Individuals found guilty of being involved in a pre-marital relationship were punished with lashings or the death penalty. In 2015, for example, the Taliban stoned to death 19-year-old Rokhshana after she was found guilty of having pre-marital sex with her boyfriend, 23-year-old Mohammed Gul, who was punished with a number of lashes (Ghafoori and Bezhan 2015). In another incident, in May 2013, insurgents shot to death a 23-year-old man and a 16-year-old girl in Lal Pura district, Nangarhar province, after they were found guilty of being involved in a pre-marital relationship. The couple ran away from

their families, but they were tracked down by insurgents with the help of the couple's relatives (UNAMA 2012, 27–28). Due to the lack of data, it was many times not possible to know whether the punishments for "immoral activities" included punishments for pre-marital non-sexual relationships. In many cases, the descriptions of the "crimes"—e.g., "running away from home," "friendship with a male," "riding inappropriately together on a motorbike," "speaking with a stranger on the phone and running away from home," "a man and a woman found together in the same room alone"—were so vague that it was not possible to determine for what kind of relationship the victims of Taliban "justice" were being punished (UNAMA 2017a, 70; 2018, 10).

Fifth, perjury was considered a serious criminal offense by the Taliban. Any individual found guilty of providing false information to Taliban judges was punished, usually with a number of lashes carried out by Taliban fighters (Giustozzi et al. 2012, 24).

3 Limited Judicial Guarantees

3.1 No Institutional Independence for the Judiciary

One of the key judicial guarantees is the independence of courts. The Universal Declaration of Human Rights stipulates—in Article 10—that everyone is entitled to a fair and public hearing by an independent and impartial tribunal (U.N. General Assembly 1948). Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR) states that in criminal cases everyone must be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law (U.N. General Assembly 1966). The right to be tried by an independent tribunal is an absolute right applicable at all times and to all courts (U.N. Human Rights Committee 1992a, 2007, 6).

The separation of powers, that is, the separation of the judiciary from the executive branch and the legislature, is a key requirement for establishing an independent judiciary (U.N. Economic and Social Council 1995, 22; OHCHR 2003, 120). In order to ensure the institutional independence of the judiciary, States must guarantee that the judiciary

has independence in administrative and financial matters, independence as to decision making (i.e., other institutions must respect the decisions made by the judiciary), and jurisdictional competence (i.e., the judiciary must have autonomy in the determination of questions of competence) (OHCHR 2003, 120–122).

By keeping their courts subjected to the executive branch of power, the Afghan Taliban failed to ensure the institutional independence of the judiciary. Throughout the conflict, the Taliban judiciary remained, to a large extent, under the control of Taliban political and military figures. On the one hand, in the southern Afghan provinces, which were under the influence of the Quetta Shura, the council of Taliban leaders based in the Pakistani city of Quetta, Taliban judges remained under the control of provincial shadow governors (Giustozzi and Baczko 2014, 210). The governors controlled the judiciary through the so-called Civilian Commission (ibid.). On the other hand, in the eastern Afghan provinces, which were under the influence of the Peshawar Shura, a council of Taliban leaders based in the Pakistani city of Peshawar, the Taliban judiciary was supervised by the so-called Military Commission, a body consisting exclusively of military commanders responsible for planning and conducting military operations (Giustozzi and Baczko 2014, 210; Clark 2011, 9).

The subjugation of the judiciary to the executive branch was apparent in the following areas. First, the judiciary did not have independence in financial matters. The Military Commission, which played a major role in supervising the courts in eastern Afghanistan, was responsible for paying the judges' salaries and allowances (Giustozzi et al. 2012, 14–15).

Second, Taliban judges were not the only ones with the authority to make judicial decisions. In the first years of the rebellion against the U.S.-led occupying forces, Taliban political and military figures (i.e., shadow governors, military commanders, and religious leaders supporting the insurgency) served as judges in a justice system that did not yet recruit judges with qualifications in law (Giustozzi and Baczko 2014, 207). Although over the years new measures were introduced to include qualified judges into the judiciary, senior Taliban political figures retained the authority to make decisions in cases in which the death penalty may be provided, that is, in cases in which individuals were

charged with being informers or contractors working for the Afghan regime and their foreign backers. In such cases, the Taliban top political leaders (i.e., the supreme leader, the *Imam*, and his deputy, the *Nayeb*) and the Taliban provincial governors had the authority to issue a verdict and order an execution (Clark 2011, 4–5).[4]

Third, the Taliban judiciary did not have independence in decision making because not all the other Taliban institutions respected and observed the decisions made by the Taliban courts. The Military Commission had the authority to bar a judge from announcing a verdict (Giustozzi et al. 2012, 15). In addition, the Taliban provincial governors also supervised and influenced the decisions made by the judges (Giustozzi et al. 2012, 13–15).

3.2 No Individual Independence for Judges

Another key component of an independent judiciary is the individual independence of judges. This kind of independence must be ensured through a number of measures, for example, by selecting judges with sufficient professional qualifications and personal integrity, by providing them long-term security of tenure, adequate remuneration, and promotions based on objective factors, and by creating independent monitoring mechanisms for evaluating unethical behavior (OHCHR 2003, 123–135). Due to the limited information about Taliban courts, it was not possible to examine which measures, if any, did the Taliban implement to ensure the individual independence of judges. It was, however, possible to examine one measure (i.e., the selection procedure for judges) that failed to secure the needed individual independence.

The selection process of individuals for judicial office must take into consideration the candidates' professional qualifications and personal integrity (U.N. General Assembly 1985). Only individuals with "appropriate training or qualifications in law" can be selected for judicial office (ibid.). Any other criteria (e.g., the candidates' political views and

[4]The provincial governors had the authority to order an execution only if there were no provincial or district judges working in the province (Clark 2011, 4–5).

religious beliefs) can compromise the independence of both the judge and the judiciary as such (OHCHR 2003, 123).

As we have seen above, the Taliban leadership relied, in the early years of the insurgency, on shadow governors and military commanders to carry out the work of judges. By appointing people without appropriate qualifications and training in law, the Taliban leaders compromised the individual independence of judges. Even when they, over the years, started to recruit judges on the basis on their formal education and practical experience, the Taliban leaders remained unable to fill all positions with individuals with the required level of education (Giustozzi et al. 2012, 19). The minimum requirement for judges was that they were religious scholars who graduated from a religious institution, but those who specialized in Shari'a and reached the rank of *Qazi* (Shari'a judge) were preferred (ibid.). Due to the lack of sufficiently trained professionals, the Taliban many times appointed as judges individuals who had no qualifications in law, for example, military commanders who proved capable of solving peoples' disputes, or family members of judges who worked as apprentices for judges and thus gained the experience needed for solving disputes (ibid.). As a result, the Taliban continued to be unable to secure the individual independence of judges.

3.3 Denying the Right to a Defense Lawyer

The right to be assisted by a qualified legal counsel of one's own choice is one of the essential judicial guarantees in a fair trial (Henckaerts and Doswald-Beck 2005, 360). The right to be represented by a defense lawyer is particularly important in cases in which individuals face charges for which the death penalty may be provided (U.N. General Assembly 1966; U.N. Economic and Social Council 1995). In such cases, it is necessary to give to the accused access to a lawyer at every stage of the proceedings in order to provide him protection above and beyond the protection afforded in non-capital cases (U.N. Human Rights Committee 2003, 2005).

The Taliban courts did not provide a defense lawyer to the accused persons, including those who faced charges for which the death penalty

might be provided. Both the complainant and the defendant had no right to be represented by a legal counsel—both had to appear alone before the Taliban judges when they were summoned by the court, and they had to bring witnesses to the hearing (Giustozzi et al. 2012, 21).

3.4 Denying the Right to Have Sufficient Time and Facilities to Prepare a Defense

Article 14(3) of the ICCPR provides for the right of the accused person to have adequate time and facilities for the preparation of defense in a trial (U.N. General Assembly 1966). The U.N. Human Rights Committee (1984) did not clearly determine what is the "adequate time" for the preparation of defense, stating only that "adequate time" depends on the circumstances of each case. The meaning of the term "adequate facilities" is clearer. In order to provide "adequate facilities" to an accused person, a court must provide to the accused the evidence used against him and the opportunity to see and freely communicate with a defense lawyer.

Based on accounts of people who witnessed how Taliban courts operated, it seemed that Taliban judges many times failed to provide to the accused persons enough time to prepare their defense. In the early years of the conflict, Taliban commanders many times executed people without a proper investigation, without allowing the victim of the execution the sufficient time to prepare his or her defense (Giustozzi and Baczko 2014, 209).[5]

3.5 Limited Right to Appeal

The ICCPR stipulates—in Article 14(5)—that anyone convicted of a crime has the right to have his conviction reviewed by a higher tribunal

[5]Even after they established a firm grip over large parts of the country, the Taliban continued to lack the needed investigative infrastructure and information on which Taliban judges could make fair and informed decisions (Giustozzi and Baczko 2014, 216). The inability to verify the facts before announcing a judgment led to miscarriages of justice (Ladbury 2010, 16; Giustozzi and Baczko 2014, 216).

(U.N. General Assembly 1966). In addition, Article 6(3) of Additional Protocol II (1977) states that a convict must be advised of the "judicial and other remedies and of the time-limits within which they may be exercised." A complete judicial review must examine both the legal and material aspects of the person's conviction and sentence—it must, for example, examine the formal and legal aspects of the conviction, re-evaluate the evidence used against the defendant and the conduct of the trial (U.N. Human Rights Committee 1998, 2000; OHCHR 2003, 306). For the right to appeal to be effectively available, the convicted person must have access to a written judgment, the transcripts of the trial, and the opportunity to re-examine the evidence used against him (OHCHR 2003, 307).

Those convicted in Taliban courts had the opportunity to have their cases reviewed by a higher tribunal, that is, the High Court, in the provinces where it existed, and the Central Court, the supreme Taliban judicial institution, which was the ultimate instance of appeal (Giustozzi et al. 2012, 14). Also, convicts had the right to file an appeal at the Military Commission (ibid.).

Although, in theory, convicted persons had the right to appeal, the appeal system remained, in practice, largely dysfunctional (Giustozzi et al. 2012, 5). Three factors negatively affected the right to appeal. First, it was difficult for Afghans with limited resources to access the Central Court, which was located in various cities in Pakistan (Giustozzi et al. 2012, 22). In 2011, for example, the Central Court had three branches, located in Quetta, Peshawar, and Miranshah (Giustozzi and Baczko 2014, 212).

Second, the fact that the Taliban punished those who were unsuccessful in appeal procedures further undermined the right of convicted persons to have their convictions and sentences reviewed. In one case, for example, a villager refused to accept the decision made by Taliban judges by claiming that the other side bribed the judges (Giustozzi et al. 2012, 23). When the Taliban realized that the villager was unable to provide evidence proving that the judges were bribed, they ordered to punish him with 200 lashes (ibid.). Such brutal punishments instilled fear into the local population and, consequently, few convicts dared to stand against a decision made by Taliban judges.

Third, due to the influence of Taliban commanders over the judges, only those who had links with the commanders thought that demanding a review of a case was a course of action that could bring them a favorable result (Giustozzi et al. 2012, 27–28). If someone could not count on the support of a commander, he may feel that it made no sense for him to file an appeal.

4 Systemic Human Rights Violations

The lack of essential judicial guarantees and safeguards, as well as the harsh punishments meted out by the Taliban "justice system," led to systemic human rights violations against civilians convicted and sentenced by Taliban courts.

First, by not providing the judicial guarantees needed to ensure a fair trial, the Taliban violated the defendants' right to life. A death sentence may only be imposed by an independent, impartial and competent court after a legal process that provides all judicial guarantees to ensure a fair trial, that is, the guarantees set out in Article 14 of the ICCPR (U.N. Human Rights Committee 1982; U.N. Human Rights Council 2017, 3). In criminal cases in which a death penalty may be imposed, there must be no exception to the obligation of courts to observe the guarantees for a fair trial (U.N. Human Rights Committee 1992b). If a death penalty is pronounced after a trial that fails to meet the standard of fairness, the right to life guaranteed under Article 6 of the ICCPR is violated (U.N. Human Rights Committee 1987). As we have seen above, the Taliban courts failed to provide to the accused persons many of the essential judicial guarantees needed to ensure a fair trial. By imposing death sentences after trials that did not meet many requirements of fairness, the Taliban courts violated the defendants' right to life.

Second, by imposing harsh sentences (e.g., lashings and amputations of limbs), the Taliban violated the right not to be subjected to torture or any other form of similar cruel treatment, a non-derogable right that has to be observed at all times and at all places (Henckaerts and Doswald-Beck 2005, 317). Although corporal punishment was not explicitly spelled out in international human rights treaties (Henckaerts

and Doswald-Beck 2005, 320), the U.N. Human Rights Committee (1992c) argued that the prohibition of torture and cruel, inhuman or degrading treatment or punishment must include corporal punishment (e.g., excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure). The corporal punishments meted out by Taliban courts were cruel, inhumane and degrading, and, therefore, in clear violation of Article 7 of the ICCPR, Article 16 of the U.N. Convention Against Torture, and Common Article 3 to the Geneva Conventions (UNAMA 2017a, 70).

References

Ahmed, Azam. 2015. "Taliban Justice Gains Favor as Official Afghan Court Fail." *The New York Times*, January 31. https://www.nytimes.com/2015/02/01/world/asia/taliban-justice-gains-favor-as-official-afghan-courts-fail.html. Accessed on 17 September 2018.

Bellal, Annyssa, Gilles Giacca, and Stuart Casey-Maslen. 2011. "International Law and Armed Non-State Actors in Afghanistan." *International Review of the Red Cross* 93 (881): 47–79. https://doi.org/10.1017/s1816383111000051.

Clark, Kate. 2011. *The Layha: Calling the Taleban to Account: Appendix 1*. The Taleban Codes of Conduct in English. Kabul: Afghanistan Analyst Network. http://www.afghanistan-analysts.org/wp-content/uploads/downloads/2012/10/Appendix_1_Code_in_English.pdf. Accessed on 1 October 2017.

Forbes, Jami. 2013. "The Significance of Taliban Shari'a Courts in Afghanistan." *CTS Sentinel*, 6 (5). https://ctc.usma.edu/app/uploads/2013/05/CTCSentinel-Vol6Iss57.pdf. Accessed on 12 September 2018.

Ghafoori, Abdul Qadir, and Frud Bezhan. 2015. "Disturbing Footage Emerges of 'Taliban' Stoning in Afghanistan." *Radio Free Europe/Radio Liberty*, November 2. https://www.rferl.org/a/afghanistan-taliban-stoning-woman-adultery/27341045.html. Accessed on 13 September 2018.

Giustozzi, Antonio, and Adam Baczko. 2014. "The Politics of the Taliban's Shadow Judiciary 2003–2013." *Central Asian Affairs* 1 (2): 199–224. https://doi.org/10.1163/22142290-00102003.

Giustozzi, Antonio, Franco Claudio, and Adam Baczko. 2012. *Shadow Justice: How the Taliban Run Their Judiciary?* Kabul: Integrity Watch Afghanistan. https://www.baag.org.uk/sites/www.baag.org.uk/files/resources/

attachments/Integrity%20Watch%20Shadow%20Justice%20Dec.%202012.pdf. Accessed on 3 September 2018.

Henckaerts, Jean-Marie, and Louise Doswald-Beck. 2005. *Customary International Humanitarian Law. Volume 1: Rules*. Cambridge: Cambridge University Press.

Ladbury, Sarah. 2010. *Helmand Justice Mapping Study*. Department for International Development. http://cpau.org.af/manimages/publications/Helmand_Justice_Mapping.pdf. Accessed on 17 September 2018.

OHCHR (U.N. Office of the High Commissioner for Human Rights). 2003. *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*. New York: United Nations.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), 8 June 1977. https://ihl-databases.icrc.org/ihl/INTRO/475?OpenDocument. Accessed on 14 September 2018.

Saifullah, Masood. 2017. "The Disturbing Trend of Taliban Justice in Afghanistan." *Deutsche Welle*, March 15. https://www.dw.com/en/the-disturbing-trend-of-taliban-justice-in-afghanistan/a-37950678. Accessed on 3 September 2018.

UNAMA (United Nations Assistance Mission in Afghanistan). 2012. *Afghanistan Mid-Year Report 2012: Protection of Civilians in Armed Conflict.* Kabul: UNAMA. https://unama.unmissions.org/sites/default/files/2012_mid-year_report.pdf. Accessed on 3 September 2018.

———. 2014. *Afghanistan Annual Report 2013: Protection of Civilians in Armed Conflict.* Kabul: UNAMA. https://unama.unmissions.org/sites/default/files/feb_8_2014_poc-report_2013-full-report-eng.pdf. Accessed on 3 September 2018.

———. 2015. *Afghanistan Annual Report 2014: Protection of Civilians in Armed Conflict.* Kabul: UNAMA. https://unama.unmissions.org/sites/default/files/2014-annual-report-on-protection-of-civilians-final.pdf. Accessed on 2 September 2018.

———. 2016. *Afghanistan Annual Report 2015: Protection of Civilians in Armed Conflict.* Kabul: UNAMA. https://unama.unmissions.org/sites/default/files/poc_annual_report_2015_final_14_feb_2016.pdf. Accessed on 12 December 2017.

———. 2017a. *Afghanistan Annual Report 2016: Protection of Civilians in Armed Conflict.* Kabul: UNAMA. https://unama.unmissions.org/sites/default/files/protection_of_civilians_in_armed_conflict_annual_report_2016_final280317.pdf. Accessed on 15 March 2018.

———. 2017b. *Afghanistan Midyear Report 2017: Protection of Civilians in Armed Conflict*. Kabul: UNAMA. https://unama.unmissions.org/sites/default/files/protection_of_civilians_in_armed_conflict_midyear_report_2017_july_2017.pdf. Accessed on 12 December 2017.

———. 2018. *Afghanistan Annual Report 2017: Protection of Civilians in Armed Conflict.* Kabul: UNAMA. https://unama.unmissions.org/sites/default/files/afghanistan_protection_of_civilians_annual_report_2017_final_6_march.pdf. Accessed on 15 March 2018.

U.N. Economic and Social Council. 1995. Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers: Report of the Special Rapporteur, Mr. Param Cumaraswamy, Submitted in Accordance with Commission on Human Rights Resolution 1994/41, E/CN.4/1995/39. http://undocs.org/E/CN.4/1995/39. Accessed on 24 July 2017.

U.N. General Assembly. 1948. *The Universal Declaration of Human Rights*. Adopted and Proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948. https://www.ohchr.org/Documents/Publications/CoreTreatiesen.pdf. Accessed on 9 May 2018.

———. 1966. *International Covenant on Civil and Political Rights*. Adopted by the General Assembly of the United Nations on 19 December 1966. https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf. Accessed on 8 May 2018.

———. 1985. *Basic Principles on the Independence of the Judiciary*. Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders Held at Milan from 26 August to 6 September 1985 and Endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx. Accessed on 28 July 2018.

U.N. Human Rights Committee. 1982. CCPR General Comment No. 6: Article 6 (Right to Life). http://www.refworld.org/docid/45388400a.html. Accessed on 2 August 2018.

———. 1984. CCPR General Comment No. 13: Article 14 (Administration of Justice, Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law). http://www.refworld.org/docid/453883f90.html. Accessed on 18 September 2018.

———. 1987. *Carlton Reid v. Jamaica*, Communication No. 250/1987, U.N. Doc. CCPR/C/39/D/250/1987. http://hrlibrary.umn.edu/undocs/session39/250-1987.html. Accessed on 5 September 2018.

———. 1992a. *M. Gonzalez del Río v. Peru*, Communication No. 263/1987, U.N. Doc. CCPR/C/46/D/263/1987. http://hrlibrary.umn.edu/undocs/dec26346.pdf. Accessed on 24 July 2018.

———. 1992b. *Alrick Thomas v. Jamaica*, Communication No. 272/1988, U.N. Doc. CCPR/C/44/D/272/1988. http://www.worldcourts.com/hrc/eng/decisions/1992.03.31_Thomas_v_Jamaica.htm. Accessed on 31 July 2018.

———. 1992c. CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment). http://www.refworld.org/docid/453883fb0.html. Accessed on 18 September 2018.

——— 1998. *Domukovsky et al. v. Georgia*, Communications No. 623/1995, 624/1995, 626/1995 and 627/1995, CCPR/C/62/D/623, 624, 626 and 627/1995. http://www.univie.ac.at/bimtor/dateien/hrc_1998_domukovsky_vs_georgia.pdf. Accessed on 2 August 2018.

———. 2000. *Cesario Gómez Vázquez v. Spain*, Communication No. 701/1996, U.N. Doc. CCPR/C/69/D/701/1996. http://hrlibrary.umn.edu/undocs/session69/view701.htm. Accessed on 2 August 2018.

———. 2003. *Azer Garyverdy ogly Aliev v. Ukraine*, Communication No. 781/1997, U.N. Doc. CCPR/C/78/D/781/1997. http://hrlibrary.umn.edu/undocs/781–1997.html. Accessed on 27 July 2018.

———. 2005. *Valichon Aliboev v. Tajikistan*, Communications No. 985/2001, U.N. Doc. CCPR/C/85/D/985/2001. http://hrlibrary.umn.edu/undocs/985-2001.html. Accessed on 27 July 2018.

———. 2007. General Comment No. 32: Article 14 (Right to Equality Before Courts and Tribunals and to Fair Trial), CCPR/C/GC/32. http://www.refworld.org/docid/478b2b2f2.html. Accessed on 24 July 2018.

U.N. Human Rights Council. 2017. Capital Punishment and the Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty: Yearly Supplement of the Secretary-General to His Quinquennial Report on Capital Punishment, A/HRC/36/26. https://www.ohchr.org/en/hrbodies/hrc/regularsessions/session36/pages/listreports.aspx. Accessed on 25 July 2017.

13

Taking "Civilian Criminals" as Hostages: Civilian Victims of Abductions by the Afghan Taliban

1 Introduction

In late May 2016, Afghan Taliban fighters intercepted three civilian buses in Ali Abad district, in the southeastern part of Kunduz province (UNAMA 2016b, 65).[1] After stopping the three buses, which were transporting passengers from Kabul to Takhar and Badakhshan provinces, the militants forced 185 passengers, including 30 women and children, to disembark. They transferred the abducted passengers to a location near the Chahar Darah River, where they launched an investigation in order to determine whether any of the passengers was a member, or in any way linked to, the Afghan security forces. While the militants soon released 157 passengers identified as civilians, they executed 12 serving members of the Afghan security forces and released eight others. The remaining eight passengers who continued to be held in captivity were killed, along with their captors, in an airstrike carried out by the U.S.-led occupying forces in June 2016.

[1]The description of the abduction incident in Ali Abad district is based on the report prepared by UNAMA (2016b, 65).

V. Badalič, *The War Against Civilians*, Palgrave Studies in Victims and Victimology,
https://doi.org/10.1007/978-3-030-12406-9_13

The Taliban, who issued a statement in which they claimed responsibility for the abductions, justified the operation by asserting that they targeted "enemy troops traveling in a civilian bus and wearing civilian clothes" (ibid.). In their view, the captured civilians, the "ordinary civilians," were not harmed because they were all set free after a brief investigation (ibid.).

Due to the limited data on the Afghan Taliban's abduction program, it was not possible to determine its exact extent. The United Nations Assistance Mission in Afghanistan (UNAMA), the only organization that systemically collected information on abductions, started to record abduction incidents in 2015. From 2015 to 2017, UNAMA researchers gathered information on 1005 incidents of abductions by anti-government armed groups, including the Afghan Taliban and other groups such as the Islamic State—Khorasan (UNAMA 2016a, 48; 2017a, 66; 2018, 34). In 2016 and 2017, anti-government groups abducted 2863 civilians in total (UNAMA 2017a, 66; 2018, 34).

It was unclear how many abductions were carried out by the Afghan Taliban and how many by other anti-government armed groups. According to UNAMA, the Taliban, by far the largest insurgent group in the country, were responsible for the majority of abductions. In 2017, for example, UNAMA attributed 215 abduction incidents, out of 255 incidents, to the Taliban (UNAMA 2018, 35). The Taliban, however, claimed responsibility for only a fraction of those abductions, that is, eight abductions that resulted in 33 people being deprived of their liberty (ibid.).

Although both anti-government and pro-government armed groups abducted civilians throughout the conflict (UNAMA 2015, 59–63), this chapter focuses exclusively on the Afghan Taliban's abduction program. The central part of the chapter is divided into three sections. The first section examines the criteria used by the Taliban for selecting targets of abduction. The section shows how the Taliban regularly targeted two categories of individuals, that is, members of the Afghan security forces and civilians (e.g., people working for the Afghan regime and their foreign backers, employees of non-governmental organizations, journalists, tourists …). The second section analyzes the main objectives the Taliban wanted to achieve with the abductions (e.g., prisoners

exchange, ransom, withdrawal of foreign troops …). The third section of the chapter shows how the Taliban consistently violated a number of norms of customary international law—not only the prohibition of hostage taking, but also the prohibition of murder, the prohibition of torture and other forms of inhuman and degrading treatment, and the prohibition of forced displacements.

2 Broad Target Selection Criteria

Although the prohibition of hostage taking is usually associated with abductions of civilians, there is no indication that this criminal offense is limited only to the capturing and holding of civilians (Henckaerts and Doswald-Beck 2005, 336). Many legal instruments endorse the idea that this offense must not be limited to the capturing of civilians, but must be applied to the capturing of any person, including members of the armed forces (ibid.). The International Convention against the Taking of Hostages (The Hostage Convention), for example, defines—in Article 1—hostage taking as the capture or detention of *a person*, accompanied with the threat to kill, to injure or to continue to keep in captivity that *person*, in order to compel a third party to do or refrain from doing something as a condition for the safety or release of the captive (U.N. General Assembly 1979). By using the term *person*, the Hostage Convention indicates that the prohibition of hostage taking applies to both civilians and non-civilians. Similarly, Common Article 3 of the Geneva Conventions (Geneva Convention III 1949) and Article 4(2) of Additional Protocol II (1977) stipulate that persons not actively participating in hostilities, including members of the armed forces placed *hors de combat* by detention, must not be subjected to hostage taking. If a member of the armed forces is placed *hors de combat*, that is, if he is in the power of an adverse party, he must not be used as leverage in negotiations aimed at compelling a third party to do or refrain from doing something.

This chapter adopts the view that the prohibition of hostage-taking must be applied to the capturing and holding of both non-civilians and civilians. Based on documented incidents of abductions carried out by

the Afghan Taliban, it was clear that they regularly abducted both categories of targets, that is, active members of the Afghan security forces and civilians. The first category included members of the Afghan police and Afghan army, and individuals identified as spies working for the Afghan security forces (UNAMA 2016b, 65–66; 2018, 35).

The category of civilian abductees, which were portrayed by the Taliban as "civilian criminals" (UNAMA 2018, 35), consisted of individuals suspected of working for, or providing any kind of support to, the Afghan regime and the U.S.-led occupying forces. This category of victims included government workers and their family members (UNAMA 2018, 35), judicial officials (UNAMA 2016b, 67), civilians working on projects financed by the Afghan government and their foreign backers (e.g., construction workers, engineers, truck drivers) (UNAMA 2016b, 67; Karimi et al. 2018), off-duty and former members of the Afghan police (UNAMA 2018, 35), civilians who were relatives of Afghan security forces members (UNAMA 2018, 35), employees of local and international non-governmental humanitarian organizations (Karp 2016; Saifullah 2017), employees of de-mining groups (UNAMA 2015, 61; Saifullah 2017), employees of foreign organizations (e.g., professors and journalists) (Schmitt 2009; Mashal 2017), and foreign tourists (Nordland 2013; Buncombe 2016; Moore 2017).[2]

In addition to the above-mentioned categories of non-civilian and civilian targets, there was another category of civilian victims who were not the primary targets of abductions but "collateral damage" of mass abduction incidents. In mass abductions, or "search operations" as the Taliban called them, the insurgents usually stopped buses traveling through the country and abducted the passengers to determine whether there were among them any members of the Afghan security forces

[2]The Afghan Taliban, as well as members of other insurgent groups, many times abducted civilians of a specific ethnic group—the Hazara (Suroush 2015; AIHRC 2017). Although some reporters and analysts labelled such abductions as deliberate attacks against the Hazara community, research evidence suggested that the Hazara were not targets of abductions because of their ethnicity (Suroush 2015). The primary motivations for abductions were taking hostages for ransom or prisoner exchange, while ethnicity was rarely the primary motive (DFAT 2017, 7). Members of all ethnic groups were victims of abductions (ibid.).

(UNAMA 2016b, 65–66). If the passengers proved they were civilians not linked to the Afghan regime and the U.S.-led occupying forces, they were soon released (ibid.). If, on the other hand, the Taliban concluded that the passengers were security forces members, they either killed them on the spot or took them into captivity (ibid.). For example, in early February 2016, insurgents intercepted two vehicles in Maimana district, Faryab province, and abducted 110 male passengers (UNAMA 2017a, 67). They immediately released 104 abductees who provided civilian identity cards, but they kept the remaining six detainees in captivity for a longer period in order to have more time to verify their identities (ibid.). All six abductees were released after the insurgents determined they had no connection to the Afghan security forces (ibid.).

3 Motives for Abductions

The objective of those who commit an act of hostage taking is to compel a third party to do or to abstain from doing a specific act as an explicit or implicit condition for the release of the hostage (U.N. General Assembly 1979). As some authors argued, the motives of hostage takers can be divided into two categories: "instrumental" motives (i.e., to obtain a particular outcome, for example financial gain) and "expressive" motives (i.e., to inform the public at large of a particular grievance) (Lipsedge 2004, 24–26; Alexander and Klein 2009, 16–17; 2010, 176–177).

Based on documented cases of abductions, the Afghan Taliban's motives for the abductions were instrumental. The Taliban pursued at least five objectives when they entered negotiations in which they tried to compel third parties—i.e., the Afghan government, local tribal elders, or the U.S.-led occupying forces—to do or to abstain from doing specific acts.

First, one of the key motives for abducting people was to use them in exchanges of detainees with the Afghan regime and the U.S.-led occupying forces (UNAMA 2016a, 49; Nordland 2015). In March 2007, for example, the Taliban used the abduction of Italian journalist Daniele Mastrogiacomo to compel the Afghan authorities to release five senior

Taliban officials, including the brother of Mullah Dadullah, a Taliban military commander (Kidnapped Italian Journalist 2007). In addition to swapping abducted individuals for Taliban fighters and commanders, the Taliban also used abductees to secure the release of detained family members and relatives of the Taliban. In at least one incident, the Taliban used the abduction of relatives of Afghan security forces members to compel the Afghan government to release family members of a Taliban commander. The incident occurred in March 2016, when insurgents abducted 200 male civilians, including at least four boys, in Warduj district, Badakhshan province (UNAMA 2017a, 67). The insurgents carried out the abductions, which targeted relatives of Afghan security forces members, in response to the earlier capture of three family members of a local Taliban commander (ibid.). After the government agreed to release the family members of the Taliban commander, the Taliban freed all the abductees (ibid.).

Second, the Taliban abducted civilians to use them as leverage in negotiations aimed at compelling the U.S.-led occupying forces to withdraw from Afghanistan. As Zabiullah Mujahid, the Taliban spokesman, explained, abducting any foreign citizen whose country had a military presence in Afghanistan was part of the Taliban war strategy (Nordland 2013). The Taliban justified such abductions by asserting that foreign citizens were responsible for electing their governments and parliaments who waged wars around the world (ibid.). One of the objectives of these abductions was to force foreign troops to withdraw from the country. The Taliban, for example, used abductees to force one of the belligerent parties—South Korea—to withdraw its troops from Afghanistan. In July 2007, Taliban fighters abducted 23 Korean Christian aid workers traveling on a bus from Kabul to Kandahar (Shalizi 2007). While keeping them in captivity, the Taliban killed two male abductees and released two women (Azimy 2007). In order to secure the release of the remaining 19 abductees, the South Korean government promised to withdraw all its troops from Afghanistan by the end of that year (ibid.). Also, the Taliban managed to compel South Korean officials to pledge to end any Christian missionary work in the country (ibid.).

In another abduction incident, the Taliban tried to use the abduction of Eric Damfreville, a worker of a France-based non-governmental

organization Terre d'Enfance, to compel France to withdraw its troops from Afghanistan (Taliban Release 2007). While holding Damfreville and three Afghans in captivity, a Taliban spokesperson demanded from the French government "to stop giving military support for the Afghan government" and withdraw its forces from Afghanistan (French Woman 2007). The French government, however, refused to bow to the pressure and continued to keep its troops in the country.

Third, although the Taliban leadership prohibited kidnapping for ransom, insurgents regularly abducted civilians to obtain financial gain (UNAMA 2016a, 48; 2018, 34). Both the 2009 and the 2010 editions of the *Layha*, the Taliban's code of conduct, stipulated that "kidnapping of people for ransom, under any pretext, is forbidden and the relevant local official must prevent it" (Clark 2011b, 12–22). If a member of the Taliban kidnapped a person for ransom, the Taliban provincial official, with the approval of the Taliban leadership, had the authority to disarm the perpetrator of the kidnapping and punish him severely (ibid.). Only the first edition of the *Layha*, published in 2006, contained a clause that allowed insurgents to capture "foreign infidels" and release them, with the permission of the Taliban leadership, for money or in an exchange deal (Clark 2011b, 25).

Despite the prohibition of kidnapping for ransom, the Taliban many times abducted civilians to demand money for their release (Clark 2011b, 16). In early April 2017, for example, the Taliban claimed responsibility for abducting a former police officer in Ab Kamari district, Baghlan province (UNAMA 2017b, 43). They kept him in captivity for a week, and then released him after payment of a ransom (ibid.). In another incident, in May 2017, the Taliban claimed responsibility for abducting three civilian men accused of stealing animals in Lash-e-Juwain district, Farah province (UNAMA 2017b, 43). The Taliban released the abductees a few days later after receiving a ransom payment (ibid.).

Fourth, in at least one incident the Taliban abducted villagers, perceived as supporters of the Afghan regime and their foreign backers, to force their families and neighbors to abandon their homes and move to another area. The objective of the abduction was, therefore, the displacement of civilians deemed to be supporters of the Afghan government. This mass abduction incident occurred in July 2017, when Taliban

fighters abducted 68 civilians in Shah Wali Kot district, Kandahar province, after clashes erupted with the Afghan National Police (Amini 2017; Shams 2017; UNAMA 2018, 35). The Taliban ordered the residents of the villages, who were accused of "cooperating with the government," to move from that area if they wanted to secure the release of their abducted family members and neighbors (Amini 2017; UNAMA 2018, 35). Over several days after the abductions took place, the Taliban released 30 of the victims, while most of the remaining abductees were kept in captivity for more than two months before being released (UNAMA 2018, 35). At least seven of the abducted victims were killed (Amini 2017).

Fifth, the Taliban abducted civilians to extract minor concessions from the Afghan regime. In October 2016, for example, the Taliban abducted more than 100 civilians in Raghistan district, Badakhshan province, in order to force the Afghan government to resume the transport of fuel into a territory controlled by the Taliban (UNAMA 2017a, 67). Afghan government officials stopped the transport of fuel into that area to deter illegal gold mining, but after the abductions took place they removed the restrictions on the supply of fuel (ibid.). After the agreement was reached, all abductees were released (ibid.).

In addition to seeking to compel third parties to do or refrain from doing something as a condition for the safety or release of the captives, the Taliban also used abductions to compel the captives to do or abstain from specific acts. It is, of course, open to question whether such deprivations of liberty fit into the definition of hostage taking. The act of compelling *a third party* to do or to refrain from doing something as a condition for the release of a captive is a key component of the definition of hostage taking. That definition does not include situations in which the captors try to compel *the captives* to do or to refrain from doing something as a condition for their release. This chapter does not argue that the definition of hostage taking should include incidents in which the captors use the abduction to compel the abductees to do or to abstain from doing something. It is, however, still important to examine such abductions in order to determine the motives behind them.

Based on available data, there were two motives for such abductions. The first motive was to intimidate and, consequently, "re-educate"

civilians perceived to behave in an "immoral" way. In May 2016, for example, members of an insurgent group abducted a 14-year-old boy in Darah Suf-e-Payin district, Samangan province, after being accused of "immoral behavior" (UNAMA 2017b, 43). The boy appeared in a video of a wedding posted on social media dancing in a manner that the insurgents deemed "immoral" (ibid.). After mediation with local elders, the insurgents released the boy (ibid.). In another incident, the Taliban used an abduction to enforce their strict dress code on women. In March 2015, Taliban fighters stopped a vehicle in Qarabagh district, Ghazni province, and took with them ten passengers, all of whom were Hazaras (Suroush 2015). The militants interrogated the passengers and warned the women to wear "proper Islamic attire"—instead of *chadors*, which a favored by many Hazara women, the women were expected to wear *burqas* (ibid.).

The second motive was to force members of the Afghan security forces to leave their jobs. In one abduction incident, Taliban fighters released an Afghan National Army member after his tribesmen promised that he would not go back to the army (Abdul-Ahad 2010).

4 Systemic Violations of Norms of Customary International Law

By regularly taking as hostages both civilians and non-civilians, the Afghan Taliban systemically violated the norm prohibiting hostage taking. This prohibition, recognized as a norm of customary international law, is applicable in both international and non-international armed conflicts (Henckaerts and Doswald-Beck 2005, 334). It is a non-derogable norm that must not be suspended under any circumstances (Geneva Convention III 1949).

In addition to breaching the prohibition of hostage taking, the Afghan Taliban violated three other norms of customary international law during abduction incidents. First, by killing some of the abductees, the Taliban violated the norm prohibiting murder. In some cases, the killing of the abductee was the primary motive for the abduction (UNAMA 2016a, 48). In December 2015, for example, insurgents

kidnapped a male civilian in Dawlatyar district, Ghor province (UNAMA 2016a, 49). The abductee was a relative of a member of the Afghan security forces involved in the killing of a Taliban commander during an operation that took place two days before the abduction (ibid.). After keeping the man in captivity for a few days, insurgents killed him and handed over his mutilated body to his tribesmen (ibid.). Even when the primary motive for the abduction was not killing the abductee, the abductions many times resulted in deaths. The captors, for example, killed abductees when the abductees refused to comply with the demands of the captors (e.g., abductees resisted being taken away, abductees tried to escape from captivity), and when the captors wanted to establish, or maintain, authority over the abductees (UNAMA 2016a, 48; 2018, 35).

Due to the lack of data, it was not possible to determine exactly how many people died or got injured while being held in captivity by the Afghan Taliban. In only two years, in 2016 and 2017, UNAMA recorded 162 deaths and 66 injuries in abductions by anti-government groups, including the Afghan Taliban (UNAMA 2017a, 66; 2018, 34–35).[3] Such killings breached the prohibition of murder, a key norm that is part of all major international human rights treaties and many other human rights instruments, as well as international humanitarian law treaties (Henckaerts and Doswald-Beck 2005, 311–314). The norm prohibiting "violence to life and person, including murder of all kinds" is non-derogable and must be applied at any time and in any place (Geneva Convention III 1949).

Second, by torturing abductees to force them to confess they were working for, or providing any kind of support, to the Afghan regime or their foreign backers (Abdul-Ahad 2010; Giustozzi et al. 2012, 21), the Afghan Taliban violated the norm prohibiting torture and any other form of cruel treatment. Both international human rights treaties and international humanitarian law treaties prohibit the use of torture

[3]In 2015, UNAMA reported that anti-government armed groups, including the Taliban, perpetrated 400 incidents of civilian abductions, causing 169 civilian casualties (UNAMA 2016a, 48). It was unclear how many victims were killed and how many injured.

and ill-treatment and other cruel, inhuman or degrading treatment or punishment (U.N. General Assembly 1966, 1984; Henckaerts and Doswald-Beck 2005, 315–319). Recognized as a non-derogable norm that is part of customary international law, the prohibition of torture and other forms of similar treatment must be respected, without exception, at all times (Henckaerts and Doswald-Beck 2005, 315–319). In addition to ignoring international law, the Taliban also ignored their own prohibition of torture. The 2010 edition of the *Layha* stipulated—in Article 15—that "captives shall not be tortured, whether with hunger, thirst, cold or heat, even if they deserve execution (Clark 2011b, 5). The previous two editions of the *Layha*, published in 2006 and 2009, did not contain a provision banning the use of torture or any other form of cruel treatment (Clark 2011a, 9).

Third, when the Taliban used an abduction of civilians to compel family members, relatives, and neighbors of the abductees to flee their villages, they violated the norm prohibiting forced displacements. In non-international armed conflicts, the belligerent parties are not allowed to order the displacement of the civilian population, in whole or in part, for reasons related to the conflict, unless it is necessary for the security of the civilians involved or military reasons so demand (Henckaerts and Doswald-Beck 2005, 457). This prohibition is part of Addition Protocol II (1977), which stipulates—in Article 17—that the "displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand." The abduction incident described above—in the third section—indicated that the Taliban forced civilians to flee their villagers not because it was necessary for the security of the civilians or because military reasons so demanded but because the Taliban believed the civilians were government supporters.

References

Abdul-Ahad, Ghaith. 2010. "Five Days Inside a Taliban Jail." *The Guardian*, November 25. https://www.theguardian.com/world/2010/nov/25/taliban-afghanistan-prison-special-report. Accessed on 30 September 2018.

AIHRC (Afghanistan Independent Human Rights Commission). 2017. *Attacks Against Hazaras in Afghanistan*. Kabul: AIHRC. http://www.aihrc.org.af/media/files/A%20Short%20Report%20on%20Attack%20against%20Hazaras_English_Final.pdf. Accessed on 2 October 2018.

Alexander, David A., and Susan Klein. 2009. "Kidnapping and Hostage-Taking: A Review of Effects, Coping and Resilience." *Journal of the Royal Society of Medicine* 102 (1): 16–21. https://doi.org/10.1258/jrsm.2008.080347.

———. 2010. "Hostage-Taking: Motives, Resolution, Coping and Effects." *Advances in Psychiatric Treatment* 16 (3): 176–183. https://doi.org/10.1192/apt.bp.108.005991.

Amini, Karim. 2017. "Taliban Ousts Residents from Kandahar Villages." *Tolo TV*, August 3. https://www.tolonews.com/index.php/afghanistan/taliban-ousts-residents-kandahar-villages. Accessed on 24 September 2018.

Azimy, Yousuf. 2007. "Taliban Release 12 Korean Hostages." *Reuters*, August 29. https://www.reuters.com/article/us-afghan-hostages-idUSISL21282020070829. Accessed on 28 September 2018.

Buncombe, Andrew. 2016. "Colin Rutherford: Canadian Held in Afghanistan for Five Years Released by Taliban." *The Independent*, January 11. https://www.independent.co.uk/news/people/canadian-held-in-afghanistan-for-five-years-released-by-taliban-a6806751.html. Accessed on 28 September 2018.

Clark, Kate. 2011a. *The Layha: Calling the Taleban to Account*. Kabul: Afghanistan Analyst Network. http://www.afghanistan-analysts.org/wp-content/uploads/downloads/2012/10/20110704_CKlark_The_Layha.pdf. Accessed on 1 October 2017.

———. 2011b. *The Layha: Calling the Taleban to Account: Appendix 1: The Taleban Codes of Conduct in English*. Kabul: Afghanistan Analyst Network. http://www.afghanistan-analysts.org/wp-content/uploads/downloads/2012/10/Appendix_1_Code_in_English.pdf. Accessed on 1 October 2017.

DFAT (Australian Government—Department of Foreign Affairs and Trade). 2017. *DFAT Thematic Report: Hazaras in Afghanistan.* https://dfat.gov.au/about-us/publications/Documents/country-information-report-hazaras-thematic.pdf. Accessed on 2 October 2018.

"French Woman Abducted in Afghanistan Freed." 2007. *CBC News*, April 28. https://www.cbc.ca/news/world/french-woman-abducted-in-afghanistan-freed-1.635141. Accessed on 3 October 2018.

Geneva Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949. https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=E160550475C4B133C12563CD0051AA66. Accessed on 17 September 2018.

Giustozzi, Antonio, Franco Claudio, and Adam Baczko. 2012. *Shadow Justice: How the Taliban Run Their Judiciary?* Kabul: Integrity Watch Afghanistan. https://www.baag.org.uk/sites/www.baag.org.uk/files/resources/attachments/Integrity%20Watch%20Shadow%20Justice%20Dec.%202012.pdf. Accessed on 3 September 2018.

Henckaerts, Jean-Marie, and Louise Doswald-Beck. 2005. *Customary International Humanitarian Law. Volume 1: Rules*. Cambridge: Cambridge University Press.

Karimi, Storay, Jalil Rezaye, Qadir Sediqi, and Rupam Jain. 2018. "Taliban Kill 16 Afghan Soldiers, Kidnap Engineers After Ceasefire Ends." *Reuters*, June 22. https://www.reuters.com/article/us-afghanistan-attacks/taliban-kill-16-afghan-soldiers-kidnap-engineers-after-ceasefire-ends-idUSKBN1JI0NX. Accessed on 26 September 2018.

Karp, Paul. 2016. "Australian Aid Worker Kidnapped in Afghanistan Is Freed." *The Guardian*, August 29. https://www.theguardian.com/australia-news/2016/aug/29/australian-aid-worker-kidnapped-in-afghanistan-released-by-captors. Accessed on 28 September 2018.

"Kidnapped Italian Journalist Freed in Afghanistan." 2007. *Reuters*, March 19. https://www.reuters.com/article/us-afghan-journalist/kidnapped-italian-journalist-freed-in-afghanistan-idUSSP4296520070319. Accessed on 3 October 2018.

Lipsedge, Maurice. 2004. "Hostage-Taking and Domestic Sieges." *Psychiatry* 3 (8): 24–26. https://doi.org/10.1383/psyt.3.8.24.43396.

Mashal, Mujib. 2017. "Taliban Release Video of Foreign Professors Abducted in Kabul." *The New York Times*, January 11. https://www.nytimes.com/2017/01/11/us/politics/taliban-video-professors-kidnapped-afghanistan-kabul.html. Accessed on 28 September 2018.

Moore, Jack. 2017. "Freed Taliban Hostage Caitlin Coleman Reveals the One Good Thing About Her Family's Captivity." *Newsweek*, October 23. https://www.newsweek.com/freed-taliban-hostage-caitlin-coleman-one-positive-capture-690371. Accessed on 11 October 2018.

Nordland, Rod. 2013. "Despite Taliban Threat, Afghanistan Manages to Entice Some Tourists." *The New York Times*, January 12. https://www.nytimes.com/2013/01/13/world/asia/taliban-targets-tourists-but-some-still-visit-afghanistan.html. Accessed on 9 October 2018.

———. 2015. "For Swapped Taliban Prisoners from Guantánamo Bay, Few Doors to Exit Qatar." *The New York Times*, May 31. https://www.nytimes.com/2015/06/01/world/middleeast/us-presses-qatar-on-travel-ban-for-swapped-taliban-prisoners.html. Accessed on 10 October 2018.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II), June 8, 1977. https://ihl-databases.icrc.org/ihl/WebART/475–760023?OpenDocument. Accessed on 26 September 2018.

Saifullah, Masood. 2017. "Why Are Afghan Militants Targeting Aid Workers?" *Deutsche Welle*, September 18. https://www.dw.com/en/why-are-afghan-militants-targeting-aid-workers/a-40558657. Accessed on 10 October 2018.

Schmitt, Eric. 2009. "Seized Times Reporter Is Freed in Afghan Raid That Kills Aide." *The New York Times*, September 9. https://www.nytimes.com/2009/09/09/world/asia/09rescue.html?pagewanted=1&_r=1&sq=Stephen%20Farrell&st=cse&scp=3. Accessed on 28 September 2018.

Shalizi, Hamid. 2007. "Taliban Kidnap 23 Koreans from Afghan Bus: Officials." *Reuters*, July 20. https://www.reuters.com/article/us-afghan-kidnap/taliban-kidnap-23-koreans-from-afghan-bus-officials-idUSISL13294820070720. Accessed on 28 September 2018.

Shams, Shamil. 2017. "Taliban Carry Out Mass Kidnapping in Afghanistan's Kandahar Province." *Deutsche Welle*, July 23. https://www.dw.com/en/taliban-carry-out-mass-kidnapping-in-afghanistans-kandahar-province/a-39805761. Accessed on 26 September 2018.

Suroush, Qayoom. 2015. *Hazaras in the Crosshairs? A Scrutiny of Recent Incidents*. Kabul: Afghanistan Analyst Network. https://www.afghanistan-analysts.org/hazaras-in-the-crosshairs-a-scrutiny-of-recent-incidents/. Accessed on 1 October 2018.

"Taliban Release 2nd Kidnapped French Aid Worker." 2007. *CBC News*, May 11. https://www.cbc.ca/news/world/taliban-release-2nd-kidnapped-french-aid-worker-1.652279. Accessed on 3 October 2018.

U.N. General Assembly. 1966. *International Covenant on Civil and Political Rights*. Adopted by the General Assembly of the United Nations on 19 December 1966. https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf. Accessed on 8 May 2018.

———. 1979. *International Convention Against the Taking of Hostages*. Adopted by the General Assembly of the United Nations on 17 December on 1979. https://treaties.un.org/doc/db/terrorism/english-18-5.pdf. Accessed on 26 September 2018.

———. 1984. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Adopted and Opened for Signature, Ratification and Accession by General Assembly Resolution 39/46 of 10 December 1984 Entry into Force 26 June 1987. https://www.ohchr.org/en/professionalinterest/pages/cat.aspx. Accessed on 14 August 2018.

UNAMA (United Nations Assistance Mission in Afghanistan). 2015. *Afghanistan Midyear Report 2015: Protection of Civilians in Armed Conflict*. Kabul: UNAMA. https://unama.unmissions.org/sites/default/files/unama_protection_of_civilians_armed_conflict_midyear_report_2015_final_august.pdf. Accessed on 12 December 2017.

———. 2016a. *Afghanistan Annual Report 2015: Protection of Civilians in Armed Conflict*. Kabul: UNAMA. https://unama.unmissions.org/sites/default/files/poc_annual_report_2015_final_14_feb_2016.pdf. Accessed on 12 December 2017.

———. 2016b. *Afghanistan Midyear Report 2016: Protection of Civilians in Armed Conflict*. Kabul: UNAMA. https://unama.unmissions.org/sites/default/files/protection_of_civilians_in_armed_conflict_midyear_report_2016_final_rev.1-9sept.pdf. Accessed on 12 December 2017.

———. 2017a. *Afghanistan Annual Report 2016: Protection of Civilians in Armed Conflict*. Kabul: UNAMA. https://unama.unmissions.org/sites/default/files/protection_of_civilians_in_armed_conflict_annual_report_2016_final280317.pdf. Accessed on 15 March 2018.

———. 2017b. *Afghanistan Midyear Report 2017: Protection of Civilians in Armed Conflict*. Kabul: UNAMA. https://unama.unmissions.org/sites/default/files/protection_of_civilians_in_armed_conflict_midyear_report_2017_july_2017.pdf. Accessed on 12 December 2017.

———. 2018. *Afghanistan Annual Report 2017: Protection of Civilians in Armed Conflict*. Kabul: UNAMA. https://unama.unmissions.org/sites/default/files/afghanistan_protection_of_civilians_annual_report_2017_final_6_march.pdf. Accessed on 15 March 2018.

Index

V. Badalič, *The War Against Civilians*, Palgrave Studies in Victims and Victimology,
https://doi.org/10.1007/978-3-030-12406-9